



**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: Norway



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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? Yes/no

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).

In Norway, all judicial review is conducted by the ordinary courts of law, with the Supreme Court as the highest instance. Thus we have no separate administrative tribunal for the consideration of cases relating to the public exercise of authority.

As the Supreme Court acts as the highest instance in all cases where an administrative act may be subject to judicial review, there are no “main regulatory authorities” whose acts may be brought before the Court. In the recent years, the Supreme Court has dealt with several appeals against decisions made by regulatory authorities, such as the Norwegian Competition Authority.

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

Yes.

To what extent a regulatory authority can impose sanctions, including fines, will follow from the relevant statute applying to such regulatory authority, cf. the Norwegian Public Regulatory Administration Act chapter IX. Examples of sanctions that may be imposed under different statutes are administrative fines, administrative deprivation of rights and administrative corporate sanctions. Examples of regulatory authorities given authority under statute to impose fines are the Norwegian Competition Authority and the Norwegian Data Protection Authority.

If yes:

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

Yes.

The courts can review “all aspects” of the case when reviewing individual decisions concerning administrative sanctions, cf. Section 50 in the Norwegian Public Regulatory Administration Act. As a general rule, this includes whether the conditions for imposing the sanction are fulfilled, the discretionary assessment of whether a sanction should be imposed if the conditions are met and the measurement of the sanction. The judicial review may however be more limited as a result of the special statute applying in the case.

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

Yes.

As mentioned above, in Norway all judicial review is conducted by the ordinary courts of law. The judicial review will follow the rules in the Norwegian Civil Procedure Act.

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? Yes/no

See question 1.

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

See question 1.

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

See question 1.

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? Yes/no

Yes.

If no:

Please explain.

In Norway the purpose of the judicial review in administrative matters is to ensure that the exercise of authority towards citizens remain within the legal competence of the acting authority. This is also the case for matters concerning regulatory authorities as those mentioned in the introduction to the questionnaire. The judicial review only takes place in individual cases and in concrete disputes, ex post.

In some cases, separate appeal bodies have been established to hear complaints against decisions made by a specific regulatory authority. These decisions may however be brought before and reviewed by the ordinary courts just as acts by other administrative bodies, unless otherwise stipulated by statute.

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

No.

The judicial review only takes place in individual cases and in concrete disputes where the plaintiff can establish a “legal interest” in the lawsuit. Disputes concerning “hard law” acts, as mentioned above, do not raise particular issues of admissibility as long as these criteria are fulfilled.

If yes:

Please explain.

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

No.

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



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

No.

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.).

The judicial control of administration, including regulatory authorities, is often referred to as a control of legality or a control of validity. Any person – an individual or entity – may file a lawsuit regarding the way a regulatory authority has exercised its authority if that person can demonstrate a “genuine need”/legal interest to have the claim decided upon by the courts. Supervision of the execution of power only takes place in concrete disputes and where the outcome will be affected by the question of whether the appropriate exercise of authority is within the agency’s sphere of competence. This assessment of the interest in bringing proceedings is the same regardless of the nature of the challenged act by the 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.).

Under Section 27 b in the Public Administration Act, the regulatory authority that has made the contested decision may decide that legal action concerning the validity of the administrative decision may not be filed unless the party in question has availed himself of his right to bring an administrative appeal and the administrative appeal has been determined by the most superior appeal body available.

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

No.

The judicial control occurs in connection with concrete disputes that are brought before the courts. The courts will only review general acts of a regulatory authority if such is necessary in order to resolve the concrete dispute.

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

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

- against these authorities? Yes/no No.

- or against the State on whose behalf they may have acted? Yes/no Yes. *The party in the lawsuit will be “the State represented by the relevant authority”.*

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

No.

In some of the lower courts (district courts), there may be some specialisation, but in the Supreme Court, the composition of the justices assigned to different cases is decided randomly, and will change every week.

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.

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?

In civil cases, such as administrative cases, the general rule under the Norwegian Civil Dispute Act is that the evidence shall be presented directly to the adjudicating court in cases that are heard orally. Written expert reports may only be presented before the court in the following case: i) where the expert is appointed by the court in accordance with the rules in the Civil Dispute Act, or ii) if the parties agree or they have the opportunity to examine the person who made the report. In the latter case, the report may not be presented until it is confirmed that the person who made it will attend the hearing. The parties are however free to call witnesses to give expert testimonies. The examination of such an (non-court appointed) expert witness is conducted in accordance with the provisions relating to the examination of ordinary witnesses.

Under Section 15-8 in the Civil Dispute Act, written submission to highlight matters of public interest (amicus curiae) may be presented to the court by organisations and associations within the purpose and normal scope of the organisation and public bodies within its area of responsibility. The submission may be rejected by the court if it due to its form, scope or content is regarded ill-suited for highlighting the public interest in the case.

