

Réponses au questionnaire sur la régulation économique
Responses to the questionnaire on economic regulation

Estonie
Cour suprême

Estonia
Supreme Court

QUESTIONNAIRE ON ECONOMIC SECTORAL REGULATION IN EUROPEAN UNION COUNTRIES

I. Scope and purpose of economic sectoral regulation¹

1. Economic sectoral regulation mainly focuses on sectors submitted to European Union' secondary legislation (transport, energy, postal activities, electronic communication, audiovisual media). Are other sectors subject to such regulation in your country?

There were some difficulties in understanding the substance of this question. However, some examples can be given here. It is not clear whether, e.g., taxi driving is also included in transport sector in the context of this question. There are no specific laws governing this area in the European Union legislation and this sector falls under the scope of the Services Directive. Although some standards of (road) construction materials have been harmonised with construction related directives in the area of road management, the general organisation of road management work is regulated by specific national laws. However, other European Union laws governing specific matters apply here to a certain extent (Services Directive, Public Procurement Directive, etc.).

2. Is the whole set of European Union' secondary legislation for economic sectoral regulation transposed into national law and/or practically implemented?

Yes, the European Union countries have no other choice in this matter. This has been achieved with several specific laws. *For example, as regards communications and postal activities, the European Union secondary legislation for economic sectoral regulation has been transposed into Estonian law with the Electronic Communications Act and Postal Act.*

3. Is economic sectoral regulation only aimed at introducing competition in sectors where there is State monopoly? If not, what are its other purposes (implementing an internal market, defining universal service obligations, consumer protection, etc.)?

No. An additional purpose is the organisation of the internal market, universal service and consumer protection issues, traffic and transport safety, ensuring social conditions, etc. In addition, the goal is to ensure the efficient use of limited resources, such as radio frequencies and allocation of numbers.

4. Is economic sectoral regulation an *ex ante* control, aimed at defining obligations for companies in the regulated sectors *a priori*, or an *ex post* control, aimed at upholding competition provisions in case of infringement ?

Both variants exist. For example, *ex ante* regulation is prevalent in the communications sector, while *ex post* regulation is common in the area of postal services.

5. Has the implementation of an economic sectoral regulation prompted the emergence of competition in the relevant sectors? Did new entrants manage to fit in regulated markets? If not, why?

No new regulations have been adopted in the road transport sector for a long time. The whole road transport sector has been gradually opened up to competition within the past 25 years, including transition to public service contracts in bus transport during the past 15 years. So far, no significant market failures have occurred in the road transport sector (excluding international transport with Russia where transport quotas and cabotage limits apply to member states' transport market under EU legislation), which means that a reasonable competitive environment exists for EU countries in Estonia in internal as well as international transport. In the rail sector, the EU transport market is also legally opened up to competition, but no new entrants have come to Estonia, primarily due to the small scale of the Estonian rail market. The dependence of international rail freight transport services on administrative restrictions imposed by Russia (discriminating tariffs, Estonia bound traffic schedule restrictions, etc.) also hinders the entry of new carriers. Communications and postal services sectors are also open to competition. The electricity market was opened in 2012.

¹ Answers to questions presented in parts I and II of the questionnaire have been prepared in cooperation with the Ministry of Economic Affairs and Communications of the Republic of Estonia.

6. Has the implementation of an economic sectoral regulation directly or indirectly lead to the total or partial privatisation of publicly owned companies?

We can speak about privatisation in Estonian society and legal order primarily in connection with the developments that occurred after the restoration of Estonian independence (from 1991). In order to ensure the transition to a market economy and to create conditions conducive to a market economy, the Estonian state was forced to privatise almost all publicly owned transport and road construction organisations. Currently, the state has a (majority) shareholding only in some companies that offer an important public service or provide a market balancing effect in addition to earning an income for the owner.

Our rail sector offers a different example. Specific restrictions transposed to national legislation from the EU law did not allow the management of public railway to meet the expectations of a private operator. Due to the resulting market failures, the state was forced to buy back the previously privatised railway some years later.

