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Answers to questionnaire: Hungary

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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? Yes/no

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

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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).

Regulatory authorities in Hungary

Although the term has a great variety of meanings, in the Hungarian legal-institutional context "regulatory authority" is mainly used to refer to organisations that are i) set up by a public law instrument; ii) structurally and financially, at least to some extent, separated from the regular institutional architecture of public administration; and iii) entrusted with the regulatory responsibility of a market.[1] *In Hungary, the term "regulatory authority" is not used by legislative texts*. Instead, Article 23(1) of the Fundamental Law of Hungary provides that "Parliament shall have authority to establish *autonomous regulatory bodies* in an implementing act for carrying out certain tasks and exercising certain competencies of the executive branch." (emphasis added) Section 1(3) of Act XLIII of 2010 on Central State Administrative Organs and on the Legal Status of Government Members and State Secretaries (hereinafter: Act XLIII of 2010), identifies two autonomous regulatory bodies, namely the Hungarian Energy and Public Utility Regulatory Authority (Magyar Energetikai és Közmű-szabályozási Hivatal, hereinafter: 'MEKH') and the National Media and Infocommunications Authority (Nemzeti Média- és Hírközlési Hatóság, hereinafter: 'NMHH'). Their regulatory function is also confirmed by their de facto activities and instruments issued on the basis of sectoral legislation. Many of their tasks and responsibilities correspond to what EU legislation explicitly assigns to regulatory authorities.

Taking into account the above definition of regulatory authorities, we should also refer to 'autonomous public administrative bodies' under Section 1(4) of Act XLIII of 2010, namely the Public Procurement Authority (Közbeszerzési Hatóság), the Hungarian Competition Authority (Gazdasági Versenyhivatal), the National Authority for Data Protection and Freedom of Information (Nemzeti Adatvédelmi és Információszabadság Hatóság) and the National Election Office (Nemzeti Választási Iroda). However, while autonomous regulatory bodies are expressly entrusted with regulatory functions by law [see Article 23(4) of the Fundamental Law of Hungary providing that "(…) the heads of autonomous regulatory agencies shall have powers to issue decrees under authorization conferred by an implementing act (…)"], the normative/regulatory value of the instruments issued by the above mentioned autonomous public administrative bodies is subject to discussion among practicing lawyers, as well as in the legal literature.[2] While some argue that the latter bodies (plus other

[1] For a detailed explanation of the concept elements of the above definition, see Hajnal, Gy. (2012) Agencies in Hungary. Uses and misuses of a concept. In Laegreid, P. – Verhoest, K. (eds): *Governance of public sector organizations. Autonomy, control and performance*. Basingstoke, Palgrave MacMillan, pp. 44–65; Horváth M. T. (2009) Gazdasági regulátorok: A piacgazdaság szabályozásának újabb konfúziói. *Új Magyar Közigazgatás*, Vol. 2, No. 6–7, pp. 12–16; Smith W. (1997) Utility Regulators: the Independence Debate. Public Policy for the Private Sector. *World Bank Note*, No. 127, https://openknowledge.worldbank.org/handle/10986/11570; Vatiero, M. (2008) 'Measuring' Independent Regulatory Authorities: A Review, http://dx.doi.org/10.2139/ssrn.1280295

[2] For the various approaches, see among others Fazekas, J. (2020) Autonóm államigazgatási szervek. In Jakab, A. – Könczöl, M. – Menyhárd, A. – Sulyok, G. (szerk.): Internetes Jogtudományi Enciklopédia. http://ijoten.hu/szocikk/autonom-allamigazgatasi-szervek; Horváth, M. T. (2004) A szabályozó hatóság típusú közigazgatási szervek koncepciója. *Magyar Közigazgatás*, Vol. 54, No. 7, pp. 403–407; Lapszánszky, A. (2014) A szabályozó hatóság jogállásának, szervezetének és "szabályozó" feladatainak elméleti alapja, sajátosságai. *Új Magyar Közigazgatás*, Vol. 7, No. 3, pp. 1–10

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authorities like the Central Bank of Hungary) may also carry out regulatory functions (f. e. the Competition Authority, by issuing non-binding guidance documents and notices), others hold that their instruments cannot reach the level of having a real regulatory impact.

Based on the above considerations, in the following, *the answers given to this questionnaire are focusing on the 'autonomous regulatory bodies' identified above, namely the MEKH and the NMHH.*

Acts of regulatory authorities before the Curia of Hungary

The MEKH's responsibility covers licensing, supervision, price regulation, tariff- and fee preparatory tasks in the fields of electricity, natural gas, district heating as well as in water utility supply. The NMHH carries out surveillance and market analysis activities in the field of electronic communications and media administration.

