



**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: Austria



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DISPUTES CONCERNING ACTS BY REGULATORY AUTHORITIES

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 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).

Yes.

In Austria, regulatory authorities are mainly established in the following areas:

The energy market is regulated by the Energy-Control Austria for the regulation of the electricity and gas sector (Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft, E-Control).

The media, telecommunications and postal sector is regulated on the one hand by the Regulatory Authority for Broadcasting and Telecommunications (Rundfunk und Telekom Regulierungs-GmbH, RTR), on the other hand by specialised regulatory authorities: the Communications Authority Austria (Kommunikationsbehörde Austria, KommAustria), the Telecommunications Control Commission (Telekom-Control-Kommission), and the Postal Control Commission (Post-Control-Kommission).

The rail infrastructure is regulated by both the Rail-Control GmbH (Schienen-Control GmbH) and the Rail Control Commission (Schienen-Control Kommission).

Against individual decisions of regulatory authorities, one may appeal to the Federal Administrative Court (Bundesverwaltungsgericht). Decisions of the Federal Administrative Court may then be brought before the Supreme Administrative Court (Verwaltungsgerichtshof) and/or the Constitutional Court (Verfassungsgerichtshof). The Constitutional Court also verifies the lawfulness of regulations issued by administrative authorities, including regulatory authorities.

An exception are sanctions in the energy sector. Because these sanctions are not imposed by the regulatory authorities but by the district administrative authorities, the administrative courts of the provinces (Landesverwaltungsgerichte) decide on appeals against them (see Q 2 and 4).

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.

However, sanctioning of infringements differs from sector to sector. In general, all regulatory authorities can monitor and enforce compliance with regulatory acts, but not all regulatory authorities can issue fines. For audiovisual media, KommAustria may conduct proceedings concerning administrative offences based on different regulations (see sec. 2 KommAustria Act); also in the rail sector, the Rail Control Commission may impose fines (see sec. 227 Railway Act 1957). In the telecommunications and postal sector, fines are imposed by a specialised federal authority (Telecommunications Office, Fernmeldebüro). As the E-Control itself cannot impose sanctions (see Q 4), the district administrative authorities impose sanctions in the energy sector.

In a first step, individual decisions of regulatory authorities must be challenged before the first instance administrative courts. Decisions of the administrative courts may then be brought before the Supreme Administrative Court and/or the Constitutional Court (see Q 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.

Yes.

Only specific decisions of the E-Control-Commission pursuant to sec. 12 para. 4 Energy Control Law (dispute resolution) are subject to what could be regarded as judicial review by civil courts. However, technically the civil courts in these cases are not called upon to review the decision by the regulatory authority; rather the decision of the regulatory authority is invalidated by bringing action before the court and the proceedings start anew in the civil court.

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

If yes: Please explain.

The Federal Constitutional Law stipulates the distribution of competences.

Pursuant to art. 10 Federal Constitutional Law, both the legislation and the execution in the media, telecommunications and postal sector as well as the rail infrastructure lie with the

Federal State. The regulatory authorities are established as federal authorities. Therefore - according to the general rule established by art. 131 para. 2 Federal Constitutional Law - the Federal Administrative Court is the competent court to decide upon complaints against individual decisions by federal authorities. The relevant laws repeat this general rule (sec. 121 para. 5 Telecommunications Act 2003 for acts issued by the Telecommunications Control Commission, sec. 44 para. 3 Postal Market Act for acts issued by the Postal Control Commission, sec. 78 para. 2 and 84 para. 4 Railway Act 1957 for the Rail Control Commission).

The competence in energy matters is stipulated in art. 12 Federal Constitutional Law: Whereas the principal legislation lies with the Federal State, the implementing legislation and the execution lies with the provinces. Therefore - according to the general rule established by art. 131 para. 1 Federal Constitutional Law - the administrative courts of the provinces should hear complaints against the acts of regulatory authorities. But, as an exception to this general rule of competence, art. 131 para. 4 subsec. 2 lit. c Federal Constitutional Law allows the Federal Administrative Court to be given jurisdiction on matters of art. 12 Federal Constitutional Law. As this was implemented, the Federal Administrative Court is competent to hear complaints against acts of regulatory authorities in energy matters (exception see Q 3).

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.

No.

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.

Yes.

