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.

ACA-Europe seminar

The judicial review of regulatory authorities

Paris, 6 December 2021

General report

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Summary

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Introduction

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 ACA-Europe seminar organised in Paris on 5 and 6 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 seminar will make it possible to address the important challenges that these appeals raise for the effectiveness and credibility of the court's intervention.

This report is a synthesis of information provided by ACA-Europe members and observers in response to a questionnaire on disputes arising from acts of regulatory authorities. Twenty-four courts responded: Belgium, Bulgaria, Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, Sweden, Turkey and Norway. A list of the institutions that submitted a report in response to the questionnaire is attached. It is not possible to give a detailed account of all the information provided by the courts, but the aim is to identify the main themes and areas of discussion, which will be addressed during the seminar, and to highlight the similarities and differences in the way in which ACA-Europe members and observers deal with disputes involving regulatory acts. The report is organised into six main sections: courts competent to hear disputes involving regulatory issues; the admissibility

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of appeals against regulatory acts, the internal organisation of the courts, the investigation of appeals, decision-making, the judge in the regulatory ecosystem.

1. Courts competent to hear disputes involving regulatory authorities

1.1. Presentation of the regulatory authorities of the States of the respondent courts

Regulatory authorities with various powers, including regulatory and sanctioning powers, exist in all States of the respondent courts. The responses highlighted the diversity of entities that national legal orders group under this term and the variety of interpretations that are made of the concept of regulatory authority itself.

Belgium defines a regulatory authority as an institution under public law, with legal personality and operating in a more or less decentralised manner.

Estonia has chosen to interpret the concept of regulatory authority in a broad sense, including most of the supervisory authorities that are related to market regulation, such as tax and customs authorities.

For Cyprus, a regulatory authority is a legal body under public law, legally and functionally distinct from the State and any other public or private body.

In Hungary, the term refers to a body, established by an act of public law, structurally and financially separated, at least to a certain extent, from the regular administrative institutions, and exercising the responsibility of regulating a market.

In Portugal, regulatory authorities, governed by the Framework Law on Independent Administrative Entities (LQER), are legal persons under public law, with the status of independent administrative entities, exercising powers in relation to the regulation of an economic activity, or the defence of services of general interest, or the protection of consumer rights and interests, or the protection of competition in the private, public, cooperative and social sectors.

Table presenting the principal regulatory authorities of the States of the respondent courts

Belgium	Financial Services and Markets Authority Belgian Institute for Postal Services and Telecommunications Commission for Electricity and Gas Regulation Belgian Competition Authority National Bank of Belgium Vlaamse Regulator voor de Media (Flemish Regulator for the Media) Federal Agency for Medicines and Health Products Superior Audiovisual Council National Accounts Institute Federal Agency for Nuclear Control Regulatory Commission for Energy in the Brussels-Capital Region Brussels gas electricity Health Insurance Fund Control Office National Railway Company of Belgium
Bulgaria	Bulgarian National Bank Financial Supervision Commission Communications Regulation Commission Commission for Protection of Competition Energy and Water Regulatory Commission Electronic Media Council Commission for Protection against Discrimination
Czech Republic	Office for the Protection of Competition Czech Telecommunication Office Council for Radio and Television Broadcasting Energy Regulatory Office
Germany	Bundeskartellamt (Federal Cartel Office) Bundesnetzagentur (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway)
Estonia	Tax and Customs Board Competition Authority Financial Supervision Authority Agriculture and Food Board
Greece	Hellenic Competition Commission Hellenic Telecommunications & Post Commission Regulatory Authority for Energy Hellenic Capital Market Commission Hellenic Data Protection Authority
Spain	Bank of Spain National Securities Market Commission Spanish Data Protection Agency National Markets and Competition Commission, Nuclear Safety Council Institute of Accounting and Auditing
France	French Anti-Doping Agency French Prudential Supervision and Resolution Authority French Competition Authority Financial Markets Authority Regulatory Authority for Electronic Communications, Post and Press Distribution National Gaming Authority Transport Regulatory Authority Nuclear Safety Authority French Energy Regulatory Commission Superior Audiovisual Council French Data Protection Authority High Authority for Transparency in Public Life National Commission for the Monitoring of Security Interceptions. National Agency for the Safety of Medicines and Health Products

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	Airport Noise Control Authority
Croatia	Croatian Competition Agency (AZTN) Croatian Financial Services Supervisory Agency (HANFA) Croatian Energy Regulatory Agency (HERA) Croatian Regulatory Authority for Network Industries (HAKOM) Agency for Science and Higher Education (AZVO)
Italy	Authority for the protection of personal data Authority for Competition and the Market Authority of regulation of transports Authority of regulation of the energy
Cyprus	Commission for the Protection of Competition Office of the Commissioner of Electronic Communications and Postal Regulations Cyprus Energy Regulatory Authority Cyprus Securities and Exchange Commission Cyprus RadioTelevision Authority Cyprus Transmission System Operator Office of the Commissioner for Personal Data Protection Cyprus Gaming and Casino Supervision Commission Ombudsman
Latvia	Public Utilities Commission Financial and Capital Market Commission Competition Council
Luxembourg	Luxembourg Competition Council Financial Sector Supervisory Commission Luxembourg Institute of Regulation
Hungary	Hungarian Energy and Public Utility Regulatory Authority National Media and Infocommunications Authority Public Procurement Authority Hungarian Competition Authority National Authority for Data Protection and Freedom of Information National Election Office
Austria	Energy-Control Austria for the regulation of the electricity and gas sector Regulatory Authority for Broadcasting and Telecommunications Communications Authority Austria Telecommunications Control Commission Postal Control Commission Rail-Control GmbH Rail Control Commission
Poland	Financial Supervisory Authority President of the Office of Electronic Communications President of the Office of Competition and Consumer Protection
Portugal	Authority for Mobility and Transportation National Authority for Civil Aviation Authority for the Supervision of Insurances and Pension Funds Competition Authority National Communications Authority Regulatory Entity for Energy Services Regulatory Entity for Health Regulatory Entity for Water and Residue Services Regulatory Entity for Communication Securities Market Commission Bank of Portugal
Slovenia	Slovenian Competition Protection Agency Securities Market Agency The Bank of Slovenia Insurance Supervision Agency Communications Networks Services Agency of the Republic of Slovenia
Slovakia	Antimonopoly Office of the Slovak Republic Regulatory Office for Network Industries Regulatory Authority for Electronic Communications and Postal Services Council for Broadcasting and Retransmission

	Office for Personal Data Protection Health Care Surveillance Authority Transport Authority Office for Public Procurement
Finland	Financial Supervisory Authority Finnish Competition and Consumer Authority Finnish Patent and Registration Office Regional Centres for Economic Development, Transport and the Environment Finnish Medicines Agency Fimea National Supervisory Authority for Welfare and Health Valvira Finnish Transport and Communications Agency Traficom Finnish Transport Infrastructure Agency Finnish Energy Authority Regional State Administrative Agencies
Turkey	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
Norway	Norwegian Competition Authority Norwegian Data Protection Authority

1.2. The competence of the administrative courts and, in particular, the respondent supreme administrative courts in disputes involving regulatory issues

All 24 courts that responded to the questionnaires are competent to hear appeals against the acts of regulatory authorities.

However, it should be noted that the Supreme Court of Norway, which responded to the questionnaire as a guest, is not an administrative court. Norway states that it has no administrative jurisdiction. Like all administrative disputes, disputes involving regulatory acts are heard by the ordinary courts in accordance with the Norwegian Civil Procedure Act.

The respondent courts have varying degrees of regulatory competence, often shared with other courts.

On the one hand, it is restricted in some States to certain categories of act or sector.

For example, in Cyprus and Sweden, the administrative courts, and therefore the supreme administrative courts, are only competent to review by way of action individual decisions of regulatory authorities. The legality of regulatory acts can only be challenged by way of exception, in support of an appeal against an individual decision.

In Germany, the Federal Administrative Court (Bundesverwaltungsgericht) has limited jurisdiction over three regulatory sectors: electronic communications, post and railways.

In Portugal, the competence of the Supreme Administrative Court is exceptional, as there is in principle no double level of jurisdiction in administrative matters. It is limited to disputes of significant

social importance and complexity and to questions of law (Article 150 of the Code of Administrative Court Procedure). The Supreme Administrative Court acts as '*an internal safety valve of the system*'.