According to Section 13(3) of Act 1 of 2017 on Administrative Litigations (hereinafter referred to as Act on Administrative Litigation or AAL), decisions of these bodies can be challenged at first instance before the Budapest High Court (Fővárosi Törvényszék). Under the procedural rules previously in force, judgments of the Budapest High Court delivered in these cases could be appealed before the Curia of Hungary by the party or the person concerned, by invoking a violation of law. (The part of the provisions applying to them could be appealed before the Curia of Hungary under the same conditions, by persons in respect of whom the judgment contained provisions.) As a result of a modification in the procedural rules (Act CXXVII of 2019, in force from 1 April 2020), the judgments of the Budapest High Court in these cases may be subject to judicial review by the Curia of Hungary (as extraordinary legal remedy) instead of appeal (as ordinary legal remedy). It means that the request for judicial review must comply with stricter admissibility criteria (for details see the answer given to Question 6, below) in order to gain a decision on the merits of the case, and it is prohibited to refer in the request to any new legal ground and any new facts, circumstances not having formed the subject-matter of the first instance proceedings (i. e. before the Budapest High Court). However, the former procedural rules are still applicable in cases pending at the time of the entry into force of the new rules. Practically it means that currently the majority of such cases are still subject to appeal and not to judicial review before the Curia of Hungary. It must also be added that in some specific cases appeal (instead of judicial review as extraordinary remedy) is still available, even after the entry into force of the new procedural rules (for instance, in the case of NMHH decisions adopted in auction or tender procedures for the allocation of frequency use rights, see Section 44(8) of Act C of 2003 on Electronic Communication, hereinafter referred to as Electronic Communication Act or ECA).

Both MEKH and NMHH are authorized to issue general acts of binding nature in form of decrees. However, these decrees cannot be subject to judicial review by the Curia of Hungary or lower administrative courts. (As regards soft law acts, see the answer given to Question No. 7.)

2. In particular, can any of these authorities themselves impose sanctions (including fines)? Yes/no

If yes:

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

Yes, it is possible. As part of their supervisory powers, both MEKH and NMHH can impose sanctions, including fines, in the form of a decision. Such decisions may be challenged before the Budapest High Court and the judgments of this court may be appealed before the Curia of Hungary (see the answer given to Question No. 1).

3. Are any of these regulatory authorities subject to judicial review by civil courts, for some or all of their acts? Yes/no

If yes:

Please give examples.

By way of exception, regulatory authorities can be subject to judicial review by civil courts. Section 6:548(1) of the Civil Code of Hungary provides that "Liability may be established for damage caused in the course of exercising administrative powers if the damage has been caused by exercising public authority or by failing to exercise it, and the damage could not be averted by an ordinary legal remedy or an administrative court action." The relevant judicial practice shows that this provision also extends to activities of the regulatory authorities if they cause damage to individuals within the scope of their supervisory powers. The jurisprudence of Hungarian courts has also made clear that in the exercise of public authority errors in the application or interpretation of the law in individual cases can give rise to liability for damages only if they are manifestly serious.

In a case before the Budapest Court of Appeal (Fővárosi Ítélőtábla), the company at issue (in which the applicant was a shareholder) could not start the exploitation of an optical fibre network since it had not received the authorization from the competent authority (NMHH) to do so. It took four years for the company to obtain the necessary authorization, following repeated administrative and administrative judicial procedures. The administrative court (obliging the NMHH to grant the authorization) established that the NMHH had made a manifest error of law and seriously infringed the principle of legal certainty in its procedure by failing to give a reasoned justification for why it had departed from the position it had taken in its earlier procedure and why it had invoked a new ground for refusal in the contested decision. After finally obtaining the authorization, the applicant brought an action before a civil court, seeking ca. EUR 4 million from the authority (jointly and severally with the first defendant) as a compensation for damages suffered by the reduction of the market value of its shares in the company due to the authority's (and the first defendant's) tortuous conduct. The final judgment, although it confirmed that the NMHH denied the company's application for authorization on the basis of a serious error of law and established the existence of a causal link between the authority's conduct and the applicant's damage, came to the conclusion that the reduction of the market value of the shares did not constitute a damage which the

applicant would have suffered independently of the company's economic activity, i. e. as a consequence solely of the NMHH's conduct.

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? Yes/no

Under Section 13(3) AAL, the Budapest High Court has exclusive jurisdiction in legal disputes related to the administrative activities of independent regulatory bodies (i. e. MEKH and NMHH).

