**The pre-trial procedure in** **the judicial review of the acts of regulatory authorities in the Greek legal order.**

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According to the Greek procedural system of administrative litigation, acts adopted by regulatory authorities may be challenged by means of an action for annulment (*recours pour excès de pouvoir*) before the Council of State, limited to reviewing their legality, while individual acts may be challenged by means of an appeal (*recours de pleine juridiction*) before the administrative court of appeal, acting as court of full jurisdiction. Understandably, the aforementioned distinction results in the application of an equally different procedural framework for each category of disputes, thus differentiating the powers of each court in the preparation of these cases. However, despite their differences, the two procedures share a common core shaped by the two axes of the pre-trial procedure: on the one hand, the cruciality of the role of the judge-rapporteur who is vested with the necessary powers to clarify the (often highly complex) factual, i.e. technical, issues arising in the proceedings (I), and on the other hand the power of the courts themselves to return to any matter which, in their view, requires further investigation in order to form a sound conviction (II).

**Ι. The institutional role of the judge-rapporteur in disclosing and clarifying the factual basis of the case, especially regarding matters of a technical nature.**

Α. The standard powers.

Article 22 of the Presidential Decree no. 18/1989 (Official Gazette A΄8), i.e. the procedural code of the Council of State, provides as follows: “1. The judge-rapporteur shall ensure the collection of all information useful for the investigation of the case and shall draw up a summary report, which shall include the facts of the dispute, the evidence ascertained from the documents and the issues raised. … 2. The judge-rapporteur may request the parties to submit the missing or useful evidence. 3. The authorities to which the judge-rapporteur addresses in order to obtain evidence and information useful for the investigation of the case shall send to the judge-rapporteur the data and information requested”. In addition, article 23 para. 1 of the same Presidential Decree provides that “[t]he public authority or a legal person governed by public law against whom an action for annulment or an appeal is brought shall state its views on each of the pleas put forward by the applicant, specifying the factual basis of each plea”.

Similarly, article 128A of the Code of Administrative Procedure- CAP, i.e. the procedural code applicable before the administrative courts), which entered into force through Law no. 4446/2016, stipulates the following: “1. The judge-rapporteur, in cooperation, if deemed necessary, with the judge presiding over the management committee of the court or the judge presiding over the court or the president of the court’s section, shall ensure the collection of any information useful for the investigation of the case… . 2. The judge-rapporteur may… communicate with the parties, inform them of any omissions regarding formalities and request them to adduce any missing or useful information. 3. The authorities addressed by the judge-rapporteur for the purpose of obtaining evidence and information for the investigation of the case shall send the evidence requested and provide the necessary information”.

It follows from the above provisions that both procedural codes - meaning the Code applicable before the Council of State and the Code applicable before the administrative courts - recognize (with only minor differences) certain common powers to the judge-rapporteur. Specifically, the judge-rapporteur is the sole responsible for ensuring the collection of all information useful for the investigation of the case. In doing so, he may request the parties to submit the missing or useful evidence. Should the judge-rapporteur activate this power, the authorities addressed by him for the purpose of obtaining evidence and information for the investigation of the case are then obliged to send the evidence requested and provide the necessary information.

The above provisions constitute reflections of the inquisitorial system prevailing both in the Council of State (see CoS 4518/2011 etc.) and in the administrative courts (see CoS 3035/2014, 39/2005 etc.), according to which the courts are responsible for the progress of the proceedings. For that purpose, the judge-rapporteur may address not only the parties (i.e. the applicant and the regulatory authority), but also any other administrative authority, even irrelevant to the dispute in question, in order to collect any evidence that he deems useful for the diagnosis of the dispute (see CoS 1046/2004). In other words, this process is instrumental in enabling the courts to serve their purpose of guaranteeing the right to an effective remedy, as this is enshrined in both the Greek Constitution (article 20 para. 1) and the ECHR (article 6 par. 1) (see CoS 4600/2005).