On the other hand, the competence of the respondent courts is shared in some States with other courts (other than the civil courts, whose competence in regulatory matters is analysed below in 1.3).

In Greece, jurisdiction in disputes is shared between the Council of State and the Court of Appeal, which has been given jurisdiction by law to hear appeals against individual decisions of the Hellenic Telecommunications and Post Commission and the Hellenic Capital Market Commission.

In Spain, given the regional form of the State, appeals against acts of the territorial regulatory authorities, whose competence is limited to the territory of an autonomous community, are judged by the High Courts of Justice of these autonomous communities.

In Latvia, the Constitutional Court is competent to assess the conformity of regulatory acts of the Public Utilities Commission and the Financial and Capital Markets Commission with higher standards.

In Austria, competence to hear appeals against decisions of the Federal Administrative Court in disputes involving individual decisions and sanctions of regulatory authorities is shared between the Supreme Administrative Court (Verwaltungsgerichtshof) and the Constitutional Court (Verfassungsgerichtshof). In addition, the Constitutional Court is competent to assess the validity of regulatory acts of regulatory authorities.

The respondent courts in most cases exercise either appellate or cassation jurisdiction over decisions taken by the administrative courts on appeals against the acts of regulatory authorities.

For example, in Germany, disputes involving the regulation of telecommunications, post and railways are brought before the administrative courts (Verwaltungsgericht) in the first instance, on appeal to the Higher Administrative Court (Oberverwaltungsgericht) and then in the last instance before the Federal Administrative Court in Leipzig (Bundesverwaltungsgericht), which only rules on points of law.

In Estonia, the administrative courts also have three instances. The Administrative Chamber of the Supreme Court hears appeals in cassation that have been allowed after a filter procedure.

In Spain, appeals against decisions of the regulatory authorities are brought before the Administrative Chamber of the National High Court (Audiencia Nacional) and then before the Supreme Court, which acts as a court of cassation.

In Cyprus, appeals against acts, decisions and omissions of regulatory authorities, taken in the exercise of public powers, are brought before the administrative courts in the first instance and then before the Supreme Court on appeal.

In Luxembourg, the Administrative Court is competent to hear appeals against the acts of regulatory authorities.

In Hungary, appeals against the acts of regulatory authorities are brought in the first instance before the High Court of Budapest, whose judgments could initially be challenged before the Curia by

the parties or persons concerned alleging a violation of the law. From now on, since a reform of the procedural rules came into force on 1 April 2020, they can only be subject to judicial review by the Curia, provided they meet strict eligibility criteria.

In Slovakia, regional courts are the basic element of administrative justice and have competence in the first and last resort. The Supreme Court has the power of cassation of decisions of the regional courts.

As a court ruling on questions of fact and of law, the Supreme Administrative Court of Finland is competent to hear, after a filter procedure (leave to appeal), decisions of the regional administrative courts as well as part of those of the Market Court in disputes involving regulatory issues.

However, a minority of the respondent courts have competence in the first and last instance in regulatory matters.

In Belgium and Greece, the Council of State is in principle the competent body to judge disputes involving acts of regulatory authorities, unless the action has been specifically assigned by law to the jurisdiction of another court.

In France, the Council of State is competent, pursuant to the Code of Administrative Justice, to rule directly, at first and last instance, on a significant part of disputes involving acts of regulatory authorities. As a court of cassation, it is also competent to hear disputes involving regulatory authorities, which do not fall within its direct jurisdiction, but within the jurisdiction of the administrative courts under ordinary law (such as, for example, disputes involving compensation).

In Croatia, the Supreme Administrative Court has competence in the first instance, specially assigned by law, in matters of public procurement procedures and the right of access to information, in case of challenges to the administrative acts of the Croatian Network Industries Regulatory Authority and the Croatian Competition Authority.

In Lithuania, the Supreme Administrative Court is competent in the first and last instance to review the legality of regulatory administrative acts of regulatory authorities. Apart from this, it is the court of appeal for decisions taken by the regional administrative courts in disputes involving regulatory issues.

In Turkey, the Council of State is competent to hear appeals directly against regulatory acts of the regulatory authorities. Appeals are first heard by the Thirteenth Chamber, whose decisions may then be appealed to the Council of Administrative Chambers of the Council of State. In addition, the Council of State is competent to hear at third instance appeals against individual decisions of regulatory authorities, with the exception of disputes arising from tendering procedures, for which it is competent at second instance.

1.3. The competence of the civil courts in disputes involving regulatory issues

A minority of respondent States (Estonia, Greece, Croatia, Luxembourg, Slovenia, Slovakia and Turkey) indicate that their civil courts have no jurisdiction in relation to disputes involving regulatory issues.

In the other respondent States, the civil courts have varying degrees of competence in this area. Depending on the case, these civil courts are either ordinary courts or specialised courts such as in Belgium or Poland.

As mentioned above, since Norway does not have an administrative court, all disputes involving acts of regulatory authorities are heard by the civil courts. In Slovakia, such disputes are heard by specialised chambers of the judicial courts. However, the establishment by a constitutional revision (Constitutional Act No 422/2020 Coll.) of a separate Supreme Administrative Court as of 1 January 2021 is the first step towards the organisation of an administrative jurisdiction independent of the judicial courts.

Some respondent States (Latvia, Portugal, Czech Republic, Spain) explain that civil courts have jurisdiction over private-law disputes involving regulatory authorities. In others (Germany, Cyprus, Sweden, Hungary, Poland), they have jurisdiction over claims for compensation for damage caused by the acts of regulatory authorities.

In several respondent States, specific laws attribute to the civil courts, by derogation from the general rules of jurisdiction of the administrative courts, competence for appeals against certain administrative acts of regulatory authorities. France explains that these attributions of competence are justified by '*the interest of the proper administration of justice*', Germany by a consensus within the country's institutions that it is preferable that economic matters be decided by civil courts.

In Belgium, for example, laws have transferred to the Market Court, a section of the Brussels Court of Appeal, jurisdiction in disputes for some of the decisions of the Financial Services and Markets Authority (FSMA), for decisions of the Belgian Institute for Postal Services and Telecommunications (BIPT), of the Commission for Electricity and Gas Regulation (CREG), of the Competition Authority (ABC), for decisions of the National Bank of Belgium (NBB) imposing an administrative fine.

In Germany, the division of competence between administrative and civil courts depends on the regulatory sector. The civil courts have jurisdiction over disputes concerning the regulation of electricity and gas. They are also competent for disputes arising from decisions taken by the Federal Cartel Office (Bundeskartellamt).

In France, the Paris Court of Appeal has competence to rule in the first and last instance on part of disputes involving individual decisions of certain regulatory authorities, the Competition

Authority, the Electronic Communications, Post and Press Distribution Regulatory Authority and the Financial Markets Authority.

In Italy, the civil courts are competent for appeals against acts of the Personal Data Protection Authority and against sanctions of the banking and financial markets regulatory authorities.

In Poland, a specialised civil court, the Competition and Consumer Protection Court (one of the divisions of Warsaw District Court), has been given jurisdiction to hear appeals against regulatory acts of regulatory authorities (e.g. regulatory decisions of the President of the Office for Electronic Communications by Article 206 of the Telecommunications Act).

Finally, in two respondent States (Germany and Lithuania), civil courts have jurisdiction over appeals against sanctions taken by regulatory authorities. In Germany, these appeals are heard by the criminal courts, in accordance with the Code of Criminal Procedure. In Lithuania, a change in legislation in 2011 transferred disputes involving administrative offences committed by natural persons to the civil courts.

1.4. The lack of specificity of remedies against acts of regulatory authorities

The majority of respondent States consider that the remedies available against acts of regulatory authorities are of the same nature as those available against equivalent or similar acts of other administrative authorities.

Germany specifies that the civil courts adapt their procedure when judging disputes involving regulatory issues (implementation of an inquisitorial procedure).

Poland explains that the scope of the court's review varies depending on whether the appeal is heard by the administrative or civil court. The civil court, the Competition and Consumer Protection Court, applies the *de novo* procedure, while the administrative court reviews the validity of the administrative decision *ex tunc*, depending on the legal and factual circumstances at the date of the decision.