- or do they result from the application of the general rules on the distribution of competences? Yes/no

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

If yes:

Please explain.

The Budapest High Court also has exclusive jurisdiction in legal disputes related to the administrative activities of autonomous state administration bodies, government offices, railway administration bodies, air transport authorities and the Central Bank of Hungary.

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/no

If no:

Please explain.

The system of remedies available against the acts of these authorities have also changed due to the new procedural rules (mentioned in the answer given to Question 1, above) entered into force on 1 April 2020. According to the new rules, administrative remedy is excluded against the acts of regulatory (and any other public) authorities, i. e. these acts are not subject to remedy by other administrative authorities. It means that, as a rule, only judicial remedy is available against the acts of administrative authorities, including regulatory and any other public authorities, administrative remedy is permitted only exceptionally by an express provision of law. Such an exception does not exist in relation to MEKH decisions while, as regards NMHH, Section 44(1) ECA provides that acts of NMHH may be appealed before the President of the NMHH (hereinafter NMHH President), provided that such an appeal is not excluded by other provisions.

The Electronic Communications Act also contains specific rules (Section 44) for administrative court proceedings related to the legality of NMHH decisions adopted in auction or tender procedures for the allocation of frequency use rights. The act sets a shorter

time limit for each step of the proceeding in order to ensure that sales procedures for the acquisition of frequency usage rights are carried out within a short timeframe.

Before the entry into force of the new procedural rules, the situation was different. As a rule, administrative remedy was available against the acts of administrative authorities but there were several exceptions. Even at that time, only judicial remedy was available against the acts of the MEKH. Such a rule did not apply to NMHH decisions which were subject to a specific administrative remedy system, namely that remedies were available within the organizational structure of the authority. It means that the authority's first instance decisions were subject to appeal before the President of the NMHH (unless it was not excluded by other provisions), except for decisions on media administration, against which appeals could be lodged with the Media Council of the NMHH (hereinafter NMHH Media Council). Some elements of this "old NMHH remedy system" remained, even after the entry into force of the new procedural rules (see the previous paragraph).

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/no

If yes:

Please explain.

As it is explained above (see answer given to Question No. 1), according to the new procedural rules, the judgments of the Budapest High Court in cases concerning the legality of acts of these authorities may be subject to judicial review by the Curia of Hungary as extraordinary legal remedy (appeal is available only exceptionally). It means that the request for judicial review must comply with strict admissibility criteria. Namely, the Curia of Hungary admits the request for review if the examination of the violation of law affecting the merits of the case is justified on the following grounds: a) ensuring the uniformity or improvement of the practice of law, b) the special weight or social significance of the legal issue raised, c) necessity of the proceedings of the Court of Justice of the European Union (CJEU) to provide a preliminary opinion, or d) any provision of judgment deviates from a judgment published in the Collection of Judgments of the Curia of Hungary. It must, however, be pointed out that these criteria are generally applicable to any kind of request for judicial review by the Curia of Hungary, and not specifically to requests submitted against the acts of regulatory authorities.

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? Yes/no

If yes: under what conditions? Make any distinction you think useful according to the degree of normativeness of the acts.

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The Act on Administrative Litigation broadly interprets the scope of those acts which can be subject to administrative litigation. Section 4(1) of AAL provides that "[t]he subject of the administrative litigation is the lawfulness of the act as specified in Paragraph (3) of the administrative body regulated by administrative law, or *resulting in changing the legal position of the subject-at-law affected by such act, or the omission of such act* […]."(emphasis added) Section 4(3) of AAL referred to in the previous provision expressly mentions "*provisions of general effect* […] to be applied in the individual case" (emphasis added) as possible subject to administrative litigation. According to the official commentary on AAL (https://uj.jogtar.hu/), the significance of these two provisions is that the AAL has opened *the possibility of a direct judicial challenge to soft law*. Section 92(1) of AAL makes it possible to annul acts challenged in administrative litigation if a) the act is void or invalid for reasons stipulated in law or has any deficiency in formal requirements owing to which it must be considered as non-existing, b) the legal injury caused by breaching the essential rules of the preceding proceedings cannot be remedied in the action, c) the administrative body based its act solely on statutory provisions that are not applicable in the case, or d) the act may not be reversed.

In sum, based on the above reasoning, soft law measures of regulatory authorities may also be the subject of a direct action for annulment in administrative litigation. However, we have no information about concrete judicial case(s) where a soft law act of a regulatory authority was challenged.

