



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

“The Judicial review of Regulatory Authorities”

Paris, 6 December 2021

Answers to questionnaire: Poland



**Co-funded by
the European Union**



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

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



Co-funded by
the European Union

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

As a principle, in Poland every economic sector is regulated by a specific authority. All decisions of the regulatory authorities are subject to judicial review of administrative or civil courts. The main regulatory organs in Poland, whose acts are subject to complaint to administrative courts are:

- The Financial Supervisory Authority (is an independent body, whose tasks are aiming to limit excessive risk in the operation of supervised entities, strengthen the transparency of the financial market and assist the market in building its position in Europe),
- President of the Office of Electronic Communications (is a regulatory authority responsible for telecommunications and postal activities and frequency resources management),
- President of the Office of Competition and Consumer Protection (is a central authority of the state administration responsible for shaping the antitrust policy and consumer protection policy).

There are, of course, more regulatory authorities in Poland (President of the Civil Aviation Authority, President of the Office of Rail Transport, President of the Public Procurement Office), but since complaints to administrative courts against their acts are literally few per year - they will not be described in detail here.

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

Yes

If yes:

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

Decisions of regulatory character (eg decisions on finding significant market position; on the imposition, withdrawal, amendment or cancellation of regulatory obligations; on the imposition of penalties; decisions issued in disputes, excluding decisions on a general exclusive frequency license following a tender, an auction or a contest and the decision finding the tender, auction or contest unresolved) are subject to revision of the specialized civil court - the Court of Competition and Consumer Protection (functioning organisationally as one of the divisions of the District Court in Warsaw).

Other decisions of the regulatory authorities, which are not expressly mentioned by the relevant provisions, are subject to review by the Voivodship Administrative Court in Warsaw with possibility of a cassation appeal to the Supreme Administrative Court as the last instance. For example, decisions of

the President of the Office of Electronic Communications in defining the amount of payments designed to compensate the operator designated universal service cost (judgment of the Supreme Administrative Court on 5 December 2013 , case. No II GSK 1167/12). Decisions on changes in the offer on access to the telecommunications infrastructure, addressed to other operators than owner of the infrastructure (resolution of the Supreme Administrative Court of 28 September 2009, case No. II GPS 1/09 or judgment of the Supreme Administrative Court of 5 February 2013, case No. II GSK 2107/11).

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

Yes

If yes:

Please give examples.

For example, according to Telecommunication Law, decision of the President of the Office of Electronic Communications concerning regulatory duties shall be challenged before the civil court – Court of Competition and Consumer Protection (Article 206 of the Telecommunication Law).

Also the President of the Competition and Consumer Protection Office issues acts challengeable before the Court of Competition and Consumer Protection (Article 89 of the Act on Competition and Consumer Protection) – but also issues decisions controlled by administrative courts (penalties for placing non-compliant products on the market).

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?

No – all above mentioned regulatory organs have their seat in Warsaw, so the only administrative court competent is the Voivodship Administrative Court in Warsaw (in first instance) and the Supreme Administrative Court.

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

Yes.

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

No

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, individual acts issued by regulatory authorities are challengeable in the same way as individual acts of other authorities, unless the provisions of substantive law provide otherwise (see also answers below).

The legislator may establish the rules of appeal in a specific manner, recognizing, for example, that a civil court is competent in certain cases - if only due to the specificity of the matter in question.

The scope of control exercised over an administrative decision is not dependent on the type of decision, but depends whether an appeal goes to a civil or an administrative court. The civil court - Court of Competition and Consumer Protection - applies procedure "de nouveau". The Voivodship Administrative Court exercises judicial control of the lawfulness (conformity with procedure and substantive law) of an administrative decision *ex tunc* (with the view of facts and law that were in place at the time an administrative decision is taken).

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?

No

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?

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?

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.).

According to Article 52 of the Law on Proceedings before administrative courts, a complaint may be lodged after the exhaustion of the means of review which have lied with the complainant in proceedings before an authority competent in the matter, unless the complaint is being lodged by a public prosecutor, the Human Rights Commissioner (Ombudsman) or the Ombudsman for Children. Exhausting appeal measures means a situation in which a party no longer has any appeal measure, such as complaint, appeal or reminder as envisaged by the act, at its disposal.

A complaint may be submitted to a court by anyone (both a natural and a legal person) who has a legal interest in doing so. Whether an individual possesses a protected legal interest in a given case is determined by the provisions of the law. A complaint is filed to a voivodship administrative court as a result of a breach of the complainant's legal interests.

The prosecutor and the Human Rights Commissioner constitute a separate category of complainants; in administrative court proceedings, they can act having the rights of a party. A social organization is also entitled to submit a complaint regarding the legal interests of other persons, if the case falls within its statutory activity and the organisation has taken part in administrative proceedings. Furthermore, other entities entitled by law to submit a complaint may do so, such as a commune (gmina), inter-commune association, district (powiat) or voivodship (województwo).

