



**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: Turkey



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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).

Yes, the regulatory and supervisory authorities whose acts are brought before Council of State of Turkey (CoS) are: Radio and Television Supreme Council, Information Technologies and Communication Authority, Capital Markets Board, Banking Regulation and Supervision Agency, Energy Market Regulatory Authority, Public Procurement Authority, Competition Authority, Public Oversight Accounting and Auditing Standards Authority.

There are different trial procedures in disputes arising from individual and regulatory acts of regulatory and supervisory authorities.

Lawsuits against disputes arising from regulatory acts are filed directly in 13th Chamber of CoS, and the judicial review of the decisions, made by the Chamber, is carried out by the Board of Administrative Law Chambers of CoS. The same judgment procedure is applied in case individual acts are subject to litigation together with regulatory acts.

A lawsuit is filed against the individual acts of these authorities in the courts of first instance; Except for the disputes arising from the tender proceedings, the Regional Administrative Courts carry out an appeal examination against the decisions made by these Courts, and the appeal examination of the decisions of the Regional Administrative Courts made by 13th Chamber of CoS upon the application of appeal.

Due to the urgency required by the tender procedures, first instance courts' decisions regarding the cases filed against acts relevant to those procedures, can be appealed directly in CoS, without an appeal examination in the Regional Administrative Courts.

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, it is possible to file a lawsuit before our Chamber against the sanctions imposed by the regulatory and supervisory authorities.

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.

Administrative jurisdiction is competent in terms of all administrative decisions taken by regulatory and supervisory authorities.

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.

The competence of the courts with the power to examine the acts of the regulatory and supervisory authorities are determined within the framework of general rules. In this framework, no special jurisdiction rule has been determined in terms of the aforementioned cases.

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.

Against the acts of some regulatory authorities, unlike general litigation periods, different litigation periods have been determined. Apart from this, there is no difference in legal remedies with other administrative acts.

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.

If there is a power of sanction in both an act and the legislation which provides the legal basis for the act, the act is subject to a lawsuit for annulment.

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.).

Anyone with a current and legitimate interest can challenge the acts of the regulatory authorities. In terms of both the acts established subject to the "application" procedure and the act established by the supervisory authority ex officio, there must be a legally protected, concrete, up-to-date and legitimate interest between the action and the claimer. Rather than making a distinction between types of acts in this regard, each dispute should be evaluated within the framework of the aforementioned criteria.

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 is no different admissibility requirement than general annulment cases.

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, an act can be filed against both the individual decision of the regulatory authority and the regulatory act on which the individual decision is based. In those cases, in terms of the regulatory act, if the claim of illegality is deemed appropriate, the regulation is annulled with retroactive effect.

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 compensation arising from the decisions of regulatory and supervisory authorities must be brought against these authorities.

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.

There is no specialization in Administrative Courts. However, at the stage of appeal examinations in regional administrative courts and in CoS, disputes are resolved by the specialized chambers.

In the internal organization of 13th Chamber of CoS, the importance is given to the specialisation of the rapporteur judges in terms of each regulatory and supervisory authority and the care is taken to examine the files in accordance with the specialisation.

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.

We think that such cases do not require a specific method in terms of research and examination techniques. However, during the investigation and examination of the cases, we decide to hold an expert review and a hearing if the issue requires technical knowledge. Especially the scientific works in the literature contribute to the enlightenment/clarification of the judge about the subject.

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

They remain outside the case.

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.

It is not a common practice to collect observations from stakeholders during the judgement phase. However, judicial authorities take into account the views shared by all relevant stakeholders with great care and seriousness during the administrative decision-making process.

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

There is no oral expression other than the hearing.

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, there is no such unit.

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

One of the main categories of grounds put forward is the objections regarding the implementation of the procedural rules in the decision-making process. Furthermore, it is observed that objections were also raised on the merits such as supervisory institutions did not exercise their discretionary powers properly in decision-making and the decisions were taken without making the necessary research.

It is understood that the regulatory authorities fulfill an important task with impartiality and independence within the framework of qualified staff facilities in line with a serious knowledge and experience. In this respect, it is understood that the positive aspects of the regulatory authorities are more prominent.

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?)

13th Chamber of CoS, which conducts compliance with the law, examines the technical or economic assessments of the regulatory authorities within this scope.

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 competent of 13th Chamber of CoS, is limited to the annulment of the sanction as a result of the examination.

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. Especially, in the practices of Competition Law, the decisions and practices of the Court of Justice of the European Union are mostly taken into account. In this regard, both the appeal decisions and the preliminary decisions, the opinions and decisions declared by the Court of Justice of the European Union are taken into consideration and constitute the basis for the supervisory authority and judicial decisions.

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.

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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.

Great importance is given to not sharing the draft decisions with the public or the media. It should be noted that there has not been a serious problem in this regard so far.

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.

No

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

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.

No

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.

There is no such possibility.

Quantitative data

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

In 2020, a total of 4011 cases, including cases examined by CoS as the court of first instance and appeal, were registered in 13th Chamber of CoS, 2713 of those are the cases related to regulatory authorities.

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

In 2020, a total of 4057 decisions were given by 13th Chamber of CoS as the court of first instance and appeal, of which 2400 are decisions regarding regulatory authorities.

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?

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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?

In 2020, 13th Chamber of CoS, acting as a court of first instance, has partially or completely annuled a total of 316 acts of the regulatory authorities.

However, there is no easily accessible statistical information about how many of the regulatory authority acts were canceled partially or completely with the decisions taken by the 13th Chamber during the appeal phase.