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

Based on the above reasoning (see the answer given to Question No. 7), it cannot be excluded. It is, however, less likely that informal documents like these may result in changing the legal position of a subject-at-law in the meaning of Section 4(1) of AAL.

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.).

According to the general rules of bringing an administrative action as laid down by Section 17 AAL, the following persons/bodies/organisations are entitled to do so: a) *any person whose rights or lawful interests are directly affected* by the administrative activity, b) the public prosecutor's office or *the body exercising regulatory supervision* or legal control, if the deadline set in the notice elapsed without any result, c) *any administrative body that did not take part in the preceding proceedings as* an authority or *regulatory authority*, if its competence is affected by the administrative activity, and which is party to the administrative contract (contracting administrative body), d) any non-governmental organisation in the cases specified in law or government decree that has been pursuing its registered activity in order to protect any fundamental right or enforce any public interest in a geographical territory affected by the administrative activity for at least one year, if the administrative activity affects its registered activity, e) in the case stipulated by law, in the case of direct injury to or

jeopardising the lawful interests of the members or group represented by it, also any interest-representation organisation or body whose activity that is registered or set forth in its deed of foundation is affected by the administrative activity, f) the body exercising regulatory supervision or legal control or the public prosecutor, if they file a motion for annulment of a provision of general effect.

As regards regulatory authorities, it typically means that administrative actions can be brought by all those bodies/companies which are affected by the act(s) of a regulatory authority issued within its supervisory power (f. e. a public service provider whose request for the necessary authorisation has been refused); consumers whose rights are affected by the act(s) of such authority (f. e. those concerning consumer charges or conditions of access to services); or authorities whose competence is affected by certain administrative action(s) of a regulatory authority.

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.).

As was already explained above (see the answer given to Question 6), in respect of admissibility, the general rules of the Act on Administrative Litigation apply. However, sectoral rules may establish specific rules in respect of particular aspects of admissibility (like time limits, for appeal). For example, as was mentioned above (answer given to Question 5), Section 44 of the Electronic Communications Act contains specific rules for administrative court proceedings related to the legality of NMHH decisions adopted in auction or tender proceedings for the allocation of frequency use rights. According to Section 44(4), the definitive ruling adopted in auction or tender procedures for the allocation of frequency use rights for the refusal of registration in the auction or tender register may be appealed before administrative court (i. e. the Budapest High Court) within fifteen days from the date of delivery of the ruling. A request for review of the court decision in such proceedings may be lodged within fifteen days from the date of delivery of the decision, with the proviso that no justification will be accepted upon failure to meet this time limit.

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/no (<u>The answer is rather no but some explanation is needed.</u>)

If yes, to what extent? Will the plea of illegality against this general act, if upheld, lead to the (retroactive) annulment of this act?

In cases where the question of legality arises in relation to both the individual decision and the general act of the regulatory authority, the general act can be challenged in the appeal against the individual decision only if the general act at issue is a soft law instrument. As it is explained above (see the answer given to Question No. 7), soft law acts may be subject to administrative judicial proceedings. It follows from the combined reading of Section 4(1) and (3) AAL. The latter paragraph provides that administrative acts (allowed to be challenged before administrative courts) are, among others, "provisions of general effect - *not falling under the scope of the Act on Legislation* - to be applied in the individual case" (emphasis added). As binding general acts of regulatory authorities (i. e. decrees) are legislative acts falling under the scope of Act CXXX of 2010 on Legislation (see Section 1(1)), they cannot be subject to administrative litigation.

In any other cases, only the individual decision can be subject to direct action brought by the party to the proceedings. It does not mean that the legality of the general act cannot be challenged in judicial proceedings at all, but the possibilities for raising this issue are very limited. These are mainly restricted to review of constitutionality, i. e. if a party considers that the law applicable in his/her case is in conflict with the Fundamental Law of Hungary, he or she may request the court before which the case is pending (however such a request is not binding on it) to file a motion to the Constitutional Court for declaring that the law at issue or a provision thereof is contrary to the Fundamental Law of Hungary.

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

- against these authorities? Yes/no (For details see the answer given to Question No. 3.)

- or against the State on whose behalf they may have acted? Yes/no

Based on the relevant jurisprudence of the Hungarian courts on liability for damages caused by legislation, by analogy we can conclude that even if the harmful consequences would be attributable to a general act of a regulatory authority, the liability claim should be brought against the authority itself and not the State, since these authorities are endowed with 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? Yes/no

If yes: please explain and give examples.

- Or is it a distributed dispute with no particular allocation rule?

Yes/no

Please indicate, in a more general way, any notable particularities in the internal organisation of your courts that may be relevant.