However, complaints against decisions of regulatory authorities are not automatically granted suspensive effect upon application, but only upon decision by the administrative court.

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.

No.

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.

No.

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 general rules apply to appeals against acts of regulatory authorities.

Individual decisions (including sanctions) may be challenged by any party to the proceedings via appeal to the competent administrative court. The decision of the administrative court may then be brought before the Supreme Administrative Court (see Q 4). The national rules concerning standing are applied in the light of relevant judgments of the CJEU, for instance C-282/13, *T-Mobile Austria*, and C-426/05, *Tele2 Telecommunication GmbH*.

General acts, such as regulations, can only be challenged before the Constitutional Court.

A complainant may raise doubts about the constitutionality and legality of general acts applied in the contested decision to the administrative court. If the court shares these doubts, it shall file an application for challenge with the Constitutional Court.

Individuals who feel that their rights have been infringed upon through a ruling of an administrative court may file a complaint with the Constitutional Court claiming either the violation of a constitutionally guaranteed right (Fundamental Rights) through the contested ruling and/or the violation of his/her personal rights through the application of an unconstitutional law or an unlawful regulation. The Constitutional Court also pronounces on the unconstitutionality of legal provisions upon application by an individual claiming that his/her rights have been directly violated, if the law has taken effect for the individual concerned (individual application).

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.).

There are no particularities.

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

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

Yes.

If an individual decision which is based on a general act (regulation) by a regulatory authority is challenged before the administrative courts, either these court (administrative courts of the provinces or federal administrative courts as well as in second instance the Supreme Administrative Court) or - after the decision of a first instance administrative court - the parties to the proceedings themselves can challenge the legality of the general act at the Constitutional Court. If the Constitutional Court finds the general act illegal, it will invalidate the general act as well as quash the decision based upon 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.

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.

No.

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

No.

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

According to the allocation of business of the Supreme Administrative Court, cases concerning the aforementioned matters are assigned to two specific panels. However these panels do not exclusively deal with cases concerning regulatory authorities but also decide upon cases in various other areas of administrative law.

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.

The Supreme Administrative Court only handles questions of law; thus it does not commission experts or hear testimony; it may of course hold a hearing (which is also limited to questions of law). The Austrian system of administrative justice does not provide for amicus curiae intervention (with the exception of cases where an amicus curiae invention is based on EU law).

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

If yes: Please explain.

No.

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

Because the regulatory authorities are not bound by directives (see sec. 116 para. 3 TKG 2003, sec. 5 para 2 Energy Control Act, sec. 6 para. 1 KommAustria Act, sec. 39 para. 3 Postal Market Act and sec. 83 para. 4 Railway Act 1957), sec. 21 para. 1 subsec. 3 VwGG is applicable: The responsible federal minister or the provincial government are parties to the proceedings on an appeal against the decision of an administrative court on grounds of illegality (pursuant to Art. 133 para. 1 subsec. 1 or para. 9 B-VG) before the Supreme Administrative Court. In practice, these administrative authorities do not intervene in the proceedings.

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.

No.

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

In general, the first instance administrative courts shall hold a public hearing. Pursuant to section 24 para. 4 VwGVG, the administrative court may abstain from a hearing if the files indicate that the oral discussion cannot be expected to lead to a further clarification of the case and neither art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms nor art. 47 of the Charter of Fundamental Rights of the European Union preclude a waiver of the hearing.

The Supreme Administrative Court reiterates that the legislator intended the purpose of an oral hearing to be the clarification of the facts of the case and the granting of the hearing to the parties, as well as the oral discussion between the parties and the court of a legal issue that is disputed based on the case file. The purpose of a hearing before the administrative court is, in principle, not only to clarify the facts of the case and to grant the parties an opportunity to be heard, but also to discuss the law and the legal issues.

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

If yes: Please explain and give examples.

No.

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

Against individual decision of regulatory authorities, one may appeal to the Federal Administrative Court. Decisions of the Federal Administrative Court may be brought before the Supreme Administrative Court. However, the access to the Supreme Administrative Court is limited to cases containing a "legal issue of essential importance". According to Art. 133 para. 4 B-VG the "legal issue of essential importance" is a legal question in which the administrative courts deviate from the settled jurisprudence of the Supreme Administrative Court, where such jurisprudence is missing, or where the legal question was addressed inconsistently by the Supreme Administrative Court in the past.