With regard to the oral hearings in lower courts, expert lay judges may be appointed if required for the proper conduct of the case.

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

Do you feel that these regulatory cases require a particular method? Yes/no

No.

If yes:

Please explain.

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

No.

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

Yes.

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

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?

The general rule under Norwegian procedural law is that rulings following a hearing shall be made on the basis of the proceedings at the court hearing. Written submissions only form part of the basis for the decision to the extent provided by statute. If the facts of the case are complex, the court may for example under Section 9-9 in the Civil Dispute Act order the parties to submit a brief chronological or other systematic account of the facts or part thereof.

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/no

No.

If yes:

Please explain and give examples.

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

In order to keep the separation between the executive and judicial power, there are certain limitations in the courts' competence in administrative matters, including those relating to acts of regulatory authorities. The judicial control in administrative matters is often referred to as a "control of legality" or a "control of validity" of administrative decisions. A party who wants to challenge an administrative decision before the courts may therefore only challenge the validity of the decision, i.e. whether the relevant administrative body had legal basis for the decision, whether there are any errors in the factual basis for the decision or whether the decision is invalid due to procedural errors. If the legislation provides certain consequences if relevant statutory or legally binding conditions are met (e.g. tax exemptions or rights to social benefits) the courts can also undertake a full review of the content of the decision and determine whether it is in accordance with the law. The same applies if the law stipulate that the court shall review all aspects of the case, e.g. in case of judicial review of administrative decisions on coercive measures against individuals. The latter may be more frequent in acts of regulatory authorities, e.g. in relation to imposed administrative sanctions, see question 2.

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?)

As mentioned under question 19, the judicial review in administrative matters include a review of the factual basis for the contested decision. As a general rule, it lies within the court's competence to control technical or economic assessments made by the regulator. It is only where the law exclusively entrusts to the administration the discretion to decide whether a decision is to be made and what it will involve, the judicial review will be limited to whether the administration has based the decision on considerations that lie within the legal framework, there has not been unfair discrimination, and the decision has not been made on a purely random basis or is not highly unreasonable.

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 mentioned under question 2, the courts can review "all aspects" of the case when reviewing individual decisions concerning administrative sanctions, cf. Section 50 in the Norwegian Public Regulatory Administration Act. As a general rule, this includes whether the conditions for imposing the sanction are fulfilled, the discretionary assessment of whether a sanction should be imposed if the conditions are met and the measurement of the sanction. The judicial review may however be more limited as a result of the special statute applying in the case.

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

No.

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

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

Norway is not a member of the EU, but Norwegian courts may under Section 51a of the Court of Justice Act request an Advisory Opinion from the EFTA Court in cases where the court must decide on the interpretation of the Agreement on the European Economic Area and protocols (the EEA Agreement). The Supreme Court has in the recent year sent 1-2 such requests per year. A number of these cases relate to administrative matters, but is no predominance of cases relating to independent administrative authorities.

If yes:

Please explain and give examples.

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

No.

If yes:

Please explain and give examples.

The judge in the regulatory ecosystem

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

No.

If yes:

Please specify.

With the delivery of judgements from the Supreme Court, the Court will also publish a summary of its judgement that is sent to the press and made available on the Court's website, along with the judgement itself. In cases with particular public interest, the Supreme Court may also release a press release. Judgements on appeals on acts by regulatory authorities are however not subject to any special publicity or accompanying measures as such.

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? Yes/no

No.

If yes:

Please specify.

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

No.

If yes:

Please explain.

Quantitative data

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

As mentioned under question 1, Norway does not have any special courts (administrative courts, criminal courts or constitutional courts), and all judicial review is conducted by ordinary courts of law, with the Supreme Court pronouncing judgments in the final instance. As a court of last resort, the Norwegian Supreme Court is functioning as a Court of precedent, and as a general rule the Supreme Court only hears cases that are considered to have significance beyond the specific case. There is no passage for an appeal to be decided on the merits by the Supreme Court other than through being granted leave to appeal by the Appeal Selection Committee of the Court. In 2020, leave to appeal was granted in 13,6 % of all appeals received and registered by the Supreme Court in civil cases. There are no data on how many of the appeals received and registered before the Supreme Court that concerned administrative matters, including acts by regulatory authorities.

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

According to the Supreme Courts Annual report for 2020, 25 of the 58 civil cases that were heard before the Supreme Court in 2020 concerned administrative matters. None of these cases concerned regulatory authorities as those mentioned in the introduction of this questionnaire.

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?

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?

0 %, see question 30.



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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?

0 %, see question 30.



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