

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

Lituanie

Cour administrative suprême

Lithuania

Supreme administrative Court



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QUESTIONNAIRE ON ECONOMIC SECTORAL REGULATION IN EUROPEAN UNION COUNTRIES

I. Scope and purpose of economic sectoral regulation

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

The sector regulation in Lithuania reflects the sectors exposed in the European Union's legislation. However, there are peculiarities concerning the structure and the importance of particular sectors. The relevancy of specific economic activities varies in Lithuania. It is presupposed by social circumstances, political attitude and economic status of various markets. For instance, besides the traditional areas of electricity, gas, water and renewable energy, a special attention to the heating as an essential economic activity of the energy sector is paid. Therefore, the unique approach to the heating shapes activities of the regulatory authority in different ways and shifts the way legal framework is structured in the related sectors such as gas, water and renewable energy. Another example might be the content of regulations in the transport sector. Although there is a conventional way to distinguish inland water and maritime regulations, the focus in Lithuania is on maritime activities rather than inland shipping simply due to the low usage of inland water capabilities.

Most of economic sectors are influenced by regulations. The financial sector is one of the fundamental examples. The trade sector is also regulated in various ways. For instance, the food products markets are regulated by the regulatory authority (i.e. the State Food and Veterinary Service) in terms of the requirements to the food safety and proper labelling. Those regulatory activities are primarily aimed at the consumers' welfare. Another example is a strong regulation and a relatively active litigation in the tobacco and alcohol markets related fields due to the intense and sometimes quite ambiguous regulations which try to balance the freedom of economic activity and healthcare concerns. Therefore, although the aforementioned sectors also exist in Lithuania, the economic sector regulations might be found in all the relevant economic sectors such as finance, trade, services, mining activities and others.

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

According to the currently available data, Lithuania has transposed and implemented the relevant law of the European Union.

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.)?

One of the fundamental tasks of the most of sector regulations was the market liberalisation. There are plenty examples of state monopolies in Lithuania in the early 90's. Currently, the situation is different. Among the most prominent examples of state monopolies are the former national provider of public fixed telephone services; the national state owned gas company which owned the entire chain of gas services up to the distribution to final consumers in the past; the former state owned postal service provider; the national railways company which still has a monopoly (both natural and legal) in the area of railroads infrastructure. Even though some of the companies are still state owned (e.g. national railways company), the sectoral regulation has determined the opening of the majority of markets for private persons and induced competition. There are also plenty of other reasons to regulate particular economic sectors. First of all, one of the fundamental concerns has always been the consumer protection. This aim was implemented in many market regulations, for instance, in electronic communications sector by enabling easier switch between telephone services operators. Another concern has been a need to ensure products / service quality. There were particular quality requirements introduced in many sectoral regulations. Moreover, the inability of the general type of competition law rules to deal with the dynamic technology driven sectors (primarily, electronic communications) indicated the need to introduce more detailed, sector specific primarily *ex ante* type of markets regulations. In addition, there was always a need to define universal service obligations (e.g. in the sectors of electronic communications, postal services).

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 ?

The economic sectoral regulation is primarily aimed at *ex ante* control. However, in most of cases the regulation authorities keep the power to react to abuses *ex post*. For instance, the State Energy Inspectorate is the institution which controls whether the energy suppliers are following the requirements provided in law. Therefore, both *ex ante* and *ex post* type of provisions are present. Nevertheless, in case of safeguarding the competition, the competition authority is the most important institution exercising the power. The discretion of specific regulatory bodies to act *ex post* is strictly limited in law, leaving the general *ex post* control to the competition authority, i.e. the Competition Council of Lithuania.

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?

There are different examples regarding the factual change in various markets. For instance, the electricity market (in the narrow sense encompassing buying and selling electricity to the final consumer) is successfully emerging from the dissolution of the only electricity company and separation production, transmission and distribution activities in 2010 to the introduction of power exchange market in Lithuania with independent suppliers in the last few years. However, some fields still lack of competition either due to the natural monopoly (e.g. the transmission of electricity) or the procedure of separation of functions is still in process (e.g. the national railways company is still the only operator of the railroads infrastructure).

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

In many cases the introduction of sectoral regulation was related to the dissolution of big publicly owned companies. It happened in gas, some of transport related sectors, sector of electronic communications etc. However, in some markets the liberalisation was not followed by the privatisation of a state owned entity, e.g., railroads are still mostly occupied by the state owned national railways company, the biggest provider of postal services is still a state owned postal company, most of important maritime companies (first of all, the managing company of the biggest port in Lithuania) are state owned and operated. The main public reasons of keeping particular companies in the hands of the state are national security and public interest.

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

One of the most difficult and politically sensitive sectors is energy. Lithuania is still very much dependant on one supplier in many energy related markets. Mostly, the solely importing entity circumvents the competition due to its natural monopoly status or due to the lack of infrastructure enabling the competition. This is still true in the markets primarily related to the gas distribution, such as heating. For instance, there are regular examples of the regulatory agency struggling to fix the heating prices which both satisfies heating providers and final consumers or (and) the Government. Therefore, the regulatory institution does not only need to find the balance between opposite interests but participate as a party in a variety of judicial cases related to the requirements for the activities in the heating distribution market and prices of energy.