For disputes before the Council of State - in other words, those concerning the judicial review of regulatory acts by regulatory authorities, the evidence and information gathered by the judge-rapporteur (for the purpose of completing the case-file) aim to enlighten the regulatory choices of the authority concerned and are of a technical nature, relating mostly to the scientific fields of statistics, economics, information technology (such as studies and technical reports). They may also refer to administrative documents dealing with technical issues (e.g. minutes of the board of the regulatory authority where the views of its members on the regulatory measures of a technical nature are recorded, cf. CoS 865/2008). Yet, such additional evidence and information must be used sparingly because of the limited review of legality exercised by the Court. More specifically, their use is conditioned upon their direct linkage to the dispute at hand and their direct relevance to parameters taken into account, yet not explicitly invoked, by the regulator (e.g. statistical data relating to the structure of the market at a particular point in time). Furthermore, the evidence and information must antecede the contested regulatory act and may be used both for the understanding of the provisions at stake as well as for their correct interpretation. On the contrary, they may not be used to remedy the infringement of any essential procedural requirement regarding issue of the contested regulatory act, such as the failure to carry out a study, as this kind of treatment would violate the constitutional principle of procedural equality. As a consequence of the above, evidence and information are being used as part of what the Greek doctrine of administrative law calls the “scientific common knowledge”, which essentially represents disseminated and popularized scientific research, allowing the judge to rule on matters of technical nature.

Similarly, in disputes concerning the legality of individual acts, the judge-rapporteur collects all the evidence and information that are decisive to the understanding of the critical issues (mainly of a technical nature), which relate not only to the dispute at hand but also to the functioning of the regulated market in general. Once more, the principle of procedural equality obstructs him to use evidence and information in a way that would have an influence on the outcome of the dispute, either by supplementing the otherwise inadequate reasoning of the contested act or, conversely, by rendering an initially inadmissible appeal admissible by clarifying the (otherwise vague) pleas (cf. CoS 935/2017). In fact, the latter has been ruled by the courts in a dispute relevant to a fine on an internet service provider for violations of competition law, imposed by the Hellenic Telecommunications and Post Commission. More specifically, the applicant provider had submitted to the Court of Appeal an expert opinion and a technical report in order to prove his claim that the Reasonably-Efficient-Competitor-Test, (which is the basis of the method used by the regulator to establish the financial damage caused to the economic operators dependent on the provider) was incorrect because it was based on the wrong parameters. The Court of Appeal, having concluded that the plea at stake was vague in that respect - since it did not contain any reference either to specific parameters used or to their deficiencies - held that the evidence submitted during the pre-trial procedure could not be taken into account, since this would have cured an otherwise vague, and thus inadmissible, appeal. The administrative court’s judgment was upheld by the Council of State (see CoS 860/2019).

The evidence and information gathered by the judge-rapporteur in both categories of litigation become integral part of the case-file and hence are made available to the parties, provided that they do not fall in the business confidentiality restrictions. If the regulatory authority fails to provide the judge-rapporteur with the requested evidence and information, the courts are free to decide solely on the basis of the evidence and information provided by the applicant, unless they are considered to be insufficient (cf. CoS 5453/2012).

Β. The practice of oral briefing of the judge-rapporteur.

Acknowledging the crucial role that the legislator has reserved to the judge-rapporteur during the pre-trial stage, the Court has diachronically - even since its establishment - recourse to the practice of cooperation between the judge-rapporteur and the parties for the purposes of clarifying the facts and issues of the dispute. Within that context and for the purpose of formulating his opinion on the facts and technical matters of the case, the judge-rapporteur communicates with the parties in order to obtain information on technical matters that usually require knowledge of other scientific fields. Interestingly, the judge-rapporteur invites the parties to the Court in order to discuss with them the issues of the case. Obviously, the principle of procedural equality requires that both parties should be heard, in turn or in adversarial settings. The invitation may be either of a general content, if the judge-rapporteur wishes to have a horizontal viewpoint of the facts and issues which led to the adoption of the contested act of the regulatory authority, or it may be more specific, referring to certain matters, usually of a technical nature, which in the judge-rapporteur's opinion require further understanding or clarification. There is also the possibility for him to invite third parties, i.e. exclusively other institutional actors, especially those involved in the market connected to the contested act of the regulatory authority (e.g. market operators who, though, may have already become intervening parties to the proceedings), in order to obtain a thorough briefing on how this market functions.

In disputes before the Council of State, this practice enables the parties to significantly contribute to the Court’s understanding of the regulatory acts at stake. Indeed, through the hearing of the parties’ legal advisers and scientific experts, especially when it takes place in an adversarial way, the technical assessments of the regulatory authority are elucidated and the necessary clarifications and explanations are provided, thus leading to mutual understanding between the parties and the court with regard to the contested technical and legal issues. This, in turn fortifies the legitimate force of the future judgment. In cases where this pre-trial hearing brings up issues which are crucial to the case settlement, the judge-rapporteur (relying on the aforementioned provisions of the procedural code of the Council of State) may invite the parties to repeat, in form of written submissions, the arguments which they had orally presented and to submit the respective evidence. Once the written submissions and the supporting evidence have been placed on the case-file, they become accessible to the parties.