The new Act on Administrative Litigation, which entered into force on 1 January 2018, significantly expanded the scope of administrative litigation. In administrative disputes, a client may turn to a court if he requests the judicial review of an administrative decision, or considers a decision of an administrative body to be unlawful, or if an administrative body has failed to fulfil its procedural obligations, or if his legal problem relates to an administrative contract or a public service relationship, or if he seeks compensation for damage suffered in connection with such a relationship. In case of declaratory actions, the client may also seek in his action that the courts proceeding in the administrative dispute establish the facts arising from the administrative relationship, even without submitting any further claim.

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,

- expert's report,

- amicus curiae,

- solicitation of a reference expert administration,

- other?

Please explain, where applicable by giving some examples from your experience.

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

Yes/no

If yes:

Please explain.

We can answer the questions relating to oral hearings and the work of forensic experts in respect of domestic litigations.

In an oral hearing held in the presence of the parties, the metacommunication of the person being heard is of fundamental importance.

In evaluating an expert opinion, the relevant issue is whether the question at issue is a legal or a technical question. In an expert opinion the expert answers the court's questions, but when an expert is heard − typically orally, at a hearing − the parties and their representatives may also ask questions and in such cases the expert must be able to distinguish between a technical issue and a legal issue, since he is not obliged to answer a legal issue. If, despite this fact, the expert answers a legal question, the judge does not need to take his answer into consideration, he may depart from it without giving reasons, since under Hungarian law issues of law are to be determined solely by a judge.

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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? Yes/no

- or do they remain outside the case? Yes/no

In litigious proceedings the identity of the parties is fixed, no other person than the litigants take part in the proceedings, and in respect of the public administration bodies having previously proceeded only documentary evidence is taken.

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?

Yes/no

If yes:

Please explain.

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

In the trial phase, the principle of orality is applicable as follows:

Article XXVIII (1) of the Fundamental Law of Hungary provides: "Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act." The constitutional principle of the right to a fair trial is further elaborated under lower level legislation, which provide for the orality criterion in relation to the principle of directness.

In its decision no. 3251/2019 (X. 30.) AB, the Constitutional Court of Hungary has invoked the case law of the ECtHR, according to which: if a case is heard in one instance, the party has the right to an oral hearing, unless exceptional circumstances arise which justify the omission of a hearing [Allan Jacobsson v Sweden (No 2.) (8/1997/792/993). Thus, the right to a public hearing under Article 6(1) of the ECHR includes the right to be heard orally at least at one instance [Salomonsson v Sweden (38978/97), 12 November 2002, §§ 34-36].

Following the first instance proceedings, other considerations, such as the right to be tried within a reasonable time, must also be taken into consideration in assessing the need for a public hearing and therefore, if a hearing has already been held at first instance, the special characteristics of the proceedings at second or third instance may justify the omission of a hearing [Helmers v Sweden (11826/85), 29 October 1991, § 36].

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The Constitutional Court has emphasised that the right to an oral hearing is not absolute, and that a hearing may be omitted, in particular where a party has clearly waived the hearing and there is no public interest in holding an oral hearing. The waiver may be express or implied, the latter being the case, for example, where a party does not request or does not maintain a request for a hearing. Nor is a hearing required in exceptional circumstances, for example, where no issue of fact or law arises in the case which cannot be adequately determined on the basis of the files of the case and the parties' written submissions.

In its former practice (decision no. 3064/2016 (11.4.2016)AB) the Constitutional Court confirmed the position that "in the absence of any other procedural or substantive fundamental rights violation, the mere fact of not holding a hearing does not constitute a constitutionally relevant procedural fundamental rights violation", and in relation to the principles of orality, directness and publicity it has also emphasised that these three principles are closely interrelated and partially overlap each other. And while not holding a hearing results in a restriction of these principles: that is, orality, directness and publicity become narrowed, this does not mean that it is not constitutionally acceptable in exceptional, justified cases (decision no. 3027/2018 (II. 6.)AB).

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/<u>no</u>

If yes:

Please explain and give examples.

<u>The extent of the judge's control, the court decision</u>

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

As the judicial practice shows, there are several categories of grounds that can be invoked against the acts of regulatory authorities. These include both substantial and procedural issues. The main substantial categories of grounds are primarily based on the infringement of sectoral rules governing the competences (including discretionary powers) and activities of regulatory authorities, in particular in issues like granting/withdrawing authorisations to provide services or carry out specific activities, ensuring access to network or infrastructure for service providers, designation of universal service providers, designation of operators as having

significant market power (SMP), sanctions (mainly fees) imposed by these authorities, handling consumer complaints, definition of (statistical) reporting obligations. As the supervisory power of the NMHH Media Council in the field of media administration also extends to issues of constitutional significance, the infringement of constitutional principles (as specified in the relevant sectoral legislation, f. e. the requirement of balanced reporting under Section 13 of Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content as a manifestation of "the freedom and diversity of the press" as laid down in Article IX(2) of the Fundamental Law) may also serve as a ground which can be invoked against the acts of the NMHH Media Council.