In addition, other quite complicated fields are tobacco and alcohol related markets. These are the fields where the two fundamental interests compete – a freedom of economic activities and a healthcare. There are many regulations which attempt to balance both interests and become too vague to be strictly implemented. For instance, the advertising of alcohol is restricted but the terms of restriction and individual implementation of regulations are regularly disputed in administrative courts.

Furthermore, the economic activities related to waste management needs to be highlighted. As waste collection is an economic activity mainly exercised by private entities, being highly sensitive in terms of pricing, the municipalities are the institutions which regulate the way the pricing is enforced. Therefore, there are many cases when the pricing is ascertained as too favourable to private contractors.

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?

There are dozens independent national regulatory authorities which exercise power in various fields. Some of them act in a specific field having a comparatively narrow competence to regulate and enforce regulations (e.g. the State Energy Inspectorate). Others have a broad, comprehensive jurisdiction in the sector (e.g. the National Commission for Energy Control and Prices). The idea of the current regulatory system is to establish separate independent regulatory bodies and leave the governing of particular economic sectors to the expertise lead agents who are driven by rather public interest than political or ideological standpoints.

The most important and powerful regulatory agencies are those: the State Road Transport Inspectorate (transport sector, competence regarding the road traffic and transportation), the Lithuanian Maritime Safety Administration (transport sector, competence regarding the water related transport), the Civil Aviation Administration (transport sector, competence related to air transport), the National Commission for Energy Control and Prices (energy sector, competence related to the most of energy regulations), the Communications Regulatory Authority (electronic communications and postal activities sectors, competence related to the most of sectors regulations), The Radio and Television Commission (audiovisual media sector, competence related to the broadcasting and some other audiovisual media sector regulations).

The choice of the competence of particular regulatory agencies is mostly based on the ability to unify specific markets as belonging to the homogenous regulatory field. For instance, the relatively broad field of electronic communications has specific unifying elements (such as the issues of connections between devices of communication) which determine the choice of the regulatory agency which deal with such type of questions.

The independence of institutions is not absolute and varies. The chair and members of the management body are usually appointed by the President or the Parliament. The institutions which have less power and competence might be formed by particular ministries or the Government. Although the National Commission for Energy Control and Prices is the influential agency regarding the regulatory policy in the energy sector, it depends on the state budget and belongs to the Government according to the Commission regulations. Nevertheless, the part of the budget allocations is based on the earnings of the Commission from private entities as it is prescribed by the law. In theory, the accountability of agencies is not related to the status of managing officers. However, there might be some concerns in practice. The institutions usually have their own budget. However, they are mostly dependant on the allocations from the state budget. The criteria of activities of the agencies and the appointment of managing officers are based on professional evaluation. Moreover, the status of personnel of regulatory agencies is equalised to the status of civil servants.

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

Having regard to the idea of independence of the regulatory authorities, one should assume the independence of them from private entities acting in regulated markets. The decisions of the regulatory agencies need to be based on neutral, professional knowledge based criteria. Principles of independence and impartiality usually are indicated in legislations or rules dealing with the activities of particular institutions. The activities of regulatory agencies are exercised in accordance to strict procedures which are transparent and limiting abilities to affect officials for

external agents. The discretion of regulatory agencies in most cases is limited by the statutory law. The decisions of regulatory authorities are published immediately and can be subject to full jurisdiction review before the administrative courts, if one wishes to appeal the decision. In many cases the session (hearings) of regulatory institutions are public.

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?

There is a difference between various institutions considering their regulatory power. Some of the regulatory agencies have comparably strong regulatory powers. For instance, the National Commission for Energy Control and Prices is empowered to adopt methodologies of energy price fixing, it regulates the requirements for the energy supply related activities which are monitored by the state, it also fixes reasonable costs of energy supply related activities etc. Still regulatory powers of this Commission are limited, because basic principles and rules of particular sector are and should be (according to the constitutional principles of Lithuania) established by the laws adopted by the Parliament.

Some institutions have narrow powers within the strict limits of the existing regulation. For instance, the Lithuanian Maritime Safety Administration has powers related to the certain aspects of the specific regulations and acts more like an issuing and monitoring institution. Although it has a right to participate in the adopting of policies related to maritime and inland water activities, its determining power concerning sectoral regulations is limited.

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

In most of cases the regulatory bodies are entitled to participate in the drafting of relevant legislations. Though the role they play in this process varies. Some institutions have an explicitly provided right to participate in the drafting quite actively by having a right to initiate the drafting of the law. For instance, the National Commission for Energy Control and Prices has a right to propose principles of energy price fixing to the Government. The State Road Transport Inspectorate has an explicit function entrenched in the regulations of its activities to draft legislations, rulings and other legal documents in the field of transportation.

Some institutions have limited rights which merely consist of a right to submit an opinion or concerns regarding the proposed legislations. For instance, the State Energy Inspectorate has a right to submit an opinion regarding the draft legislation and rulings as well as the right to participate in the drafting process with no clearly defined determining power concerning the outcome of a procedure.

