



**Seminar organized by the Council of State of France and
ACA-Europe**

“The Judicial review of Regulatory Authorities”

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Answers to questionnaire: Greece



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ACA-Europe symposium

Disputes concerning acts by regulatory authorities

Regulatory authorities have gradually emerged as one of the new forms of State intervention. In addition to the Regal State or the State as a supplier of goods and services, the regulatory authorities, in the broad sense, cover a wide range of administrative activities: they may be authorities responsible, in a given sector or across the board, for correcting market imbalances in a context of opening up markets to competition, or for ensuring that free competition is reconciled with other general interest objectives; in the broadest sense, regulatory activities may refer to any administrative activity that seeks to reconcile interests that may be contradictory or to organise access to scarce resources in a manner consistent with general interest objectives. In this broadest sense, this notion can refer as much to the transversal authorities responsible for enforcing competition law (e.g. the French Competition Authority) as to sectoral authorities (electronic communications, transport, energy, etc.), including national data protection authorities or authorities responsible for the marketing or evaluation of health products.

The symposium planned for December 2021 should be an opportunity to examine the specific issues that disputes concerning acts taken by these regulatory authorities may raise in the administrative courts. These questions arise from certain characteristics of the acts of these authorities, characteristics over which they do not have a monopoly compared with other forms of administration, but which combine or take on a particular role. These characteristics are at least three in number: firstly, the use of a wide range of acts or intervention tools, from flexible laws and codes of conduct to more traditional regulatory acts or sanctions, via a variety of communication media (press releases, public statements, FAQs, etc.); secondly, the degree of expertise and technicality of the decisions taken in a given activity sector (energy, health, electronic communications, etc.) and/or a certain technological context (personal data protection, cyberspace, etc.); finally, integration into complex economic and social ecosystems, often with a significant European or even international dimension, and likely to have a high media profile.

In this context, from the particular object of study that is disputes concerning the acts of these regulatory authorities, the symposium planned for December 2021 will make it possible to address the important challenges that these appeals raise for the effectiveness and credibility of the court's intervention.

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?

A. YES

If yes:

Without being exhaustive, could you present the main regulatory authorities in your country whose acts are brought before your supreme administrative court, specifying if these appeals are subject to several levels of jurisdiction? Please distinguish, if necessary, according to the nature of the acts



concerned (in the event, for example, that individual acts taken by these authorities are subject to separate jurisdictions from their general acts, notably regulations).

A. As a rule, the Council of State has jurisdiction over appeals (actions for annulment/recours pour excès de pouvoir) against all acts taken by regulatory authorities, as long as these acts are of regulatory (i.e. general) content. According to well established case law of the Council of State, in these cases the law may render competent other administrative courts as well, provided that the regulatory acts concerned are not of such importance as to remain under the competence of the Council of State (Judgment 617/2013, Grand Chamber). So far, the Council of State has jurisdiction over all appeals against regulatory acts taken by regulatory authorities. In all these cases, the Council of State does not have full jurisdiction but conducts only a limited scope review of legality of the acts concerned. As for the individual acts, the Constitution and the law provide that the Council of State has competence to hear appeals (actions for annulment/recours pour excès de pouvoir) against such acts (namely sanctions) taken by regulatory authorities, unless the special legislation regarding each regulatory authority provides for otherwise. Having regard to these provisions:

1. The Court of Appeal, acting as a court of full jurisdiction, has competence to hear appeals (recours de pleine juridiction) against individual acts taken by the **Hellenic Competition Commission** (article 30 of Law No 3959/2011).
2. The Court of Appeal, acting as a court of full jurisdiction, has the competence to hear appeals against individual acts taken by the **Hellenic Telecommunications & Post Commission** regarding the fines imposed by the regulatory authority. Furthermore, the same court has competence to hear appeals (actions for annulment) against all other individual acts of the same regulatory authority regarding telecommunications and post market, performing a limited scope review of legality of those acts (article 139 of Law No 4727/2020).
3. The Court of Appeal, acting as a court of full jurisdiction, has the competence to hear appeals against all individual acts taken by the **Regulatory Authority for Energy** regarding the granting of permits/licenses/authorisations and the denial of such granting. Furthermore, the same court has competence to hear appeals (actions for annulment) against all other individual acts of the same regulatory authority regarding the energy market, performing a limited scope review of legality of those acts (article 33 of Law No 4001/2011).
4. The Court of Appeal, acting as a court of full jurisdiction, has the competence to hear appeals against individual acts taken by the **Hellenic Capital Market Commission** regarding the fines and the other administrative sanctions imposed by the regulatory authority for market abuse (article 25 of Law No 3371/2005 and article 25 of Law No 3340/2005). Furthermore, the same court has competence to hear appeals (actions for annulment) against all other individual acts of the same regulatory authority regarding the capital market, performing a limited scope review of legality of those acts (article 25 of Law No 3371/2005).
5. The Council of State has the competence to hear appeals (actions for annulment/recours pour excès de pouvoir) against all individual acts (including fines) taken by the **Hellenic Data Protection Authority**, performing a limited scope review of legality of those acts (article 20 of Law No 4624/2019).