There are no special requirements for the grounds of complaint lodged to voivodship administrative court concerning acts of the regulatory authorities.

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.).

See answer above.

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)?

No.

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?

No

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

Yes.

In Polish system the administrative courts are not competent to rule on compensatory claims. The proceedings concerning the administrative decision is conducted in administrative court, whereas the proceedings for compensation takes place in common (civil) court, which is bound by previously made arrangements, referring to the incompatibility with the law of the final administrative act (decision of the administrative court).

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?

No. These cases are heard in the Commercial Chamber of the Supreme Administrative Court, but there is no designated panel of judges that deals exclusively with complaints against the acts of regulatory authorities.

If yes: please explain and give examples.

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

See answer above.

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?

The judgment of the administrative court is based on the file of the case collected by the regulatory authority and the court is not conducting the evidence proceedings. Only exceptionally, the court



acting ex officio or at the request of the party, can conduct the supplement evidence proceedings on documents. That's possible only when such proceedings are necessary for clarifying serious doubts and will not cause excessive extending of court's proceedings.

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

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

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?

No

- or do they remain outside the case?

Yes.

The parties in a proceedings before an administrative court are the complainant (petitioner) and the body whose action or inaction is the subject of the complaint.

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.

If yes:

Please explain.

As a rule the parties to an administrative court case are the complainant and the body whose action or inaction is the subject of the complaint. A party who has taken part in administrative proceedings and has not submitted a complaint, but whose legal interests are affected by the outcome of the court proceedings, is a participant in the proceedings having the same rights as a party. Participation may also be claimed by a person who has not taken part in administrative proceedings, if the results of the proceedings concern his legal interests. A social organisation may take part in proceedings also if the case falls within the scope of its statutory activity.

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

See answer to question 14.

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.)?

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

There are no specific categories of charges in cases of acts issued by regulatory authorities. The complainant may allege a violation of substantive and/or procedural law. The voivodship administrative court decides within the limits of a given case, and is not bound by the charges and motions of the complaint, or by the cited legal basis.

A party dissatisfied with a verdict or decision issued by a voivodship administrative court can submit a cassation appeal to the Supreme Administrative Court. A cassation appeal may be made on the following grounds:

- 1) the violation of substantive law caused by its misinterpretation or improper application;
- 2) the breach of procedural rules, if that infringement could have substantially affected the outcome of the case.

In case of the voivodship administrative courts, according to article 134 (1) of the Law on Proceedings before administrative courts, the court shall determine a case within its limits while not being bound by the charges and requests of the complaint and the legal basis invoked. In consequence the court of first instance proves the legality of challenged administrative act (decision) in unlimited manner (generally).

In case of the Supreme Administrative Court (second and last instance), according to Article 183(1) of the Law on Proceedings before administrative courts, the Court hears the case within the limits of the cassation appeal, however, it takes into account - on its own authority (ex officio) – invalidity of the proceedings.

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?)

The administrative court adjudicates on the basis of the factual status established by an administrative body. Ex officio or at the request of the parties, the court may conduct additional evidence from the documents, if this is necessary in order to clarify major doubts and will not unduly prolong the proceedings. Neither the scope of the administrative court's control powers nor the criteria for the controls performed by the court provide the basis on which to assess the expediency of the consideration of the case by the administrative body.

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 a rule the administrative courts may issue only cassatory rulings regarding challenged administrative decisions, i.e. either uphold (by dismissing the complaint) or set aside the contested act in whole or in part.

As a rule an administrative court in Poland does not replace an administrative authority, however, since the Act of 9th April 2015 on the amendment of the Law on Proceedings Before Administrative Courts entered into force (15th August 2015):

- 1) the Supreme Administrative Court has possibility to examine the appeal on its merits if it considers that the essence of the case has been sufficiently clarified;
- 2) the voivodship administrative courts (courts of first instance) have been granted the power of adjudicating on the merits – if the authority does not observe the court's obligation to issue a decision or ruling within a time limit specified by the court, the court will, at the party's request, issue a decision on the merits, if this is allowed by the circumstances of 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)?

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?

No

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?

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)?

No

If yes:

Please specify.

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

There are no such cases before administrative courts.

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?

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?

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?

- The Financial Supervisory Authority - 36
- President of the Office of Electronic Communications - 38
- President of the Office of Competition and Consumer Protection - 15

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

- The Financial Supervisory Authority - 10
- President of the Office of Electronic Communications - 23
- President of the Office of Competition and Consumer Protection – 6

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?

In 2020 in the Supreme Administrative Court registered total number of cassation appeals is 14 381 – of which 89 in cases of the above regulatory bodies.

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?





Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

In 2020 in the Supreme Administrative Court resolved total number of 15 717 cases – of which 39 cases of the above mentioned regulatory bodies.

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?

No such data available.



**Co-funded by
the European Union**