2. Admissibility of appeals against regulatory acts

2.1. The particular issues of admissibility of appeals against 'hard-law' regulatory acts

For the vast majority of respondent countries, disputes involving 'hard-law' regulatory acts do not present particular issues of admissibility compared with appeals against other administrative acts. Belgium, Bulgaria, Germany, Spain, France, Italy, Croatia, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Slovenia, Slovakia, Finland, Sweden, Turkey and Norway thus indicate that they are governed by the general rules of admissibility of appeals against administrative acts.

Some respondent States, however, report particular questions that their courts have asked about the admissibility of appeals against 'hard-law' regulatory acts.

Estonia explains that while competing undertakings and consumers are not in principle entitled to challenge discretionary refusals by regulatory authorities to prosecute or take action against an undertaking, the Supreme Court has accepted the admissibility of the appeal where the regulatory authority's supervisory powers have been conferred on it to protect the applicant's subjective rights and these are likely to be infringed by the illegal activity of the undertaking.

In the same vein, Greece states that particular questions arise as to the legitimate interest of applicants in challenging decisions by regulatory authorities not to investigate or to reject their complaints about market distortions or their interest in challenging the duration and severity of sanctions imposed on economic actors.

In Portugal, it was debated before the Constitutional Court whether the devolutive and non-suspensive effect of appeals against regulatory authorities' sanctioning decisions violates the principle of presumption of innocence enshrined in the Constitution. A decision of the Constitutional Court ruled that the appeal against final and enforceable sanctioning decisions of the body responsible for regulating health matters has a purely devolutive effect, and can only have a suspensive effect if the applicant argues that the enforcement of the sanction is likely to cause him or her considerable harm (Constitutional Court decision, No 74/2019, 7 March).

2.2. The institution of appeals against 'soft-law' acts

A majority of respondent States (Belgium, Czech Republic, Greece, Spain, Croatia, Cyprus, Luxembourg, Austria, Poland, Slovenia, Slovakia, Finland, Sweden, Norway) indicate that 'soft-law' acts (opinions, recommendations, warnings) and position papers (press release, website section, FAQ, etc.) of regulatory authorities cannot be directly challenged for annulment as they are not binding.

In the other respondent States (Germany, Estonia, France, Italy, Latvia, Lithuania, Hungary, Portugal, Turkey), the 'soft-law' acts of regulatory authorities may in some cases be subject to appeal.

In Germany, recourse to the administrative courts does not depend on the legal form of the act, but on the applicant's standing, who must show that the act has infringed his or her individual rights. 'Soft-law' acts and statements of regulatory authorities are subject to appeal if their indirect effects do not merely reflect legal regulation, but infringe the individual right of the applicant, for example, his or her freedom of enterprise under Article 12 of the Basic Law.

In Estonia, 'soft-law' acts can be challenged if they have been used as a basis for a decision, e.g. the published position of the Tax and Customs Commission on the taxation of certain categories of share transfers, on the basis of which it taxed a group of shareholders.

In France, soft-law acts may be subject to appeal if they are likely to produce significant effects, in particular of an economic nature, or are intended to have a significant influence on the behaviour of the persons at whom they are directed (CE, Ass., 21 March 2016, *Société Fairvesta International GMBH* and others, Nos 368082, 368083, 368084 and *Société NC Numéricable*, No 390023). For example, the Council of State accepted the admissibility of an appeal against the recommendations of

good professional practice issued by the French Prudential Supervision and Resolution Authority, which are intended to encourage insurance undertakings and intermediaries to modify their reciprocal relations significantly (CE, 20 June 2016, *Fédération française des sociétés d'assurance*, No 384297).

In Latvia, 'soft-law' acts cannot in principle be appealed, unless the applicant establishes that they infringe his or her legal rights or interests (e.g. violation of trade secrets).

Lithuania states that in the case law of its Supreme Administrative Court, 'soft-law' acts are interpreted in accordance with the binding 'hard-law' provisions that they supplement. Their nature as acts of 'soft law' cannot erase their legal effects or exclude them completely from judicial review. In a recent case, decided by an enlarged panel of judges, the Court held that the statutory obligation on financial institutions to follow the regulator's guidelines is not sufficiently precise to enable them to assess in advance whether disregard of these non-binding guidelines amounts to a violation of the law that may be sanctioned by a fine (Case No eA-663-822/2021).

However, Lithuania makes a distinction in the case of warnings or cautions. According to constitutional case law from 2017, a warning of a possible suspension of the validity of a licence is an act subject to judicial review.

In Portugal, courts review 'soft-law' acts of regulatory authorities. While they cannot replace the regulators, they are competent to verify the regularity of the procedure they follow and the 'reasonableness' of their actions. Article 8 of the Code of Administrative Court Procedure requires administrative authorities to reject 'manifestly unreasonable' solutions.

Portugal also stresses that 'soft-law' acts may have legal value either because they interpret binding 'hard-law' acts or because they are a preliminary step to the adoption of such acts. Thus, in decision 1233/20.9.BEPRT of 2 April 2021, the Central Administrative Court of the South assessed whether the publication on the Internet by the competent authority of a notice on an illegality committed by persons identified by name, without implementing an adversarial procedure, violates their right to be presumed innocent.

2.3. Persons entitled to challenge the acts of regulatory authorities

In none of the respondent States is there an *actio popularis* against the acts of regulatory authorities. Applicants must have standing.

In some States (Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Poland, Sweden, Turkey, Norway) it is sufficient for the applicant to establish that the contested act affects one of his or her legitimate or legally protected interests.

Greece specifies that this legitimate interest must be personal, direct and current.

In France, persons entitled to challenge the acts of regulatory authorities are those whom they adversely affect in sufficiently special, certain and direct conditions.

Cyprus states that a claim may be brought by any aggrieved person who, as an individual or as a member of a group, has a legitimate, direct and existing interest affected by the contested act. The

recognition of a legitimate interest to act does not necessarily imply the violation of a subjective right. The legitimate interest may be financial or moral.

Latvia distinguishes between individual decisions and regulatory acts of regulatory authorities. The former may be challenged before the administrative courts by individuals whose legal rights and interests they infringe or are likely to infringe. The latter, on the other hand, may be appealed to the Constitutional Court only by persons who allege violation of their constitutionally protected fundamental rights.

In Sweden, individual decisions of regulatory authorities can be challenged by any person directly concerned. Distant legal interest is not enough. The admissibility of the appeal depends on the practical (legal, economic or other) effect of the act on the applicant.

In other States (Czech Republic, Germany, Estonia, Austria, Slovakia, Finland), the applicant is only entitled to challenge the act if it affects one of his or her subjective rights.

In the Czech Republic, acts of regulatory authorities may be challenged by any person claiming an infringement of his or her rights either directly by the act itself or during its adoption procedure.

In Germany, as already mentioned above, the applicant must establish a violation of his or her subjective rights. Disregarding only political or economic interests is not sufficient to give standing. The crucial question is therefore whether regulatory acts serve to protect the rights of individuals. For example, if the Federal Network Agency (Bundesnetzagentur) imposes regulatory obligations on an undertaking with significant market power in a regulated market, a competitor is entitled to bring an action for the imposition of new regulatory obligations, since the obligations to provide access to a market, to create transparency and to keep separate accounts are also intended to protect competitors (BVerwGE 130, 39 para 14 et seq.).

In Estonia, the Code of Administrative Court Procedure provides that individuals may only apply to an administrative court for the protection of their rights.

In some States (Latvia, Lithuania, Poland, Portugal), public authorities are empowered by law to challenge the legality of regulatory acts before the courts.

In Latvia, the conformity of regulatory acts of regulatory authorities with the hierarchy of norms can be challenged before the Constitutional Court by certain authorities, including the President, the Saeima, 20 deputies of the Saeima, the Prosecutor General, the Ombudsman, etc.

In Poland, the public prosecutor, the human rights defender (Ombudsman), social organisations, within the limits of their statutory interests, and public bodies (municipalities, inter-municipal structures, districts, voivodships) are entitled to challenge the acts of regulatory authorities.

In Portugal, the public prosecutor, as the guardian of legality, and the executive are entitled to challenge the acts of regulatory authorities.

2.4. The exception of illegality of general acts of regulatory authorities

The questionnaires did not reveal any particularity specific to disputes involving the acts of regulatory authorities, as the replies referred to the general rules of administrative disputes in the respondent countries.