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

A. YES

If yes:

is it possible to challenge them before your supreme administrative court?

A. The sanctions imposed by most of the regulatory authorities are challenged before the Court of Appeal (of Athens), with the exception of sanctions (including fines) imposed by the Hellenic Data Protection Authority, which are challenged before the Council of State.

3. Are any of these regulatory authorities subject to judicial review by civil courts, for some or all of their acts?

A. NO

If yes:

Please give examples.

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

- specifically identified by the texts in force, by way of derogation from the normal rules of territorial or material competence?

A. YES: As explained above (answer to question 1), the Constitution and the law provide that the Council of State has the competence to hear appeals (actions for annulment/recours pour excès de pouvoir) against such acts taken by regulatory authorities, unless the special legislation regarding each regulatory authority provides for otherwise. Such special legislation exists (see the examples listed in the answer to question 1).

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

A. NO

Is there any specific distinction in relation to the rules of competence applicable to equivalent acts of other administrative authorities in your country?

A. NO: As a matter of constitutional principle (article 95 section 1 par. a of the Constitution), the Council of State has competence to hear all appeals (applications for annulment) against all kinds of administrative acts, unless the law provides for otherwise.

If yes:

Please explain.

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?

A. YES: Depending on the nature of the issues regulated by other administrative authorities, their acts may be challenged by lodging either an application of annulment permitting a review of legality or an appeal permitting a full scope review.

If no:

Please explain.



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?

A. YES: These disputes may raise particular issues regarding the legitimate interest of the applicants/appellants, namely in cases of appeals against regulatory (i.e. general) acts challenged by individuals and not by legal entities, especially by those who had filed complaints regarding market distortions and the regulatory authorities failed to examine them or rejected them. The same applies in cases where individuals challenge acts imposing sanctions against economic actors, complaining about the duration or/and the severity of the infringements of the economic actors (Judgment 764/2014).

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?

A. NO: Soft law acts are not considered to have normativity (i.e. binding effect), therefore the direct appeals against them are inadmissible.

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

A. Yes, they can be challenged if the court rules that they have a binding effect.

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.).

A. Legal entities and individuals. The legitimate interest should be personal, direct and present (see also the answer to question number 6).

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.).

A. Regarding fines, in some cases court fees are calculated as a fraction of the imposed fine instead of the fixed amount provided by the provisions of the Code of Judicial Procedure for the Administrative Courts (e.g. fines imposed by the Hellenic Telecommunications & Post Commission). In other cases the law provides that the court's decision to suspend the enforcement of an act imposing a fine, i.e. the retrieval of the amount, cannot prevent the authority from retrieving 20% of the imposed fine (e.g. fines imposed by the Hellenic Competition Commission and by the Hellenic Capital Market Commission). Finally, in some cases the law provides for a very short period of hearing and deciding the case (e.g. fines imposed by the Hellenic Capital Market Commission).

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)?

A. YES: The incidental review of regulatory acts is a typical review of legality, as in cases where these acts are directly challenged, but this review cannot result in the annulment of these acts. Only the individual act directly appealed will be annulled, unless the regulatory act was held illegal due to violation of formal provisions regarding the competence of the authority or of the procedure that led to its issuance. In these cases the courts may not annul the individual act, if, according to their opinion, a long period, depending on the circumstances, has elapsed since the entry into force of the regulatory act under review and the consequences of its unlawfulness for the individual act are likely to affect legal certainty (article 50 section 3 par. c of Presidential Decree No 18/1989, regarding the procedure before the Council of State).