For disputes falling within the jurisdiction of the Council of State the interpretation of the legal framework is of course excluded from the hearing at the pre-trial stage, since the legal principle of “jura novit curia” applies in this case. Although this demarcation may seem clear, a real risk of confusion between legal and technical issues emerges at this stage, since the content of the contested regulatory acts is, by definition, highly technical. Therefore, the parties often deliberately attempt to present legal issues as technical and vice versa. An example of a successful distinction between technical and legal issues by the Council of State is provided in a case regarding the review of the legality of a regulatory act adopted by the Hellenic Regulatory Authority for Energy concerning, inter alia, the calculation method of the compensation paid to the producers of electricity from high-efficiency cogeneration (see CoS 197/2021). The Court proceeded as follows; it initially clarified, mainly at the pre-trial stage, the technical matters regarding the meaning of the term “condensate heat” and whether this form of heat is considered to be “efficient heat” according to the rules of science and incorporated these conclusions to its reasoning. Subsequently, it ruled that it is up to the legislature to lay down a provision regulating whether “condensate heat” should be counted or deducted when calculating the “efficient heat”, which is in turn the basis for the calculation of the amount of electricity produced from cogeneration and, by implication, the amount of the electricity producer's compensation. The Court concluded that contrary to the applicant’s claims the lack of such a provision cannot be inferred from other acts regulating technical matters. In order to conceive the depth of the Court's understanding on technical matters during the pre-trial procedure, an additional example is offered by a case concerning the legality of the decision of the Hellenic Regulatory Authority for Energy relative, inter alia, to the determination of the numerical prices of unit charges for electricity supply (see CoS 2382/2019). In that case, the Court had to answer a plea of the applicant energy supplier according to which the scaled prices for fixing the tolerance limit on the deviation (BAL\_TOL), depending on the maximum demand (peak load) of each energy supplier, are subject to a differentiation that favours suppliers with a peak load lower than that of the applicant. As a result, the applicant was claiming that this situation was conferring an advantage to his competitors, contrary to the constitutional principle of equality. The Court utilised the findings of the judge-rapporteur at the pre-trial stage and went on to explain, through its reasoning, how the price fixing system operates. Taking all the above into account, the Court concluded that the legislature had replaced this system by another, more favourable to the applicant, thus rejecting his claims.

Considering the aforementioned, well-established practice of the Council of State, the legislature went on to reform, in 2016, the CAP introducing, through article 128A, the institution of the judge-rapporteur in cases before the administrative courts and explicitly recognizing the power of the judge-rapporteur to communicate with the parties, thus enabling him to come to an in-depth understanding of the technical matters related to the individual acts of the regulatory authorities. Due to its relatively recent adoption, there is still no extensive hands-on experience regarding the application of this provision by the court of appeal in disputes regarding acts of regulatory authorities.

**II. The institutional role of the courts.**

Α. The filling of the case-file.

According to well- established case-law of the Council of State, the aforementioned article 22 para. 2 of the Presidential Decree no. 18/1989 has been interpreted as enabling not only the judge-rapporteur but also the Court to request, by a preliminary ruling, the applicant or another administrative authority to adduce useful evidence and information (see CoS 1046/2004).

Accordingly, article 155 of the CAP provides that: “1. The court may, upon its decision, request from any public… authority, as well as from any legal or natural person, information and data useful for the diagnosis of the case. All such persons shall supply the court with the information and evidence requested within the time limit fixed by the court’s decision. …”.

It follows from the above that, following the hearing, and if there are still doubts about specific (technical or not) factual aspects of the case, the court of appeal may address any authority or person requesting information and evidence useful for its understanding and settlement of the case. Reversely, if the court considers that the evidence and information of the case-file suffice for it in order to reach an understanding of the technical matters in question, it can proceed to hearing the case without being bound by the parties’ requests for further investigation. As an example, the Council of State had upheld a Court of Appeal judgment in a case regarding sanctions for violations of competition law (see CoS 1677/2014). The Court of Appeal held that the Hellenic Competition Commission’s decision on the existence of a horizontal collusion between two companies was lawfully reasoned and that no further economic analysis was required in order for this decision to be considered lawful. The Court of Appeal founded its reasoning on the collected evidence and information of the case-file, according to which the practice that these companies had developed was, from an economic point of view, manifestly contrary to the rules of the proper functioning of the market.

Β. Conducting an autopsy and expert opinion.