Eight respondent States (Belgium, Croatia, Italy, Latvia, Luxembourg, Hungary, Poland, Norway) indicate that the illegality of general acts of regulatory authorities cannot be challenged by way of exception in an appeal against an individual decision. However, this statement must be qualified by the additional explanations that some of them provided.

Belgian law recognises and applies the technique of the exception of the illegality of regulatory acts. However, Belgium points out that the regulatory authorities do not have regulatory powers, so the question is not relevant for Belgium. 'Soft-law' acts of regulatory authorities (guidelines and recommendations) can be challenged in support of an appeal against an individual decision implementing them. In Belgium's view, this is not an objection to the illegality of a regulatory act, but a challenge to the individual decision on the grounds that it is based on an incorrect interpretation.

In Croatia, the applicant may, in an appeal against an individual decision of a regulatory authority, invoke the illegality of the general act on the basis of which it was taken. The Supreme Administrative Court is then competent to review the legality of the general act, at the request of the court before which the appeal against the individual decision is pending (Article 83 of the Administrative Judicial Procedure Act). The general act, which the Supreme Administrative Court has found to be illegal, ceases to be valid on the date of publication of the Court's decision in the Official Gazette.

In Latvia, the courts may stay an appeal in order to refer a question to the Constitutional Court for a preliminary ruling on the conformity with the Constitution or international law of a legal provision applicable to the dispute.

The exception of illegality is not recognised in Luxembourg administrative law. However, the Administrative Court did apply the plea of illegality mechanism in a case that gave rise to a request for a preliminary ruling from the Court of Justice of the European Union, in order to comply with European Union law. The exception of illegality has never yet been applied in disputes involving regulatory acts.

In Hungary, the plea of illegality can only be raised in support of an appeal against an individual decision if the general act is an act of 'soft law'. Indeed, because of their binding nature, general acts of 'hard law' are considered to be legislative acts falling within the scope of the 2010 Law on Legislation and are not subject to review by the administrative courts.

Fourteen respondent States (Czech Republic, Estonia, Germany, Greece, Spain, France, Cyprus, Lithuania, Austria, Portugal, Slovakia, Finland, Sweden, Turkey) apply the plea of illegality mechanism to disputes involving regulatory issues. In some States (Estonia, Cyprus, Austria, Slovakia, Sweden), the plea of illegality is the only way to challenge the legality of general acts of regulatory authorities that cannot be appealed directly.

In Estonia, all courts may refer to the Supreme Court, ex officio or at the request of a party, a question on the conformity with the Constitution of a regulatory act applicable to a dispute pending before them. If the Supreme Court finds the act contrary to the Constitution, it may annul it, either *ex tunc* or *ex nunc*. The annulment is always retroactive for the specific dispute in which the question of constitutionality was raised. The Supreme Court may decide to limit the retroactive effect of the annulment to disputes already pending before the courts.

In Greece, the exception of the illegality of a general act cannot lead to its annulment, but only to the annulment of the individual decision taken on the basis of it. Should the illegality of the general act result from a formal or procedural defect, the judges may not annul the individual decision if the general act has been in force for a long period of time and the consequences of its illegality on the individual decision are likely to affect legal certainty (Article 50, Section 3, paragraph (c) of Presidential Decree No 18/1989 on proceedings before the Council of State).

In France, the general acts of regulatory authorities, both 'hard law' and 'soft law', may be challenged by way of exception. If the exception of illegality is accepted by the judge, it only leads to the annulment of the individual decision that applies the general act, and not the general act itself. Similarly, in Lithuania, Slovakia and Sweden, the exception of the illegality of the general act only leads to the annulment of the individual decision.

In Austria, the legality of a regulatory act of a regulatory authority may be challenged before the Constitutional Court, on the occasion of an appeal against an individual decision implementing it, either by the court before which it is pending, or by the parties, after the appeal has been ruled on by the court of first instance. The recognition of the illegality of the regulatory act by the Constitutional Court entails its annulment as well as that of the individual decision based on this act.

Similarly, in Turkey, the plea of illegality, if upheld, leads to the retroactive annulment of the regulatory act.

2.5. Bringing an action for damages against regulatory authorities

In all respondent countries, it is possible to bring a liability action either against the regulatory authorities or against the state to obtain compensation for damages caused by regulatory activity, in particular by the issuing of illegal regulatory acts.

In Lithuania in particular, the duty to remedy damage caused by unlawful actions of state authorities is a constitutional principle. Where the exercise of discretionary power by administrative authorities is at issue, Lithuanian administrative courts take into account the seriousness of the breach of the rule of law in assessing the liability of the State.

Some respondent States (Belgium, Greece, France, Latvia, Luxembourg, Hungary, Slovenia) indicate that liability claims should be directed against the regulatory authorities themselves when they have legal personality.

In France, only some of the regulatory authorities have legal personality. These have the status of independent public authorities (Article 2 of the Act of 20 January 2017 on the general status of independent administrative authorities and independent public authorities). The liability action must

be directed against the State when the damage has been caused by a regulatory authority that does not have its own legal personality.

3. The internal organisation of the courts

3.1. The allocation of cases concerning regulatory authorities

In 14 respondent States (Belgium, Bulgaria, Germany, Estonia, Spain, France, Italy, Latvia, Lithuania, Austria, Portugal, Slovenia, Finland, Turkey), cases concerning regulatory authorities are assigned to specialised judges or panels of judges to take account of their complexity and technicality.

In Germany, the Constitution provides for a constitutional right to be tried by a judge appointed by law. This right does not allow for random assignment of cases or variation in the composition of panels according to their complexity. The number of panels, their areas of jurisdiction and the assignment of judges to panels are set out for each court in its annual business plan (Geschäftsverteilungsplan), drawn up by the 'Präsidium', a council elected by the court's judges. As the composition of the chambers normally remains stable from one year to the next, the internal organisation of the courts leads to judges specialising and becoming experts in their field. Young judges benefit from the knowledge and experience of older judges. At the Federal Administrative Court, cases concerning the regulatory authorities are heard by the Sixth Chamber (or Senate).

Similarly, in Spain, the rules for assigning cases to each court are set annually and published in the official State gazette.

In Estonia, specialisation is only possible if the court and the volume of disputes are large enough. In the Supreme Court, administrative disputes are heard by five judges, each of whom has specialised areas (including disputes involving regulatory issues) as rapporteur. Cases are decided by panels of at least three judges, so it may be that only the rapporteur is an expert in the field.

In France, disputes concerning acts of regulatory authorities are divided between several chambers within the Legal Section of the Council of State. The regulatory authority that initiated the contested act or the sector in which it operates determines the chamber to which the case is assigned. The chambers have other competences, so that they are not only specialised in disputes involving regulatory issues. Similarly, in Austria, disputes involving regulatory issues are assigned to two specialised chambers of the Supreme Administrative Court, which do not deal exclusively with such disputes, but hear cases in various fields of administrative law.

In Latvia, the assignment of cases and the composition of panels take into account the specialisations of the judges. The same is true in Lithuania, which indicates that the law has become so complex and specific in certain areas of regulation that a proper examination of cases requires a high level of specialisation.

In the 10 other respondent States (Czech Republic, Greece, Croatia, Cyprus, Luxembourg, Hungary, Poland, Slovakia, Sweden, Norway), disputes involving regulatory issues are not assigned to judges or to specialised judicial panels.

Greece points out, however, that while the Council of State does not have a chamber specialising in disputes involving regulatory issues, other courts have specialised panels that only hear cases concerning a particular regulatory authority. For example, the Athens Court of Appeal has a specialised panel to hear appeals against the Greek Competition Authority.

There are two panels for administrative law cases in the Supreme Court of Cyprus. Each panel hears appeals in all branches of administrative law, and does not specialise in any one area. Moreover, due to the multitude of competences of the Supreme Court, which performs, among others, the functions of constitutional court, court of final appeal in civil and criminal matters, court of appeal in family law and electoral court, its judges cannot specialise in a particular competence or sector.

In Poland, cases concerning regulatory authorities are heard by the Commercial Chamber of the Supreme Court, but there are no panels within the Chamber dedicated exclusively to disputes involving regulatory issues.

In the Supreme Court of Norway, the composition of the panels is decided randomly and changes every week.