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

- against these authorities?

A. YES: If the authority has its own legal personality (e.g. the Hellenic Competition Commission, Judgment 2903/2013, Athens Court of Appeal)

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

A. YES: If the authority does not have its own legal personality.

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?

A. NO: There is no panel of the Council of State dedicated to deciding cases regarding acts of regulatory authorities. The competence of each of the six court panels (sections) is defined by decisions taken by the Plenary of the Council of State (currently decision No 8/2019). The Court groups the different kinds of cases based on the relation to each other. In this context, the Fourth Section of the Court has jurisdiction over every case that cannot be categorized into one of the case groups conferred upon the other five Sections. In the other courts, namely the Athens Court of Appeal, there are specialized panels that only hear cases concerning one regulatory authority (e.g. the panel that hears only appeals against acts by the Hellenic Competition Commission, see also article 33 of Law No 3959/2011).

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

A. Oral inquiry hearing in the presence of the parties, expert's report provided by parties, expert's opinion after court's decision (article 159 of the Code of Judicial Procedure for the Administrative Courts).

Do you feel that these regulatory cases require a particular method?

A. YES: The courts should recruit their own independent and impartial experts (e.g. economists, engineers etc.) to help them through very complex technical issues (e.g. market analysis).

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?

A. NO, unless the regulatory authority applied another regulatory act issued from an administrative authority (e.g. ministry). In this case, the rapporteur judge can ask the opinion of this authority as well (article 22 section 3 of Presidential Decree No 18/1989)

- or do they remain outside the case?

A. YES, as a rule.

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?

A. NO

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

A. The usual subsidiary role. The judges may ask questions in order to try to understand complex technical issues. Though, the most important role lies with the documents provided by the parties.

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.)?

A. YES: During the past few years the National School of judges provides to its students lessons to special subjects (e.g. economics). It also organises cross-sectoral conferences concerning special fields of law, i.e. competition law, energy law, data protection law, with the participation of economists, engineers etc.

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.

A. The applicants/appellants may invoke the same legal reasons as in any other cases (formal or substantial). The review of these act does not raise any particular problems compared with disputes concerning acts taken by other administrative authorities.

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?).



A. As a rule, the court considers itself bound by the technical or economic assessments made by the regulator, therefore it does not review them directly. Only a very narrow review of the reasoning of the regulator's act is permitted.

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?

The Council of State can only annul the act or sanction, because it performs a review of its legality. On the contrary, the Court of Appeal can modify the sanction imposed when it acts under its capacity as a court of full jurisdiction.

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

A. NO

23. Are these cases a particular field of preliminary questions to the Court of Justice of the European Union?

A. YES: By its Judgment 2634/2005, regarding the judicial review of an act by the Hellenic Capital Market Commission imposing fine to a legal entity, the Council of State referred to the ECJ a preliminary question about the scope of article 21 of the Directive 2001/34/EC. More specifically, the question was whether the aforementioned provision allows the national legislation to establish, in the event that the information given in a prospectus about a company's securities proves to be inaccurate or misleading, administrative sanctions against not only the persons expressly mentioned in that prospectus as responsible, but also the issuer of the securities to be admitted to trading and, without distinction, the members of its board of directors, irrespective of whether they have been designated as responsible within the meaning of that provision.

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

A. NO

The judge in the regulatory ecosystem

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

A. NO: A judgment's summary may be posted to the courts' website, but the same applies for all important judgments. If the judgment has been delivered by the Grand Chamber of the Council of State, the summary is emailed to certified journalists.

26. Are regulatory authorities entitled to challenge acts or decisions taken by other public persons on the grounds that they impinge on their competence?

A. This matter has not been yet decided.

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?

A. YES: To conferences organized by the regulatory authorities, the operators or the ministries.

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?

A. NO. They can take up activities in regulatory authorities only after their retirement.

Quantitative data

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

A. 34 (thirty four), regarding the 5 regulatory authorities mentioned above. Most of these cases are related to appeals against decisions of Courts of Appeal.

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

A. 27 (twenty seven), regarding the 5 regulatory authorities mentioned above. Most of these cases are related to appeals against decisions of Courts of Appeal.

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?

A. Approximately 1% (34 of 3358 cases).

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?

A. Approximately 2% (27 of 1313 decisions).

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?

A. 0%.