The main procedural categories of grounds to be invoked against the acts of regulatory authorities are failures in ascertaining the relevant facts of the case (in particular, in taking the necessary steps in order to ascertain the relevant facts and in assessing the evidence correctly) and the infringement of several aspects of the right to good administration like the right to be heard, the right to have access to the files of the case or the obligation to give reasons for their decisions.

As regards possible problems raised by appeals against the acts of independent authorities:

Concerns about the independency of the NMHH Media Council are often raised in the press, or in academic legal and political analyses, but are less often/or less directly incorporated into the arguments in court proceedings, at least before the Curia of Hungary. In this respect the situation is similar to that of certain other administrative (but not regulatory) authorities.

Another particular challenge is posed by the fact (which however does not concern independency issues) that these cases often raise really specific technical questions that make it difficult to take a (right) decision on the legal issues of the case.

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?)

In administrative judicial proceedings, the applicable general rule is that in adopting its decision the court is not bound by any other authority's decision and the facts established therein, with the exception of final decisions in criminal matters (Section 85(6)-(7) of AAL). It also follows from the general rules (Section 85(5) of AAL) that, in the scope of the lawfulness of administrative acts realised within the discretionary powers of a regulatory authority, the court shall only examine whether the authority exercised its competence within the frameworks of its authorisation for deliberation, whether the criteria of deliberation and their causal relation as to weighing the evidence can be ascertained from the document containing the administrative act. It should also be added that in such cases the Curia of Hungary (within its competences described in the answer given to Question 1) is only competent to control the first instance court's decision, and not directly the authority's decision. In doing so, it examines whether the first instance court's decision was lawful, i.e. whether the court correctly established the facts necessary for the resolution of the dispute and correctly applied the relevant legislation.

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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 it is mentioned in the previous answer, the Curia of Hungary (within its competences described in the answer given to Question 1) is only competent to control the first instance court's decision, and not directly the authority's decision. In doing so, the Curia of Hungary is only competent to quash the act/decision imposing the sanction and not to modify it.

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)? Yes/no

If yes: what kind of legal treatment? Please explain and give examples.

We have examples for cases where such an authority took into consideration an opinion/decision of a European Authority (in the context of this question, we understand under "European Authority" the European Commission as well and not only specific European agencies like the Body of European Regulators for Electronic Communications [hereinafter BEREC]). The emergence of these cases follows from the fact that regulatory authorities have a special responsibility for the implementation of EU legislation aiming at liberalization in sectors like electricity and gas supply, water and waste management, telecommunication, etc. It also includes their role to ensure the consistent application of these harmonized rules across the EU.

As examples, we can easily find cases in the field of electronic communication, as the relevant law (ECA) itself lays down the obligation to take account of the views of other authorities on several points. Section 62(2) of ECA provides that the President of the NMHH shall carry out the market definition and market analysis *in accordance with the decisions, recommendations and guidelines of the European Commission* pertaining to the harmonized application of the law, in compliance with the relevant provisions of competition laws. Section 62(7) adds that where a transnational market covering the territory of Hungary has been identified as a relevant market in a decision of the European Commission, the NMHH President shall carry out the identification of service providers with significant market power in that relevant market *in cooperation with the electronic communications regulatory authorities of the Member State or Member States concerned*. Section 64 stipulates that if the NMHH President – under exceptional and justified circumstances – intends to impose on service providers with significant market power specific obligations (i. e. other than those set out in ECA) for access or interconnection, *it shall submit this request to the European Commission for prior approval,* including a detailed explanation. Moreover, the ECA devotes a separate subchapter to cooperation with other authorities in which it is laid down that *the NMHH President shall make its draft decision* concerning a) the definition of relevant

markets; b) the identification of service providers with significant market power and the imposition, amendment, extension or withdrawal of obligations; or c) the imposition, amendment or withdrawal of obligations with respect to service providers without significant market power, with detailed reasons included, *available to the European Commission, BEREC and the electronic communications regulatory authorities of other Member States*, if the proposed decision is likely to affect trade between Member States, and if the Commission's recommendations or guidelines does not provide otherwise (Section 71(1)-(2) ECA). The NMHH President is obliged to take into consideration the observations made by these authorities, moreover, if the Commission takes a decision requiring the President to withdraw the draft measure, or it supplies specific proposals for amending the draft measure, the President has to comply with the decision of the Commission (Section 71(6)-(13) ECA).