7. Which economic sectors would you like to address more specifically in terms of regulation?

None at the moment.

II. Organisation of economic sectoral regulation

8. Is economic sectoral regulation implemented by one or several independent authorities? If so, on what grounds was this choice made and how is this independence guaranteed?

This competence is divided between several authorities. The relevant authorities that deal with the issues of communications are the Technical Surveillance Authority and the Competition Authority (a draft act whereby the corresponding competence of the Competition Authority will be entirely transferred to the Technical Surveillance Authority in the future, has passed the first reading in the parliament). Consumer related issues are the responsibility of the Consumer Protection Board. The Data Protection Inspectorate addresses data protection issues. Consumer protection and data protection are horizontal topics; therefore, separate institutions deal with these issues. The duties of the Competition Authority include addressing the same issues concerning postal services and the energy market.

As for ensuring independence, it must be said that competent authorities are financed from the state budget. The head of an authority decides how the budget will be used. It is possible to contest in court the decisions of and precepts issued by the authorities.

MTÜ Eesti Rahvusvaheliste Autovedajate Assotsiatsioon (NGO) issues documents required to operate in the road transport market, which means that sectoral economic regulation is partially implemented by an institution independent from the government. The primary goal of this arrangement is economic efficiency (for the governmental authorities as well as the companies engaged in this sector) and faster servicing of companies involved in this sector. Independence is ensured via a contract under public law that is made between a governmental authority and an independent authority, establishing the specific terms and conditions for performing the particular activity, and via the governmental authority's supervision over the fulfilment of obligations set down in the contract.

9. Are these authorities independent of the regulated economic sectors? If so, how is this independence guaranteed?

See the answer to question 8.

10. Do these authorities have a regulatory power? If so, is it a general regulatory power for the sectors concerned or a narrower regulatory power limited to certain specific aspects of regulation?

The power to adopt legislation of general application has been given to the parliament (acts) and the government and ministers (regulations) by the constitution and the Government of the Republic Act. The boards and inspectorates that organise sectorial activities and exercise supervision over the respective sectors do not have the power to adopt legislation of general application.

11. Do these authorities take part in drafting the relevant legislation for regulated sectors, through notice procedures for instance?

Yes, they are involved in the drafting process of relevant legislation.

12. Do these authorities have a sanctioning power toward companies of the regulated sectors? If so, what kind of sanctions can they adopt and under which procedure? Do these procedures guarantee compliance with provisions of article 6 § 1 of the CPHRFF?

Yes, they are competent to issue precepts and adopt decisions, which can be contested in court. The rules of procedure depend on the type of proceedings, i.e. whether it is an administrative procedure (supervision) or an offence procedure. Offence procedures are regulated by the Code of Criminal Procedure and the Code of Misdemeanour Procedure and the corresponding necessary elements of offences are specified in the Penal Code and in specific sectorial acts. Administrative proceedings are conducted pursuant to the Administrative Procedure Act and specific rules of procedure established in specific sectorial acts. By contesting in court the decisions adopted and precepts issued by administrative bodies, it is possible to get legal protection in case of breach of rules of procedure (including unreasonable time of proceedings in administrative proceedings, unduly burdensome proceedings, abuse of discretion etc.).

13. Is every economic sector regulated by a specific authority, or are there some authorities exercising their powers in several sectors?

Some administrative bodies exercise their powers in several sectors and in some sectors, supervision may be exercised by different authorities in accordance with their competence granted by law.

For example, the Technical Surveillance Authority determines *ex ante* the fee for use of infrastructure and capacity in rail sector, but it also exercises state supervision over safety. At the same time, the Competition Authority is the market regulator in the rail sector (issues activity permits, deals with complaints submitted by railway undertakings etc.), but also exercises supervision over competition issues.

14. How are economic sectoral regulatory authorities' competences articulated with those, when appropriate, of a transverse authority in charge of assessing compliance to competition law?