3.2. The internal resources of the courts to deal with disputes involving regulatory authorities

Ten states (Germany, Italy, Hungary, Austria, Poland, Slovenia, Slovakia, Sweden, Turkey, Norway) replied that the courts do not have internal resources to help judges become familiar with the technical aspects of disputes involving regulatory issues.

Sweden states, however, that the procedure before the Stockholm Administrative Court of Appeal, which has final jurisdiction over disputes relating to electronic communications, makes use of the existing technical and economic expertise within the court to hear such cases.

In the 14 other respondent States (Belgium, Bulgaria, Czech Republic, Estonia, Greece, Spain, France, Croatia, Cyprus, Latvia, Lithuania, Luxembourg, Portugal, Finland), the courts have various internal resources to strengthen their expertise in the regulatory sectors they oversee.

These resources are the initial and ongoing training of judges, the organisation of seminars and exchanges with regulation professionals, the legal and technical skills of judges, acquired through their specialisation in disputes involving regulatory issues or through the exercise of other professional functions outside the courts, the use of judicial assistants, the creation and updating of case-law databases, and the establishment within the courts of entities dedicated to legal research.

For example, in Estonia, the Supreme Court, which is responsible for organising the ongoing training of judges of all courts, recently organised seminars on artificial intelligence and applied economics (on business practices in general and more specifically in the construction sector).

In Spain, the administrative courts include a category of magistrates specialised in administrative disputes, recruited through a competitive examination open to judges and prosecutors, which includes

regulatory and competition law. Specialised magistrates have priority over non-specialised magistrates in the allocation of positions in the courts.

In France, a small number of members of the Council of State have expertise in regulatory matters thanks to their professional background outside the court. Consideration is currently being given to developing the court's internal resources. A series of lectures in economics by professors of economics is being organised and offered this autumn to members of the Council of State. They can also be followed remotely by all members of the administrative jurisdiction (administrative courts of appeal and administrative tribunals).

In Latvia, the Case Law and Research Division of the Supreme Court is responsible for legal studies in the fields of European Union and international law, case law of international courts and comparative law. It may conduct a study on a particular legal issue at the request of a judge. Similarly, in Lithuania, the judges of the Supreme Administrative Court are assisted by the Legal Research and Documentation Department, which consists of a multidisciplinary team of assistant judges, advisers, academics and other legal professionals. The investigation of complex cases in the field of competition law, financial market supervision and energy regulation often gives rise to the consultation of senior legal advisers in the Legal Research and Documentation Department for additional legal research and analysis.

In Finland, specialised knowledge in certain areas of law and practice is considered a major advantage in the recruitment of judges. In addition, for judging cases in certain fields (environment, intellectual property), the panels are composed of two experts in the fields concerned.

4. The investigation of appeals

4.1. Investigative techniques

Three respondent States (Germany, Estonia, Austria) indicate that their supreme courts, as courts of cassation, only consider questions of law and are bound by the findings of fact of the courts of first instance. Therefore, unlike the latter, they do not use fact-finding or investigative techniques.

Cyprus explains that its Supreme Court makes only limited use of fact-finding and investigative techniques, as it limits itself to reviewing the legality of administrative action, to verifying that the administrative authorities have exercised their discretionary powers within the legal limits. Its competence does not extend to technical matters or to those requiring specialist knowledge.

In Poland, the Supreme Administrative Court bases its decisions on the case file compiled by the regulatory authority and does not conduct additional investigations, except in exceptional cases of serious doubt.

Table of the main investigative measures used in the respondent countries

Country	Oral hearing	Expert's report	*Amicus curiae*	Solicitation of a reference expert administration	Other investigative techniques
Belgium	X	X (exceptional cases)			Request additional information and explanations from the parties
Bulgaria		X			
Czech Republic		X	X		Witness testimony
Germany	X	X			
Estonia	X		X	X	
Greece	X	X			
Spain			X	X	
France	X	X	X	X	Investigation in court or on the premises
Croatia	X	X			
Italy	X	X	X		
Cyprus	X		X		
Latvia	X	X	X		Witness testimony
Lithuania	X	X	X	X	Witness testimony
Luxembourg	X	X (exceptional cases)			
Hungary	X	X			
Austria	X		X (only when the recourse to *amicus curiae* is based on European Union law)		
Poland					
Portugal	X	X			
Slovenia	X	X (uncommon)	X (uncommon)		
Slovak Republic	X	X	X		
Finland	X	X			
Sweden	X	X		X	
Turkey	X	X			Use of scientific work
Norway	X	X	X		Use of lay judges with expertise in the field

Six respondent States (Greece, France, Italy, Hungary, Slovakia, Portugal) consider that disputes involving regulatory issues require a specific method of investigation.

Greece believes that courts should recruit their own independent and impartial experts (economists, engineers, etc.) to assist judges in understanding complex technical issues (e.g. market analysis).

Similarly, the Slovak Republic advocates the appointment of consultants to advise judges and provide them with the expertise and technical explanations necessary for a proper understanding of cases during their investigation.

Italy goes even further by considering that the possibility of including professionals from the sector in panels of judges should be studied.

Because of the technical nature of the disputes or the economic equilibrium involved, France notes a particularly strong need to mobilise expert opinions or methods of investigation involving oral hearings and the presence of all the parties prior to the judgment hearing, in order to ensure that the court has a good understanding of the facts. These are often technical, and presented in quite different lights by the parties, without the judge having his or her own expertise enabling him or her to spontaneously disentangle the true from the false. The direct confrontation of the words of both sides is therefore sometimes essential to establish or understand the facts (for example, the actual effectiveness of the geo-blocking techniques implemented by certain Internet search engines to prevent the display, on the terminals of European users, of search results that have been the subject of a 'de-indexing' decision by a national data protection authority, under the right to be forgotten enshrined in the GDPR: CE, 27 March 2020, *Société Google Inc.*, No 399922).

Hungary explains that in case of recourse to an expert opinion, the judge should only take into account the opinions given by the expert on technical issues and decide alone on legal issues.

Portugal considers that the particular technicality of disputes involving regulatory issues would require the creation of a set of specific procedural rules, the provision of technical means for the courts to assess certain aspects of the activities of regulatory authorities and the guarantee of rapid procedures that are essential for appropriate regulation.

4.2. The role of administrations and other stakeholders in the investigation of appeals

The vast majority of respondent States (Belgium, Bulgaria, Czech Republic, Germany, Estonia, Greece, Spain, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Slovenia, Slovakia, Poland, Portugal, Finland, Sweden, Turkey, Norway) indicate that the administrations and other stakeholders who are not parties to the proceedings have no place or only a very limited place in the investigation of appeals.

However, in Germany, administrative authorities may present their views in proceedings pending before the administrative courts through the representative of the public interest, and before the Federal Administrative Court through the representative of the interest of the Federation. These authorities cannot appeal, but they can intervene in all proceedings pending before the courts. In practice, they rarely intervene in proceedings to which the regulatory authorities are party, as the latter are already sufficiently representative of the administrations' views.

In Spain, the European Commission, the National Commission for Markets and Competition and the competent authorities of the Autonomous Regions may, within the scope of their competences, intervene, on their own initiative or at the request of the court, in proceedings concerning trusts and data protection, without having the status of party, in order to produce written or oral observations or transmit information.

In Greece, where the regulatory authority, as a party to the dispute, has applied a regulatory act issued by another administrative authority, the judge reporting on the case may request observations from the latter. Similarly, in Lithuania, the Minister for Energy, in his or her capacity as energy policymaker, has been involved in disputes challenging the decisions of the National Energy Regulator on the pricing of heating production.

In addition, in some respondent States, the courts may request or use, in the context of the investigation of appeals, the opinion of administrations (Estonia, Spain, France, Croatia, Sweden), or of private persons (Spain, France, Croatia, Sweden) who are not parties to the proceedings, on the legal and technical issues in question. For example, in Sweden, the Swedish Association of Local Authorities and Regions (SKR) is often asked to comment on cases that have a significant practical impact on local authorities.