In a case before the Budapest High Court (7.K.30467/2005/45.), the predecessor of the NMHH (Nemzeti Hírközlési Hatóság Tanácsa hereinafter NHHT, the competent authority that time) sent its draft decision on identification of service providers with significant market power to the Commission for review, in accordance with the above ECA provisions. The Commission submitted its observations requiring the NHHT, among others, to bring the imposition of obligations on these service providers closer to the nature of the problem identified, and to make them proportionate. The NHHT interpreted these observations as not justifying an amendment of the draft decision and therefore did not make any substantial modifications. The court found it to be in breach of Section 71(6) of ECA (at that time Section 65(2) of ECA), since the NHHT was obliged to take account of the Commission's opinion.

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

If yes:

Please explain and give examples.

As it is mentioned in the previous answer, regulatory authorities have a special responsibility for the implementation of EU legislation in liberalized sectors. The scope of obligations arising from this responsibility (or additional questions closely connected to it) may form the subject matter of preliminary questions referred to the Court of Justice of the European Union (hereinafter CJEU). In this context, we have three examples for preliminary ruling requests submitted by Hungarian courts to the CJEU.

In case *C-510/13 E.ON Földgáz Trade v MEKH*, the request for a preliminary ruling concerns an application, made by an operator (E.ON Földgáz Trade Zrt.), for the annulment of a decision of the MEKH which had changed the Hungarian network code to the detriment of E.ON Földgáz's right to long-term capacity allocation in the period of 2010/2011. The first and second instance courts denied locus standi to E.ON Földgáz by saying that it had failed to show its relevant direct interest in relation to the contested provisions of the decision. E.ON Földgáz therefore brought an appeal before the Curia of Hungary which submitted a request for preliminary ruling to the CJEU asking whether the concept of 'party affected' under the Second or Third Gas Directives influenced the rules on locus standi as applicable under

Hungarian law in the main proceeding. After noticing that, instead of the Second and Third Gas Directives, Regulation 1775/2005 on conditions for access to natural gas transmission networks applied in the case at issue, the CJEU established that "**Article 5 of Regulation (EC) No 1775/2005 [….] read in conjunction with the Annex to that Regulation, and Article 47 of the Charter, must be interpreted as precluding national legislation concerning the exercise of rights of action before the court or tribunal having jurisdiction to review the lawfulness of acts of a regulatory authority, which […] does not make it possible to confer on an operator, such as E.ON Földgáz Trade Zrt, *locus standi* for the purpose of bringing an action against a decision of that authority relating to the gas network code.**"

In *Joined Cases C-807/18 and C-39/19 Telenor Magyarország Zrt. v the President of the NMHH*, the CJEU interpreted, for the first time, EU Regulation 2015/2120 enshrining 'internet neutrality'. The contested internet access services, offered by Telenor company to its customers, included two (i. e. 'MyChat' and 'MyMusic') packages with preferential access (known as 'zero tariff'), and the specific feature of those packages was that the data traffic generated by certain specific applications and services did not count towards the consumption of the data volume purchased by customers. In addition, once that volume of data had been used up, those customers may have continued to use those specific applications and services without restriction, while measures blocking or slowing down data traffic were applied to the other available applications and services. The NMHH President adopted two decisions by which she found that the packages did not comply with the general obligation of equal and non-discriminatory treatment of traffic laid down in Article 3(3) of Regulation 2015/2120 laying down measures concerning open internet access and that Telenor had to put an end to these measures. The Budapest High Court, hearing two actions brought by Telenor against these decisions, decided to refer the matter to the CJEU for a preliminary ruling. The CJEU established that the packages were incompatible with Article 3(1) and (2) of Regulation 2015/2120 safeguarding a number of rights for end users of internet access services and prohibiting providers of such services from putting in place agreements or commercial practices limiting the exercise of those rights, as well as with Article 3(3) mentioned above.