In case of a possible conflict between the horizontal application of competition law and the vertical application of sectoral regulation, it must be taken into consideration that the relationship between sectoral acts and the Competition Act is one between a specific act and a general act and the principle of *lex specialis derogat legi generali* shall be applied to this relationship.

The Supreme Court has also emphasised this principle in its practice and has found that in case of discrepancies between the provisions of the Competition Act and a specific act, the provisions of the specific act shall be applied. The Competition Act can be applied to the activity of undertakings to which the regulation specified in the specific act does not extend.

To avoid conflicting solutions when decisions are adopted by authorities exercising supervision over competition and when decisions are made pursuant to sectorial regulation, relevant provisions have been added to some specific sectoral acts (e.g., electronic communications legislation). For sure, cooperation between bodies exercising supervision helps to avoid conflicting decisions.

III. Judicial review of economic sectoral regulatory authorities' decisions

15. Are all economic sectoral regulatory authorities' decisions subject to judicial review? If not, which decisions are not subject to such checks and why?

The first principle regarding the competence of administrative courts is to ensure efficient and complete control over the administrative activity of executive power. The competence of administrative courts is not set down by a list of court duties, but a general clause that covers any disputes in public law unless the law provides an exemption. Administrative courts are competent to adjudicate disputes in public law relationships unless the law provides a different procedure for determining such disputes (Code of Administrative Court Procedure §4).

Furthermore, administrative court proceedings start when an action is brought in the court which in accordance with paragraph 2 (clauses 1-6) of §37 of the Code of Administrative Court Procedure may seek the following: 1) the full or partial annulment of the administrative act (annulment action); 2) the issue or an administrative act or the taking of an administrative measure (mandatory action); 3) a prohibition to

issue a certain administrative act or take a certain administrative measure (prohibition action); 4) compensation for harm caused in a public law relationship (compensation action); 5) elimination of unlawful consequences of an administrative act or measure (reparation action); 6) a declaration of nullity of an administrative act, a declaration of unlawfulness of an administrative act or measure, or a declaration ascertaining other facts of material importance in a public law relationship (declaratory action).

For example, decisions made under supervision proceedings initiated by the Competition Authority, which is the body responsible for ensuring that competition rules are adhered to, can be reviewed in the administrative court.

16. Which system of jurisdiction is competent to verify these decisions? When relevant, is the same system of jurisdiction competent to control the decisions of the authority in charge of assessing compliance to competition law?

Supervision over competition in Estonia is characterised by many types of proceedings, i.e., violations of competition rules are dealt with in criminal proceedings (forbidden agreements), misdemeanour proceedings (abuse of a dominant position and prohibited concentration) and administrative proceedings. It follows that jurisdiction depends on the type of offence or proceedings. Decisions adopted under supervision proceedings initiated by the Competition Authority can be reviewed in the administrative court (see answer to question 14).

The main duties of the Competition Division, a unit of the Competition Authority, include, *inter alia*, controlling the concentration of undertakings in all economic sectors and taking part in resolving complaints submitted against administrative acts and decisions made during misdemeanour proceedings.

17. Which kind of legal recourse is open against these decisions? What are the relevant legal proceedings in this matter?

This answer focuses on the general options for reviewing decisions made by a body responsible for ensuring adherence to competition rules in the administrative court. In Estonia, administrative courts are separate judicial bodies solely at first level (in the second and third instance, the organisational structure of the administrative court system is connected to the general court system and administrative law chambers have been established in circuit courts and the Supreme Court). Consequently, the competence of judicial bodies of different instances that conduct administrative proceedings is the following: administrative courts adjudicate matters at the first level, circuit courts are the instance of appeal and the Supreme Court is the instance of cassation. All court cases, regardless of the position of the body that issued the administrative act, shall be first heard by a court of first instance (Supreme Court *en banc* decision no. 3-4-1-7-08 of 8 June 2009, p. 32). The resolution of the court of first instance can be contested in a circuit court and the resolution of a circuit court can be contested in the Supreme Court.