4.3. The role of oral proceedings in the investigation of appeals

In the majority of the respondent States (Belgium, Bulgaria, Czech Republic, Estonia, Greece, Spain, France, Italy, Lithuania, Luxembourg, Slovenia, Slovakia, Poland, Portugal, Finland, Sweden), judicial proceedings before the supreme administrative court are generally and mainly in writing, with oral proceedings playing only a limited or subsidiary role in the investigation and judgment of appeals. However, they stress the usefulness of holding a public hearing, especially in complex regulatory cases, to gather evidence (Czech Republic, Slovakia, Spain), to question the parties (Estonia, Greece, Luxembourg) and to confront their arguments on the most sensitive technical aspects (Italy), to ask experts for clarifications and explanations of their reports (Spain), to call for the intervention of an *amicus curiae* (Estonia) or to protect the public interest when the issues at stake have a wider social impact (Slovakia).

In Germany, the Federal Administrative Court and other administrative courts are obliged to hear appeals in oral proceedings, unless the parties agree to dispense with a public hearing.

In Cyprus, judicial proceedings consist of two phases, a written preliminary phase and a trial phase with a public hearing. The arguments exchanged and the clarifications made by the parties during the hearing can be decisive for the resolution of the case.

In Hungary, the right of the parties to be heard in open court, at least in the first instance, has been recognised by the Constitutional Court. However, the Court has clarified that a case may be decided without a hearing if the parties waive their right to such a hearing and there is no public interest in holding a hearing.

In addition, some respondent States (Germany, Estonia, France, Latvia) indicate that preliminary hearings, prior to the public hearing of the case, can be organised to allow judges to better understand the complexity and technicality of the cases and to hand down more relevant decisions adapted to the

situation. In France, a Decree of 18 November 2020 set up an 18-month experiment at the Council of State with oral examination proceedings and investigative hearings in technical and sensitive cases. Germany points out that these informal, non-public preliminary hearings sometimes enable judges to resolve the dispute at this stage, and in all other cases to better prepare for the public hearing.

5. Decision-making

5.1. The main categories of grounds invoked against the acts of regulatory authorities

Several respondent States (Belgium, Bulgaria, Greece, Slovenia, Slovakia, Poland, Portugal, Finland, Norway) indicate that the grounds invoked against the acts of regulatory authorities are not original compared with those invoked against other administrative acts.

For example, in Poland, appeals in cassation before the Supreme Administrative Court are based either on the disregard of substantive law by the lower administrative court or on the violation of a procedural rule that substantially affected the outcome of the dispute.

Other respondent States identify procedural and substantive grounds that are more particularly invoked in disputes involving regulatory issues:

- respect by the regulatory authorities of their competence (France, Cyprus, Hungary);
- compliance with procedural rules (France, Croatia, Italy, Cyprus, Hungary, Turkey), and in particular with the rules on consultation, the rights of defence and the right to be heard;
- respect for privacy in the exercise by regulatory authorities of their supervisory and investigative powers (France);
- respect for the principle of impartiality (France, Cyprus);
- the right of access of citizens to the documents on which the regulatory authorities base their decisions (Luxembourg, Hungary);
- a balancing of interests by the regulator that takes account of all the interests involved, properly assesses their respective importance and does not disproportionately affect any of them (Germany);
- compliance with the principle of proportionality of the decision (Germany, Estonia, Spain, Italy, Cyprus);
- the technical reasonableness and economic sustainability of the decision (Italy);
- the erroneous exercise of discretion by the regulator (Lithuania, Turkey).

France, Cyprus, Lithuania and Austria consider that disputes involving regulatory issues raise particular problems relating to the independence of regulatory authorities and respect for the principle of impartiality, particularly because of the combination of multiple powers (recommendation, regulation, authorisation, control, injunction, sanction).

In France, the Council of State ruled that the power of a regulatory authority, vested with the power to impose sanctions, to refer to itself cases falling within its area of competence must be

sufficiently circumscribed so as not to give the impression that the members of the disciplinary panel consider the facts referred to in the decision to initiate the procedure or the subsequent notification of the complaints as already established or their reprehensible nature with regard to the rules or principles to be applied as already recognised, in disregard of the principle of impartiality (CE, 22 December 2011, *Union Mutualiste Générale de Prévoyance*, No 323612).

In Cyprus, challenges to the independence and impartiality of the members of regulatory authorities, due to their possible political involvement, personal and financial interests, and connections, are frequently invoked against their decisions.

In Lithuania, there is a general principle of separation of functions, which implies that investigation and sanctioning cannot be conducted by the same persons or the same entities of the regulatory authority. However, this general principle can be challenged by special rules. Parties frequently argue that the general principle should apply despite the existence of special rules.

In Austria, the Supreme Administrative Court has ruled in two decisions on the structural independence of the regulatory authority in the energy sector. It ruled that this is not guaranteed if a member of the regulatory authority's decision-making body works in an organisation responsible for the protection of consumers' interests and entitled to challenge the regulator's decisions (decision of 15 December 2014, 2013/04/0108), and that the general right of the Federal Minister for Energy to be informed about matters dealt with by the regulatory authority does not necessarily compromise its independence, but that the regulatory authority must not respond to the Minister's requests for information in cases where this could undermine its independence (decision of 23 November 2016, 2016/04/0013).

5.2. The extent of the regulatory judge's review

With the exception of Greece, Cyprus and Poland, all the respondent States indicate that their courts are not bound by the technical and economic assessments of the regulatory authority and that they are entitled to review them, by comparing them with the arguments and evidence provided by the applicants (Spain, Sweden), by taking investigative measures and, if necessary, by calling in an expert (Belgium, Czech Republic, Croatia, Slovakia).

Greece explains that the Council of State considers itself bound by the technical and economic assessments of the regulatory authority, which it does not oversee directly, and that only a limited review of the reasoning followed by the regulatory authority is allowed.

Furthermore, as mentioned above, in Cyprus the Supreme Court does not review technical matters or matters requiring specialist knowledge, and in Poland the Supreme Administrative Court in principle decides on the basis of the facts established by the administrative authority, and only conducts additional investigations, at the request of the parties or ex officio, if they are necessary to remove a serious doubt and do not unduly prolong the proceedings.

In the other respondent States, the extent of the regulatory judge's review varies according to the margin of discretion enjoyed by the administrative authority. Several of them indicate that the judge does not review the appropriateness of the decision taken by the regulatory authority (Lithuania, Slovakia, Finland).

In Belgium, the judge's review is restricted to manifest error when the administrative authority has a certain power of discretion, even if limited.

In Germany, the Federal Administrative Court determines the scope of its review by interpreting the relevant legal provisions and decides whether it exercises full control or accepts a margin of discretion on the part of the administrative authority. In regulatory law, it has ruled that several legal provisions (on market regulation and access, tariffs, frequency allocations) give a wide margin of discretion to the regulatory authorities, which leads to a restriction of judicial review. The judge merely checks that the authority has applied the procedural rules correctly, has based its decision on a correct understanding of the applicable legal provisions, has fully and correctly verified the relevant facts, has applied the evaluation standards in force and in particular has not disregarded the prohibition of arbitrariness.

In Estonia, judicial review is also restricted when the contested decision has been taken in the exercise of discretionary power, which is frequently the case in the field of regulation. It is limited to manifest error if the authority's margin of discretion is wide and the infringement of the applicant's rights minor. Where the administrative authority has no discretionary power, the judge may usually substitute his or her own assessment for that of the administrative authority. However, he or she limits his or her review to manifest error where the legislation is sparse, the infringement of the applicant's rights is minor and/or the assessment requires specific non-legal knowledge or experience. In all cases, the judge exercises full review of the facts on which the decision is based, as well as a review of its rationality.

Similarly, in France, the extent of the administrative judge's review varies according to the room for manoeuvre available to the authority under the law, the nature of the decisions challenged and the content of the questions asked.

In Italy, the judge exercises full review of the facts and the logical reasoning followed by the regulator. However, where the latter has given a specific answer to a technical problem under discussion, the judge may not substitute his or her own assessment, but is limited to checking that the regulatory authority's assessment is plausible, reasonable and proportionate in the light of the state of scientific knowledge.

In Lithuania, because of the principle of separation of powers, the judge cannot substitute his or her own assessments for those of the regulator. He or she merely checks that the regulator has not exceeded its powers of discretion, made a manifest error or abused its power. The judge also checks that the regulatory authority has respected the procedural rules and correctly assessed the factual circumstances.

In Luxembourg, the judge checks that the regulatory authority has not exceeded the margin of discretion granted to it by the legislator, by applying a principle of proportionality.

