



**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: Sweden**



**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/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).

**Individual acts by regulatory authorities can almost always be subject to judicial review by an administrative court, starting in the court of first instance (Förvaltningsrätt), appealed to Administrative Court of Appeal (Kammarrätt) and then – subject to leave to appeal – SAC. Regulatory acts are not generally subject to such judicial review, but they can be subject to review in concrete cases if challenged on grounds of being invalid (i.e. unconstitutional).**

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

If yes:

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

**Yes, see 1 above.**

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

**Generally, no. However the government can be sued for damages due to the action of a regulatory authority and such a case will be taken up in a civil court of first instance.**

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

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

**The courts competence to try individual acts follow from general rules on distribution of competence, mainly in the Administrative Act (2017) and in the Administrative Procedure Act (1971).**

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

**Not sure we understand the question. If it presupposes a difference between regulatory authorities and other authorities, no there is no such difference. Most state administrative authorities in Sweden are regulatory in one way or another.**

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.

### **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. But as explained above, general regulatory act (regulations) are not subject to judicial review unless in combination with a concrete case concerning the application of such an act. General appeals against such acts are not admissible.**

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

**Yes, if such a position would have a substantial (potential) legal impact on one or more individual.**

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.).

**Individual acts can be challenged by anyone directly concerned by the act. A distant legal interest will not be enough. The form of the act will not be decisive for whether it can be challenged or not, its practical effect (in legal, economical or other sense) is more important for the question of its reviewability. General acts are not reviewable as such, as described above.**

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.).

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

**Yes. This is the only way to judicially challenge a general act.**

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

**No. Courts in Sweden do not have the power to annul general acts, only to disapply an act that is contrary to an act of higher legal status (as in regulation – statutory law – constitutional law). This follows from Chapter 11 § 14 of the constitution (Instrument of Government). An individual decision based on an invalid act may be found lacking legal basis (unless such is available in another regulatory act) and thus unlawful.**

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

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

**Yes, such cases are brought against the State, but the responsible authority is normally representing the state in such cases.**

#### **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.**

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?

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

**We can use oral hearings, expert's reports and reference to expert administration, but these options are not particular to these types of cases. Cases before the SAC do generally not include an oral hearing. Reference from expert administration is often used and expert's reports are generally provided by the parties and seldom required by the court on its own motion.**

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

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

**In Sweden, all administrative authorities are independent from the ministries when dealing with individual acts (Chapter 12 § 2 of the Instrument of Government), so no such difference between "traditional" and "regulatory" administration exists. Other authorities than the one making a decision that affects an individual have no official role in court proceedings concerning that decision.**

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

**Yes, and it can on the initiative of the court as well as by the organisation in question. An example would be issues of great practical impact for local municipalities generally, in which the national association for local municipalities (SKR) will often be invited to write an opinion on its views and experiences. It is always possible for anyone to write to the court and give his/hers/its views on a particular legal question before the court. Such materials can be consulted by the court if deemed of interest.**

If yes:

Please explain.

**See above.**

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

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. One comment is the by way special legislation, many issues relating to electronic communication is not dealt with by the Swedish SAC, but instead has the Administrative Court of Appeal of Stockholm as its court of last instance. The procedure includes technical/economical competence in the court when trying such cases.**

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

**The main objections raised against the individual decision of authorities can be categorized as “wrong assessment of facts”, “unsatisfactory fact-finding as basis for decision” and “no or wrong legal basis for decision”. No, no particular problem in general. A particular problem for administrative courts can be lack of expert knowledge of specific subjects, but in a court such as the SAC – mainly dealing with the deliverance of legal precedent – that is not a significant issue as we mostly deal with issues of law and not of fact. If the factual circumstances are too unclear in a particular case, we will usually not give that case leave to appeal and thus it will not be tried by the SAC.**

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?)

**We are not bound by such assessments as such and are required to control them if that is an issue of a particular case. However, in practice such assessments carry a certain weight that the appealing party must deliver compelling evidence against, if it not obviously incorrect. An example would be a case on the legality of a decision to allow hunting of wolves, in which the assessment by parliament and expert authorities on the number of wolves necessary for biological diversity played an important role (HFD 2016 ref. 89).**

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

**The sanction can be annulled or modified.**

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

**Yes, if we understand the question correctly.**

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

**An example might be the authority Svenska kraftnät (Swedish transmission agency) decision in 2011 to take the Commission's views on Swedish transmission of electric power into account when restructuring the system of tariffs on electricity. Many other examples could be mentioned.**

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

**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? Yes/no

**Not in our experience so far.**

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, we use the same procedure as for all judgments, which might include press releases if deemed appropriate.**

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?

**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

**Not in the line of the duty as judges, but some members of the court might be members of particular groups or associations such as "tax-lawyers" or "public-procurement-lawyers" etc. and in such exchanges meet other professionals in a particular field.**

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

**The position as a judge in the Swedish SAC is usually a “last position” in a legal career, with some few exceptions such as persons going on to be judges in international courts. Other staff do usually take up some other activity after a period at the court and it might very well include service at one of the regulatory authorities.**

If yes:

Please explain.

**See above.**

#### **Quantitative data**

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

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

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?

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?

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?

**We will answer these questions all together. The distinction between regulatory and other authorities is, as has been pointed out above, not very fitting for the Swedish administrative system. Thus, we have no statistics on the number of cases from regulatory authorities. Given the type of cases a rough estimate would be that around 70% of our cases concern issues connected to the regulatory functions of state authorities. This includes registered and settled cases.**

**When it comes to the percentage of annulled or otherwise changed administrative acts originating from such authorities, we again do not have numbers on that. In addition, the Swedish SAC is a court dedicated to deliver legal precedent, not deciding individual complaints as such. Out of around 7 500 appeals, only around 2 % are given leave to appeal and the rest are dismissed with the decision of the lower court being left standing. In the few cases that are tried, a rough estimate would be that the win/loss-rate of administrative authorities in SAC is 50/50. But this is not reliable indication on the “robustness” of administrative decisions in general. A very rough estimate from our experience of trying requests of a leave to appeal would be that 80-90 % of administrative authorities decisions in individual cases stand through the various court proceedings.**