



**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: Italy**



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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

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 the Italian legal system, the administrative courts have jurisdiction on all disputes concerning the acts of the independent administrative authorities – whether they are rule-making, adjudication, individual or sanctioning acts – and specifically the acts regulating the electricity, gas, electronic communications, transport, banking, financial and insurance markets.

Administrative courts also have jurisdiction over all disputes in antitrust matters (excluding only claims for damages)

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?

The regulatory authorities generally also have effective sanctioning powers: financial penalties, disqualification and forfeiture.

Administrative courts have jurisdiction over penalties imposed by regulatory authorities, except in banking and financial matters.

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.

The civil courts have jurisdiction only on the acts of the Authority for the protection of personal data, and on the sanctions imposed by the regulatory authorities of the banking and financial 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? Yes/no

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

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

If yes:

Please explain.

There are special rules governing the competence of the courts, at the first instance.

The disputes relating to the measures of the regulatory authorities and relating to the measures of the Authority for Competition and the Market are devolved to the mandatory jurisdiction of the Regional Administrative Court of Lazio, in Rome, in the absence of other legal provisions.

The acts of the Authority of regulation of transports (which has its headquarters in Turin) are devolved to the regional administrative court of the Piemonte; those of the Authority of regulation of the energy (which has its headquarters in Milan) to the regional administrative court of the Lombardia.

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: regulatory acts are subject to all remedies provided in general (that is for any type of dispute) by art. 34 of the Code of Administrative Trial.

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

If yes:

Please explain.

No: persons and undertakings entitled to challenge regulatory acts shall be identified in accordance with the general criteria

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.

Yes. Our legal system recognizes the interest in challenging the soft law acts of the regulatory authorities, to the extent that the market operators are likely to be affected by direct and concrete injury, especially when their non-compliance can lead to legal or economic consequences, even if consisting only in the burden of justifying the reasons for their non-compliance (comply or explain).



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

See above

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.).

They shall be entitled to challenge acts of the regulatory authorities, in accordance with the general criteria, for example: i) undertakings operating in the regulated market; ii) the persons or undertakings to which the sanctioning measure is addressed; iii) the company complaining of the competitor's incorrect behaviour.

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.).

The admissibility requirements of the application are the ordinary ones provided by the Code of Administrative Trial.

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?

The regulatory act cannot be challenged by way of exception (at the time of challenging the individual decision) in so far as it already contains a precise and unconditional rule of conduct. In this case the act of regulation must be promptly challenged. In limited cases in which the regulatory act can be challenged at the time limit of the individual decision, the ascertaining of the illegality of the general act, implies 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

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



Claims for damages arising from acts of regulatory authorities shall be brought against the regulatory authority itself, held responsible by the injured person or undertaking.

### **Internal organisation of the courts and hearing of appeals**

13. Are cases concerning these authorities assigned, within the courts and more particularly within the supreme administrative court, to panels specifically dedicated (to the authority concerned, or more generally to regulatory litigation), in order to allow for an increase in the level of competence or a critical mass of cases? Yes/no

If yes: please explain and give examples.

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

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

Both at the Regional Administrative Court and at the Council of State, settlement disputes are devolved to the Sixth Chamber of the Court, in order to ensure uniformity of judgment and the specialisation of judges

14. What investigative or examination techniques can you use in particular in the examination of particularly technical cases:

- oral inquiry hearing in the presence of the parties,
- expert's report,
- amicus curiae,
- solicitation of a reference expert administration,
- other?

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

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

If yes:

Please explain.

In disputes concerning acts of regulatory authorities, all measures of inquiry generally provided for in the Code of Administrative Trial are permitted. An expert's report (which can also be identified within other administrations and universities) is widely used.

In some cases, the Courts have experienced the oral hearing of the parties.

Amicus curiae is provided only in competition and antitrust disputes.

Looking ahead, the possibility of integrating the decision-making panel with the sector's technicians could be explored.

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

If yes:

Please explain.

The Italian administrative trial (unlike the judgement before the Constitutional Court) does not allow to acquire information from stakeholders but only from the parties, from other administrations and from the appointed experts.

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

The Italian administrative process (Trial) is almost exclusively based on written defenses.

However, in complex disputes, the oral hearing of the parties and the oral confrontation with the parties' lawyers play a very important role, in so far as it allows the court to receive details of the most sensitive technical aspects.

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 audio-visual 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

The main grounds for challenging regulatory acts – in addition to the violation of specific legal provisions – are the test of technical reasonableness, economic sustainability, proportionality of the measure adopted.

Administrative courts shall also verify compliance with consultation procedures (in particular 'notice and comment') and other procedural justice instruments.

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 judging the acts of regulation, full knowledge of the fact and the logical path followed by the regulator is allowed. The judge makes use of the same technical knowledge pertaining to the specialized science applied by the regulatory authority.

The only limit that meets the administrative judge is that for which, when to a questionable technical problem the authority has given a determined answer, the judge cannot replace its decision to that of the authority. The judge has to limit himself to verifying whether such a response falls within the range of plausible, reasonable and proportionate responses, suggested by the best specialist science.

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 administrative courts may annul the sanction or only redefine the amount.

The act of regulation cannot be modified directly by the judge. However, it should be considered that the administrative courts do not merely annul the unlawful act, but often prescribes the rules to be followed by the authority when (after the ruling) it has to come back to decide on the subject.

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.

In judging acts of regulatory authorities, it is often necessary to consider European institutions and agencies.

When the national act is adopted on the basis of an act of a European authority, the delicate problem arises of the division of jurisdiction between national courts and the Court of Justice (in Italy there has been a problem of this kind in the field of banking supervision).

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 regulatory acts mainly concern services of general economic interest governed by European law, in terms of treaties, regulations and directives. This is the reason why, preliminary referrals to the Court of Justice are very frequent.

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

NO. It just happens that most important judgments are published on the Court's website.

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?

Yes, It's admissible.

In general terms, in our legal system, public bodies may challenge acts of other administrations which infringe their competence.

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 the field of judicial training, or in the academic field, the members of the Court are often invited to take part in seminars for study and updating on the topics of economic regulation.

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.

It is possible that an administrative judge will be authorised – in compliance with the special incompatibility regime dictated by the Council for the Judiciary – to hold senior positions within the regulatory authorities.

### **Quantitative data**

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

567

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

396

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?

5,58 %

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?

5,5 %





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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?

26,8 %



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