In Hungary, when the administrative courts review an act taken by a regulatory authority in the exercise of a discretionary power, they limit themselves to verifying that the authority has taken the decision within the limits of its competence.

Finally, in Norway, judicial control is limited when the administrative authority is endowed by law with a discretionary power. The judge checks that it has based its decision on considerations within the legal framework, has not discriminated unfairly, has not taken its decision on a purely random basis, and that the decision is not highly unreasonable.

5.3. The powers of the regulatory judge

In 12 respondent States (Belgium, Germany, Estonia, Greece, Italy, Cyprus, Latvia, Hungary, Poland, Portugal, Norway, Turkey), the judge only has the power to annul the decision of the regulatory authority.

In Belgium, while the Council of State only has the power to annul, the Market Court, a judicial court with jurisdiction over some disputes involving regulatory issues, is fully competent in certain cases.

In Germany, the administrative courts can only annul binding decisions of regulatory authorities, either in whole or in part if they are divisible. They do not have injunctive powers where the administrative authorities have a margin of discretion, which is often the case in the field of regulation. They can only annul the contested decision. The authority is then obliged to decide again on the application, taking into account the legal reasoning behind the court's decision.

In Italy, acts of regulatory authorities cannot be modified directly by the judge. However, when he or she annuls an administrative act, he or she prescribes the rules that the administrative authority must follow in taking a new decision.

In Cyprus, the Supreme Court cannot change decisions of regulatory authorities or substitute its own assessment for theirs.

In Latvia, the law does not give the judge the power to modify the contested administrative act in disputes involving regulatory issues. The court is competent to set aside or declare invalid the contested act, and to order the administrative authority to issue a new act taking into account the legal and factual considerations of its decision.

In Portugal, the judge has the power to set a time limit under penalty for the administrative authority to execute its decision.

In the other respondent States (Bulgaria, Czech Republic, Spain, France, Croatia, Lithuania, Luxembourg, Slovenia, Slovakia, Finland, Sweden), the judge has the power to modify the administrative decision.

In Bulgaria, the court has jurisdiction both to repeal and reduce the sanction, but cannot increase it.

In the Czech Republic, the courts of first instance (the regional courts) may reduce the sanction, exceptionally and at the request of the applicant.

In Spain, the court can annul the act or sanction. If it finds that the sanction is disproportionate in the particular circumstances of the case, it may decide that the sanction should be reduced. According to Article 71(2) of the Administrative Jurisdiction Act, when the judge annuls an act, he or she cannot substitute himself or herself for the administrative authority in determining the terms and discretionary content of the new decision that the latter will have to take to replace the annulled one.

In France, the judge rules as a judge with full jurisdiction on the sanctions pronounced by the regulatory authorities, i.e. he or she has the power to annul and modify the contested sanctions, by reducing or increasing them. The same applies to Croatia, Lithuania, Luxembourg, Slovenia, Slovakia, Finland and Sweden.

5.4. Taking account of European Union law

Several respondent States (Germany, Spain, France, Estonia, Italy, Cyprus, Hungary, Austria, Sweden) indicate that national regulatory authorities and administrative courts take into account the opinions of the European Commission and the European regulatory authorities.

Germany questions the legal scope of recommendations of the European institutions, which, according to Article 288(5) of the Treaty on the Functioning of the European Union, are not binding but which, according to the case law of the Court of Justice of the European Union (Case C-322/88, 13 December 1989, *Grimaldi*), national authorities and courts are obliged to take into account, in particular when they clarify the interpretation of national provisions implementing European Union law or when they supplement Community provisions of a binding nature. It considers that the indirect legal effect of recommendations does not preclude national authorities and courts from departing from them. Thus, the Federal Network Agency carries out a 'comprehensive evaluation' to accommodate national characteristics that deviate from the European standard.

France explains that the Council of State accepted the admissibility of the plea of invalidity of an act of European soft law in support of an appeal against an act of soft law of a French regulatory authority. At issue in this case was an opinion of the French Prudential Supervision and Resolution Authority to comply with the guidelines on the governance and supervision of retail banking products issued by the European Banking Authority on the basis of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (CE, 4 December 2019, No 415550, *Fédération bancaire française*).

Cyprus considers that regulatory authorities do not relinquish their discretionary decision-making powers when they take into account the opinions, guidelines and best practices of the European institutions, particularly in the field of personal data protection.

Hungary states that the national regulatory authorities are responsible for implementing European Union law aimed at liberalising the markets for the supply of electricity, gas, water, waste management, telecommunications, etc., and for ensuring the consistent application of the rules in the

European Union. In this perspective, they take into account the opinions and decisions of the European Commission and the European regulatory authorities. National law itself imposes such an obligation, for example in the field of electronic communications.

Similarly, several respondent States (Bulgaria, Greece, Spain, France, Italy, Latvia, Lithuania, Austria, Slovakia) consider that disputes involving regulatory issues are a special field of preliminary questions to the Court of Justice of the European Union.

France stresses that European construction has played an important role in the development of state regulation. The opening up to competition of a growing number of sectors, including network services, within the framework of the internal market has contributed to the emergence and expansion of economic regulation to ensure the application of the principle of free competition and to reconcile it with other objectives of general interest. European Union law is an important source of the legality of acts of national regulatory authorities in the economic field as well as in other areas, such as data protection. In its review of regulatory acts, the Council of State is required to apply Community standards and to refer to the Court of Justice of the European Union for a preliminary ruling on the validity and interpretation of these standards. For example, it referred questions to the Court for a preliminary ruling on the interpretation of Directive 2009/73 EC of 13 July 2009 concerning common rules for the internal market in natural gas and on the material and territorial scope of the right to de-index personal data enshrined in its *Google Spain* judgment of 13 May 2014.

The respondent States give various examples of preliminary questions referred to the Court of Justice of the European Union in the context of disputes involving acts of regulatory authorities:

- questions referred for a preliminary ruling on the interpretation of the provisions of the Directive on payment services in the internal market, in connection with a challenge to the legality of a decision by the Financial and Capital Markets Commission to impose a fine for failure to execute a payment order, or on the interpretation of the Treaty on the Functioning of the European Union and the European regulations on state aid and regulated sectors, in disputes over compensation for the loss suffered by an electricity producer due to the failure to pay for the supply of electricity to a public operator at a price higher than the market price (Latvia);

- questions referred for a preliminary ruling in relation to the food industry and competition, electronic communications, the energy sector, consumer protection, the financial sector (Lithuania);

- question referred for a preliminary ruling on the scope of the right of access of citizens to the files on which the regulatory authorities base their sanctions and its reconciliation with business secrecy (Luxembourg);

- questions referred for a preliminary ruling on competition law, regulation of the internal electricity market (Slovakia).

5.5. Drafting the judicial decision

Sixteen respondent States (Belgium, Bulgaria, Czech Republic, Germany, Greece, Italy, Latvia, Luxembourg, Austria, Slovenia, Slovakia, Poland, Portugal, Finland, Sweden, Norway) consider that the

drafting of judicial decisions does not present particular challenges in disputes involving acts of regulatory authorities.

The other respondent States (Estonia, Spain, France, Croatia, Cyprus, Lithuania, Hungary, Turkey) identify a variety of difficulties in drafting judicial decisions in disputes involving regulatory authorities, linked to the technicality, complexity, sensitivity and media coverage of the cases. As a result, the drafting of judicial decisions presents three main challenges.

First, the drafting must not betray business secrecy (Estonia) or any other legally protected secret.

Furthermore, the legal and factual reasoning of the decision must be sufficiently thorough to make the legal community and professionals understand the reasoning followed by the judge (France, Lithuania).

Finally, the decision must be written in a way that is accessible to the public without betraying the legal and technical accuracy of the solution (Spain).

The drafting of decisions in complex cases leads to an increase in the workload of judges, which requires adjustments. For example, in Lithuania, these take the form of a reduction in the number of cases considered by judges and the establishment of a support team comprising legal assistants and linguists to give sufficient attention to the quality of the legal reasoning of decisions.

6. The judge in the regulatory ecosystem

6.1. Communication on judicial decisions in regulatory matters

The respondent States indicate that judicial decisions in the field of regulation are not publicised or communicated in any particular way because of the specific nature of this field, but according to their legal and jurisprudential interest, their socio-economic effects and their media impact.