In case *C-475/12 UPC DTH Sàrl v Vice President of the NMHH*, the applicant of the main proceeding was UPC, a Luxembourg company supplying packages of radio and audio-visual broadcast services from Luxembourg that could be received by satellite, subject to conditional access. These services were supplied to subscribers in other Member States, including Hungary. Following complaints by subscribers, the Hungarian authorities (NMHH and the then-Vice President of the NMHH at second instance) asked UPC to provide them with information concerning its contractual relationship with one of its customers. However, UPC refused to provide that information on the ground that, since its registered office was in Luxembourg, the Hungarian authorities did not have the power to initiate surveillance proceedings against it. Since they had not received the information requested, the Hungarian authorities imposed a fine on UPC. UPC brought legal proceedings to challenge the fine, and the Budapest High Court submitted a request for preliminary ruling to the CJEU asking, in essence, whether the Hungarian authorities are empowered by EU law to monitor UPC's business in Hungary. The CJEU established that, under Directive 2002/20/EC on the authorisation of electronic communications networks and services, national authorities may

request from undertakings information required for verification of compliance with conditions relating to consumer protection where a complaint has been received or, in the case of an investigation by the national authority, on its own initiative. In that context, a Member State may initiate surveillance proceedings in relation to the activity in its territory of an electronic communications service provider established in another Member State of the EU. On the other hand, Member States may not require such providers to create a branch or a subsidiary in their territory, as such an obligation would be contrary to the freedom to provide services.

24. Does the drafting of court decisions raise particular issues related to the technical nature or media exposure of some of these cases? Yes(?)/no

If yes:

Please explain and give examples.

Having regard to the specific organizational structure of the NMHH (see the answer given to Question No. 5), in cases concerning the decision of this authority, particular attention should be paid to the correct designation of the applicant or the defendant (depending on the position of the authority) in the judgment or the files of the case. Under these special circumstances, writing "NMHH", instead of "the President of the NMHH" or "Media Council of the NMHH" (or vice versa) constitutes not only a formal error but the designation of another authority.

The judge in the regulatory ecosystem

25. Are judgments on such appeals subject to any particular publicity or accompanying measures (press release)? Yes/no

If yes:

Please specify.

Under section 163(1) of Act CLXI of 2011 on the Organisation and Administration of Courts, the Curia shall publish its decision on the merits of the case in an anonymised electronic form in the Collection of Court Decisions, within 30 days of putting it down in writing. In addition to the published court decision, the overruled decisions of courts or public authorities or other bodies are also published.

A further rule on press publicity is that information on pending cases can only be given in a press release by a press spokesperson, also in anonymised form, until final judgment is delivered. Thereafter, to final judgments other rules apply: i.e. the judgment is always promulgated in public, so the final judgment enjoys full publicity so as to ensure social control and compliance with the principle of publicity.

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

Yes, there is a legal possibility for that. Under section 18 of Act CL of 2016 on General Public Administrative Procedure, if several authorities have established their competence in the same case, or several authorities have established their lack of competence and, as a result, proceedings cannot be initiated or are not pending, or proceedings have been initiated before several competent authorities and it cannot be decided on the basis of the order of precedence which authority is entitled to conduct the proceedings, the authorities concerned are obliged to attempt to resolve the dispute between themselves immediately, but within three days at the latest.

If the conciliation is unsuccessful, the competent authority is designated by the administrative court, on the initiative of the body before which proceedings were commenced later, or which established the lack of its competence later, or to which the client submitted a request for conciliation.

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?

Yes/no

If yes:

Please specify.

Usually, no such professional contact or exchange programme exists on broad professional issues. The court may overrule the authority's professional position in its own proceedings, without any consultation.

If the administrative authority wishes to contact a court in respect of an issue, it can request an opinion or information via the official channels, through the president of the court.

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?

Yes/no

If yes:

Please explain.

The career path of judges does not typically involve working in any form, whether in an internship or otherwise, at a counterpart body, they usually gain professional experience in courts, in a strictly regulated career progression system.

Quantitative data

As to the question relating to quantitative data we note that under section 1(3) of Act XLIII of 2010 on Central State Administrative Organs and on the Legal Status

of Government Members and State Secretaries, at present (as in 2020), there are two autonomous regulatory bodies in Hungary, namely the National Media and Infocommunications Authority ('the NMHH'), and the Hungarian Energy and Public Utility Regulatory Authority ('the MEKH').

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

In 2020, 44 such cases were received in which the respondent was either the NMHH or the MEKH.

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

In 2020, the Administrative Department closed 86 cases in which the respondent was either the NMHH or the MEKH.

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?

As compared to the total number of the cases received by the Administrative Section (3140), in 1.4% of the cases the respondent was either the NMHH or the MEKH.

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?

As compared to the total number of cases closed by the Administrative Section (3416), in 2,52 % of the cases the respondent was either the NMHH or the MEKH.

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?

In 2020, 22% of the completed cases having involved the NMHH or the MEKH as respondents, were annulled or modified.

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