The Constitutional Court verifies the lawfulness of regulations (general acts) issued by regulatory authorities.

The issue of whether a member of a regulatory authority should have recused himself/herself has sometimes been brought to the Supreme Administrative Court, but did not raise any specific problems. In the energy sector, issues of structural independence were repeatedly litigated before the Supreme Administrative Court (decisions of 15 December 2014, 2013/04/0108- holding that the independence of the regulatory authority is not guaranteed if a member of the decision making body of the regulatory authority is working in an organisation also charged with safeguarding consumer interests and having standing to challenge regulatory decisions - and 23 November 2016, Ro 2016/04/0013, holding that a general right of the federal minister for energy affairs to be informed about matters of the regulatory authority does not necessarily jeopardize the independence of the authority, but information requests of the minister must not be answered by the authority in cases where this might compromise its independence).

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 general, the Supreme Administrative Court is bound by the facts and evidence established by the first instance administrative courts. If the Supreme Administrative Court considers that the administrative court's decision lacks essential elements, it repeals the administrative courts' decision. It can take up an assessment of evidence that it may have found to be incorrect.

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 Supreme Administrative Court can decide on the merits of the case if it is ready for decision and the decision on the merits is in the interest of simplicity, expediency, and cost saving. In this case, the Supreme Administrative Court shall - exceptionally - establish the relevant facts. In cases concerning regulatory authorities, this is usually not 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

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

Yes.

Regulatory authorities often rely on best practice examples of regulatory authorities in their sector in other (mostly EU) countries. This may be illustrative and support an argument, but of course is not a relevant authority to be applied also by the administrative courts.

Opinions of regulatory bodies (such as BEREC) and the European Commission are often quoted and relied upon by the regulatory authorities and also by the administrative courts in support of specific arguments. The Supreme Administrative Court has held that where EU law (or the relevant national law) require the authorities to take such statements into account (or “take utmost account” of such statements), the regulatory authority has to demonstrate that it actually did so and supply relevant arguments in cases where it deviates from such statements/opinions.

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.

The Austrian Supreme Administrative Court has regularly put questions to the CJEU in regulatory affairs, for instance:

- C-462/99 Connect Austria
- C-426/05 Tele2 Telecommunication GmbH,
- C-509/11 ÖBB-Personenverkehr AG
- C-282/13 T-Mobile Austria
- C-347/14 New Media Online
- C-2/15 DHL Express (Austria)

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.

No.

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.

As with all cases, this depends on the publicity of a specific case and cannot be answered in general terms; there have been decisions with substantial public impact (for instance review of spectrum allocations or the decision concerning structural independence of the energy regulator) that were accompanied with press releases.

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

Art. 138 B-VG states that the Constitutional Court decides upon disputes concerning the conflicts of jurisdiction, namely:

- between courts and administrative authorities,
- between ordinary courts and administrative courts or the Supreme Administrative Court as well as between the Constitutional Court and all other courts, and
- between federal and provincial administrative authorities or between the administrative authorities of different provinces.

A negative conflict of jurisdiction occurs if two (or several of the aforementioned) administrative authorities/courts deny jurisdiction in a certain case, but one of them wrongly. An affirmative conflict of jurisdiction occurs if two (or several) administrative authorities/courts claim jurisdiction in a particular case, but one of them wrongly.

In the event of a negative conflict of jurisdiction, the party concerned is the only one entitled to submit an application to the Constitutional Court. In the event of an affirmative conflict of jurisdiction, the supreme administrative authority is primarily entitled to file an application; courts are subject to a duty of notification. Under certain circumstances, individuals can apply directly to Constitutional Court.

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.

In most sectors, there are specific public events in Austria that tend to bring together regulators, representatives of the regulated industry and lawyers/judges/academia in the relevant field, which are also visited by individual members of the Court (such as the yearly “Telekom-Forum”, “Rundfunk-Forum”, and symposia organised by the rail regulator for the rail sector and a university institute for the energy sector); in the field of telecommunications, members of the Court also take part in the yearly seminars for judges organised on behalf of the European Commission.

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.

No.

Quantitative data

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

We cannot provide this quantitative data for cases concerning regulatory authorities.

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

See Q 29.

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 Q 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?

See Q 29.

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?

See Q 29.