The institutional communication of supreme administrative courts on important regulatory decisions takes several forms. One of them is the publication of decisions and/or summaries of them on the court's website (Greece, France, Spain, Italy, Latvia, Finland, Norway), in its activity report (France, Lithuania), in an official gazette or legal journal (Croatia, Lithuania, Hungary), or on the websites of the regulatory authorities (Croatia).

Lithuania explains that the publication by the Supreme Administrative Court of summaries of the most important decisions, written in a concise manner, is particularly important and useful in disputes involving regulatory issues, due to its complexity, to ensure a better understanding of the Court's case law by professionals and the general public.

Another form of institutional communication by courts, which is quite common, is the publication of press releases on the most important decisions. This practice exists in Belgium, in Germany, which gives as an example the press release on the decision of the Federal Administrative Court on the auction of 5G frequencies, in Estonia, which cites decisions concerning the pharmaceutical market, wind energy, taxi applications, the publication by the Financial Supervisory Authority of warnings on

dubious commercial practices, in France, such as, for example, on the decisions of 19 June 2020 by which the Council of State on the one hand rejected the appeal against a 50 million euro penalty imposed on Google by the French Data Protection Authority for violation of the General Data Protection Regulation and on the other hand partially annulled the French Data Protection Authority's guidelines on cookies and other connection tracers, in Latvia, Lithuania, Luxembourg, Austria, which mentions decisions on the allocation of frequencies or on the structural independence of the energy regulator, in Slovenia, Slovakia, Finland, Sweden and Norway.

Cyprus reports that its Supreme Court does not make a practice of using press releases to communicate its decisions, even when these have a high media profile. The Court only communicates with the parties, other judges, the legal community and the general public through its decisions, which are the final products of court proceedings.

6.2. The participation of judges in general exchanges with professionals from the regulatory sectors

Twelve respondent States (Belgium, Bulgaria, France, Croatia, Cyprus, Latvia, Luxembourg, Hungary, Poland, Portugal, Turkey, Norway) indicate that their judges do not participate in general exchanges with professionals in the regulatory sectors.

Cyprus and Luxembourg consider that such exchanges would be contrary to the principle of separation of powers and, for Cyprus, to the principle of the independence of judges. However, Luxembourg specifies that the Court's magistrates may participate in colloquia organised by the university on regulatory issues.

France explains that the exchanges organised in the past with the regulators (e.g. with the Electronic Communications and Post Regulatory Authority) were abandoned because they were too hampered by reciprocal ethical precautions concerning ongoing litigation, too unstructured, and without a clear vision of the respective contributions.

Spain also states that there are no regular exchanges between judges and professionals, as judges are not required to participate in conferences or meetings where issues that may be subject to litigation are discussed. However, it states that the annual training plan for judges usually includes internships for a limited number of judges in regulatory bodies to enable them to gain a better understanding of their activities.

In the other respondent States where exchanges between judges and regulatory professionals are organised, the latter are generally involved in the ongoing training of judges (Czech Republic, Spain, Estonia, Italy, Lithuania, Slovenia, Finland). In some countries, the courts themselves organise round tables or exchanges between their members and professionals (Estonia, Lithuania), or between the judges of the various courts with jurisdiction over disputes involving regulatory issues (Germany). The participation of judges in colloquia and seminars organised by the regulatory authorities or by the academic world also allows for such exchanges on regulatory law and practice (Germany, Greece, Italy, Luxembourg, Austria, Slovakia).

Finally, in Austria, judges participate in annual public events bringing together judges, lawyers, academics, regulators and representatives of the regulated sectors, such as the 'Telekom-Forum', the

'Rundfunk-Forum', etc., and in Sweden, some judges are, in addition to their judicial activity, members of groups or associations of lawyers specialised, for example, in tax law or public procurement.

6.3. The exercise by judges of functions in regulatory authorities

In the majority of the respondent States, the exercise by judges of functions in regulatory authorities is not possible (Bulgaria, Czech Republic, Greece, Croatia, Cyprus, Latvia, Hungary, Austria, Slovenia, Slovakia, Poland, Portugal, Finland, Sweden, Turkey, Norway) or not very common (Germany, Estonia, Lithuania, Luxembourg).

In Belgium, the law provides in certain cases for the participation of members of the Council of State in the bodies of regulatory authorities (Vlaamse Regulator voor de Media, Sanctions Commission of the National Bank of Belgium). In Spain, as mentioned above, judges can undertake internships in regulatory bodies as part of their training. In France, the secondment of members of the Council of State and judges from administrative courts and administrative courts of appeal to regulatory authorities is possible and encouraged because it enables them to develop a regulatory competence and culture, which they can then use and share on their return to the courts. Similarly, in Italy, the secondment of judges to senior functions in regulatory authorities is allowed in accordance with the rules of professional conduct.

Annex 1 – List of member and observer institutions that submitted a national report in response to the questionnaire

ACA members

Country	Institution
Belgium	Conseil d'Etat - Council of State
Bulgaria	Върховен административен съд – Supreme Administrative Court
Czech Republic	Nejvyšší správní soud - Supreme Administrative Court
Germany	Bundesverwaltungsgericht - Federal Administrative Court
Estonia	Riigikohus - Supreme Court of Estonia
Greece	Συμβούλιο της Επικρατείας - Council of State
Spain	Tribunal Supremo de España - Supreme Court
France	Conseil d'Etat- Council of State
Croatia	Visoki upravni sud Republike Hrvatske – Supreme Administrative Court
Italy	Consiglio di Stato - Council of State
Cyprus	Ανώτατο Δικαστήριο της Κύπρου - Supreme Court of Cyprus
Latvia	Augstākā tiesa- Supreme Court
Lithuania	Lietuvos vyriausiasis administracinis teismas - Supreme Administrative Court of Lithuania
Luxembourg	Administrative Court
Hungary	Kúria - Curia
Austria	Supreme Administrative Court
Poland	Naczelny Sąd Administracyjny - Supreme Administrative Court
Portugal	Supremo Tribunal Administrativo - Supreme Administrative Court
Slovenia	Vrhovno sodišče Republike Slovenije – Supreme Court of the Republic of Slovenia
Slovak Republic	Najvyšší súd Slovenskej republiky - Supreme Court of the Slovak Republic
Finland	Korkein hallinto-oikeus - Supreme Administrative Court of Finland
Sweden	Högsta förvaltningsdomstolen - Supreme Administrative Court

ACA observer

Turkey	Danıştay- Council of State

Invited court

Norway	Norges Høyesterett - Supreme Court of Norway

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Annex 2 – Quantitative data on disputes involving regulatory issues before the respondent courts for 2020

Country	Number of cases recorded	Number of cases settled	Percentage of cases recorded	Percentage of cases settled	Percentage of cases in which the regulatory act was annulled totally or partially
Belgium	24	20	0.90 %	0.70 %	15 %
Bulgaria	Not available	Not available	Not available	Not available	Not available
Czech Republic	70	74	1.6 %	1.8 %	46 %
Germany	15	12	1.3 %	1 %	0 %
Estonia	Not available	30	Not available	44 %	80 %
Greece	34	27	1 %	2 %	0 %
Spain	Not available	Not available	Not available	Not available	Not available
France	Not available	69	Not available	0.71 %	20 %
Croatia	147	188	2.52 %	2.98 %	7.45 %
Italy	567	396	5.58 %	5.5 %	26.8 %
Cyprus	Not available	Not available	Not available	Not available	Not available
Latvia	87 (18 allowed)	12	5 % (2 % allowed)	1.3 %	Not relevant
Lithuania	Not available	Not available	Not available	Not available	Not available
Luxembourg	2	2	Not available	Not available	Not available
Hungary	44	86	1.4 %	2.52 %	22 %
Austria	Not available	Not available	Not available	Not available	Not available
Poland	89	39	0.61 %	0.24 %	Not available
Portugal	Not available	Not available	Not available	Not available	Not available
Slovenia	13	23	2 %	2 %	32 %
Slovak Republic	50	19	2.78 %	2.50 %	31.6 %
Finland	Not available	Not available	Not available	Not available	Not available
Sweden	70 %	70 %	Not available	Not available	10 to 20 %
Turkey	2,713	2,400	67.63 %	59.15 %	Not available
Norway	Not available	0	Not available	0 %	0 %

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