Supplementing evidence provided by the parties is also a specific form of pre-trial procedure. As far as cases before the Council of State are concerned, article 40 of the Presidential Decree no. 18/1989 points to the provisions of the Code of Civil Procedure (CCP) regarding matters of supplementing evidence. Following that, article 335 of the CCP provides that “[t]he subject-matter of evidence is only those facts which have an impact on the outcome of the proceedings” while article 355 of the CCP adds that “[t]he court shall order an autopsy, if it considers it necessary to perceive the subject-matter of the evidence with its own senses”. The framework regulating the pre-trial is completed by article 368 of the CCP that provides as follows: “1. The court may appoint one or more experts, if it considers that the understanding of matters in question require special knowledge of science or art. 2. The court must appoint experts if a party so requests and it considers that special knowledge of science or art is required”.

So far, there is no case-law regarding the application of these provisions by the Council of State in disputes arising from the challenge of regulatory acts adopted by regulatory authorities, because, as is well known, legal rules are not subject to proof. Nevertheless, these provisions may provide a sufficient procedural basis for further clarification of technical matters, particularly where opposing views have been expressed by the parties on the basis of different assumptions. Furthermore, an interesting question linked to these provisions is whether they can be applied in view of clarifying the meaning of soft law rules that regulators are increasingly recoursing to in order to regulate areas of their competence. For example, the Hellenic Regulatory Authority for Energy has recently issued a directive (no. 409/2020) addressed to energy suppliers proposing, among other things, the adoption of a specific, non-binding way of standardising the adjustment clauses regarding competitive charges for energy supply. Although the regulatory authority allows suppliers to choose the standardisation of their choice, it further notes that the adoption of its own proposal constitutes a presumption of compliance of the suppliers with the principles of transparency and verifiability when fixing these fees and is positively taken into account when examining relevant consumer complaints against them on excessive charges. It would be very interesting if the courts had the opportunity to examine whether this proposal of standardisation is subject to proof.

Accordingly, article 159 para. 1 of the CAP provides that “[t]he court, if it considers that issues arise for the diagnosis of which special knowledge of science or art is required, shall order an expert opinion and shall appoint one or more experts to draw it up”, article 161 para. 3 of the CAP provides that “[i]n addition to their main duties, experts must, when called upon by the court, be present during the performance of other procedural acts and at the hearing of the case that follows the conduct of the expert opinion, in order to provide explanations or information” and article 164 para. 3 CAP provides that “[i]f the expert opinion is conducted during the hearing of the case, the court may be satisfied with an oral report, which shall be filed in the minutes”. Finally, article 167 para. 1 CAP provides that “[i]f the court decides to appoint an expert, each party may appoint, at its own expense, a technical adviser, who must be a person qualified to be appointed as an expert”.

Thus, in disputes arising from the challenge of individual acts of regulatory authorities, the court of appeal has the power to order, of its own motion or at the parties’ request, the appointment of experts, when the issue raised requires scientific or technical knowledge, which the court does not possess (see CoS 3521/2013, cf. CoS 5220/1997, CoS 656/2001). An expert opinion may also be conducted orally during the hearing of the case, in order for all the members of the court to be directly informed on complex technical matters. However, if the parties submit a request for an expert opinion, they shall identify the specific issue that needs clarification, while the court may, at its own discretion, decide whether an expert opinion is necessary or whether the evidence available in the file are sufficient for the shaping of its own firm conviction. The court also decides at its own discretion as to the selection of the experts and to the qualification of the persons indicated in order clarify the issue in question (CoE 3521/2013). Pursuant to article 144 para. 1 of the CAP, an expert opinion is not required for matters that can be considered to be ascertained through “common knowledge”. For example, it has been held that the fact that Public Electricity Company holds the lion’s share of the electricity market constitutes an issue of common knowledge (CoS 2382/2019).

Finally, it is interesting to note that the case-law has somehow equated the conduct of an expert opinion (according to the relevant procedural provisions) with the exercise of audit powers conferred upon the regulatory authorities. In particular, in a case concerning the constitutionality of certain provisions of the financial legislation enabling the Hellenic Capital Market Commission to delegate audit functions to third parties in view of their specialisation in highly technical matters or the inability of the authority to exercise these functions with its own personnel, the Council of State has held that this form of “outsourcing” is not contrary to the Constitution. In order to make its judgment more convincing, the Council of State did not hesitate to compare the nature of the work entrusted by the Hellenic Capital Market Commission to private individuals with that of the experts appointed by the courts, who, according to the Council of State, also carry out audit functions (see CoS 2825/2014). Perhaps in this decision one can identify the foundations of the future framework for the effective investigation of the acts of regulatory authorities by the courts, which will necessarily include the substantial participation, during the pre-trial stage, of a special body of judicial experts, whether public or private.