Court cases are adjudicated collegially, i.e., by a panel comprising three members, in the courts of appeal and cassation. Adjudication of cases by an extended panel is also possible; the Supreme Court *en banc* has the largest number of members: court cases are adjudicated with 19 justices of the Supreme Court attending. Depending on the complexity of the case, complaints may be reviewed collegially (by a panel of three judges) already in the administrative court as a court of first instance.

As a rule, a complaint is heard at an open oral hearing in a court of first instance and in a court of appeal. After preliminary proceedings, the matter is heard in the court session or, in the cases provided in the law, in written proceedings, in simplified proceedings or in conciliation proceedings (Code of Administrative Court Procedure §126 (1)). Written proceedings and simplified proceedings can be deemed to be separate formats of hearing a matter. Although the principle of open and oral hearing of a matter may not be strictly followed during these proceedings, the court must ensure the procedural rights of the participants during the proceedings, primarily the right to be heard. During conciliation proceedings, the administrative proceedings are suspended, because conciliation proceedings are not deemed to be court proceedings in the conventional sense. In conciliation proceedings, the court does not administer justice but takes part in the resolution of the matter as a conciliator. The proceedings are still conducted in court.

According to § 71 (1) of the Administrative Procedure Act, a person who finds that his or her rights are violated or his or her freedoms are restricted by an administrative act or in the course of administrative proceedings may file a challenge. A challenge can be filed against administrative acts or administrative proceedings of boards and inspectorates, but administrative acts and measures of ministries can be challenged directly in an administrative court (Administrative Procedure Act §71 (2)). In sectors covered by

this questionnaire mandatory preliminary proceedings are not prescribed, except for in cases that fall within the scope of application of the Public Procurement Act.

18. Which control does the judge exercise on these decisions? Does he monitor the formal requirements, legal proceedings and/or reasons for these decisions? For which kind of decisions does he have limited control? In contrast, for which kind of decisions does he exercise thorough control?

According to the current Code of Administrative Court Procedure (§5 (1)), an administrative court may 1) annul the administrative act (a decision of an administrative body) in part or in full; 2) order an administrative body to make the required administrative act (or take the administrative measure); 3) prohibit the administrative body to make an administrative act (or take an administrative measure); 4) issue an enforcement order requiring elimination of the consequence of the administrative act; 5) ascertain that the administrative act is unlawful or null and void; 6) award compensation for harm caused in a public law relationship.

The court takes a position regarding the format of the act (adherence to formal and procedural requirements) as well as its substantive lawfulness. The court also assesses whether the obligation to provide justification has been fulfilled. Even a violation of procedural or formal requirements may lead to the annulment of an administrative act if such violations affected the decision made by the administrative body.

According to the established court practice, judicial control is limited in case of decisions that leave an extensive margin of discretion. In such cases, the court reviews only the following: existence of procedural and formal errors that may have influenced the substantive decision making; whether the discretionary decision is in compliance with the general principles of legal norms and law; whether the decision has sufficient legal grounds; whether the administrative body has adhered to the margins of discretion; existence of other substantive discretionary errors. The courts do not check the economic or political purposefulness of an administrative act.

Control exercised by the administrative court is primarily a follow-up control. Only in exceptional cases, it is allowed to go to an administrative court to prevent a violation of rights. A prohibition action may only be filed if there is a reason to believe that the administrative body is going to issue an administrative act or take an administrative measure which will infringe upon the person's rights and those rights cannot be effectively protected by subsequently contesting the administrative act or measure.

19. While exercising his power of judicial review, how does the judge keep himself informed (appointment of experts, specialised and contradictory investigation, resort to universities, international sources consultation, etc.)?

An administrative court may use an expert assessment as evidence. Rules of civil procedure govern the appointment of an expert and his/her actions even in the administrative court. An expert assessment is primarily performed by a forensic expert that works in a state forensic institution or some other expert, officially certified expert or some other person having special knowledge appointed by court. The court may appoint as expert a person that has the requisite knowledge and experience to provide an expert assessment. In appointing an expert, the court will take into account the opinions of the participants of the proceedings. The work of experts is remunerated.

The court may demand information necessary for adjudicating the matter from a participant of the proceedings, as well as from an administrative authority which is not a participant of the proceedings, from the employer of a participant of the proceedings, from an insurance company or a credit institution, if the administrative authority or other person can be assumed to possess such information (Code of Administrative Court Procedure §58). The court may impose upon administrative bodies the obligation to provide professional assistance in gathering information and evidence (Code of Administrative Court Procedure §57).

The court may also use reliable information from sources outside the proceedings (e.g., surveys, reference books, specialised literature) that the court deems generally known and that does not need to be proved separately (Code of Administrative Court Procedure § 60 (1)).

20. Which role does the administrative Supreme Court take toward these decisions? What are the major decisions of supreme administrative justice in economic sectoral regulation matters

The Supreme Court as the court of highest instance in the administrative procedure system in Estonia reviews appeals in cassation filed on decisions of courts of appeal (circuit courts). It also reviews petitions

for review on decisions in administrative matters that have become into force. Based on the appeal in cassation, the Supreme Court checks whether the norms of substantive law have been applied correctly by the circuit court in its decisions and whether it had adhered to the norms of procedural law when adopting the decision. The court reviews the appeal in cassation on a circuit court decision only in the part that has been contested. When satisfying an appeal in cassation, the Supreme Court may annul the decision of the circuit court in full or in part and send the annulled part for a second hearing to the circuit court or administrative court; or annul the decision of the circuit court and leave the decision of the administrative court in force; or make a new decision without sending the matter for a new hearing (if it is not necessary to collect additional evidence or change the assessment made in appeal; or change the justification of the circuit court or administrative court, leaving the decision unchanged).

The Supreme Court as well as the courts of lower instances may in case of doubt of constitutionality of the applied norm initiate a procedure for reviewing the constitutionality of the legal norm.

The case-law of the Supreme Court allows to give the following more significant examples. The Supreme Court has adjudicated the relationship between a specific and general provision when it determined the competence of authorities that exercise supervision over competition (see also the answer to question no. 14)². Concerning sectoral pricing, the Supreme Court has found that an undertaking in a dominant position should not use unfair pricing practices even if a specific sectoral regulation is applied to the undertaking and specific rules have been adopted to govern its pricing practices³. Even if sectoral legislation imposes rules of sectoral pricing on some types of services, they should not be in conflict with competition law. Unfair pricing cannot be justified by specific sectoral rules or decisions of administrative bodies⁴. The Administrative Law Chamber of the Supreme Court has explained the competence of the Competition Authority and its powers in resolving disputes between the electricity market participants and in exercising supervision over them⁵. The Supreme Court has also analysed the lawfulness of the supervision proceedings of the Competition Authority when exercising its right of discretion and gathering and assessing evidence⁶. Currently (in February 2014), a dispute is being reviewed by the Supreme Court over whether the Ministry of Economic Affairs and Communications had the right to award a direct contract to a company under the control of the state for the organisation of carriage of passengers on railway or a public procurement should have been carried out (administrative case no 3-3-1-2-14)⁷.

² The Administrative Law Chamber of the Supreme Court judgment No. 3-3-1-66-02 of 18 December 2002

³ The Civil Chamber of the Supreme Court judgement No. 3-2-1-125-10 of 1 February 2011

⁴ The Civil Chamber of the Supreme Court judgement No. 3-2-1-106-13 of 30 October 2013

⁵ The Administrative Law Chamber of the Supreme Court judgment No. 3-3-1-43-12 of 19 November 2012, no. 3-3-1-74-12 of 16 May 2013

⁶ The Administrative Law Chamber of the Supreme Court judgment No. 3-3-1-29-13 of 23 October 2013

⁷ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 provides the possibility of directly awarding public service contracts.