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?

The sanctioning power of regulatory authorities varies. Some of them have strong and wide range entitlements regarding the sanctioning; some of them have only limited powers. The most prevalent sanction of regulatory agencies is the fine. For instance, the State Road Transport Inspectorate is capable of issuing the fine of up to 800 euros for a variety of infringements from

not following the formal requirements of transportation of passengers to the unwillingness to pay the vehicle owner tax.

Another common instrument to enforce the regulations is a right to impose a duty. For instance, the State Energy Inspectorate has a right to impose a duty for private persons to fulfil the requirements concerning the energy related legislations. In many occasions the imposed duties consist of the detailed obligation to act in a specific way rather than abstract request to follow the legal requirements.

The regulatory bodies have a right to temporally limit specific activities if there is a breach of law, the risk of it might be foreseen or other risks appear and there is a public interest to act immediately. For instance, the Lithuanian Maritime Safety Administration has a right to restrict the maritime activities in the territory waters of Lithuania. The Civil Aviation Administration has a right to temporally revoke permits for regular and charter flights operations. Some authorities can permanently revoke required permissions or licences for specific activities, if there is a serious breach of obligations, which is not remedied within the prescribed time limit.

Noteworthy, that the sanctioning of the regulatory agencies is regulated by either the Code of Administrative Offences or the specific legislations. In both cases private persons maintain a right to a fair trial in administrative courts, which have power of full jurisdiction review. If the sanctioning is regulated by the separate law (not the Code of Administrative Offences), there is sometimes an optional settlement procedure. Some laws provide that before applying to the court an applicant must try to resolve certain disputes by lodging an application before respective pre-trial institution. In most cases the procedure of sanctioning consists of specific procedural steps which include a right to the hearing and settlement before the sanction is adopted.

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

In most cases the regulatory authorities act in a particular sector or part of it. The scope of their power varies. The competence of the regulatory authority might encompass only specific issues of the sector (such as the State Energy Inspectorate) or it might have a broad competence regarding a variety of sector related issues (such as the Communications Regulatory Authority). However, there are examples when the competence of one regulatory body might be questioned having regard to the broader context of its functions. For instance, the National Commission for Energy Control and Prices is primarily the institution which deals with energy related issues (water regulations and prices, gas, renewable energy, heating, electricity, waste management). However, it has also particular functions in the transport sector, e.g. related to railroads and inland shipping regulations.

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 general, the regulatory bodies have specifically articulated functions which consist of duties to regulate the market *ex ante* and specific issues regulated *ex post*. The competition authority (i.e. the Competition Council of Lithuania) is observing the market *ex post*. It has a broad general competence to monitor the compliance to competition law requirements. Oppositely, the regulatory bodies normally have detailed duties to regulate *ex post* which mostly comprise of monitoring the way private persons engage in *ex ante* regulated activities. For instance, the National Commission for Energy Control and Prices approves heating prices and monitors the compliance of private suppliers to them.

However, there are examples which indicate that a distinction between the general compliance to competition law and the specific compliance to regulations is not clear enough. For instance, the Supreme Administrative Court of Lithuania in the case No. A⁸⁵⁸-1647/2012 of June 7, 2012 has been dealing with the conflict of competences between the Competition Council and the Communications Regulatory Authority. The subject-matter was the fact that activities and the sanctioning of the Communications Regulatory Authority were based on relatively general implications regarding the protection of competition which, according to the party involved, is under the jurisdiction of Competition Council. The court has confirmed that the Communications Regulatory Authority maintains a partial discretion to engage in the *ex post* monitoring if it is exercised according to the law and conforms to the sector specific principles and regulations.

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?

As a general rule, all economic sectoral regulatory authorities' decisions are subject to judicial review. However, in order to be assessed by the court, decisions of sectoral regulatory authorities need to fulfil particular requirements. First of all, they need to be decisions, i.e. the regulatory decisions which have legal consequences for the parties involved. Secondly, such type of regulatory decisions does not include a variety of highly discretionary rulings such as opinions, interpretive documents, guidelines, recommendations or documents which might be considered as soft law. Those might be used in a court as evidence. However, they do not determine legal consequences for any of persons.

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?

The regulatory decisions which create legal consequences for the parties involved might be reviewed in administrative courts. The same administrative courts review questions related to the general compliance to competition law requirements, i.e. the decisions of the Competition Council.

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

An appeal against regulatory decisions needs to satisfy particular requirements. According to Article 5 of the Law on Administrative Proceedings, every interested person shall be entitled to apply to the court, in the manner prescribed by law, for the protection of their infringed or contested right or interest protected under law. Every applicant who challenges a regulatory decision has to demonstrate a particular interest in the annulment of this act. However, there is a distinction between admissibility conditions and conditions for satisfying a claim. For an action to be admitted for adjudication in an administrative court there is no need for claimant to prove with great certainty that his rights or interests have been infringed. The issue whether the rights or interests of an applicant have been violated is to be dealt in later stages of particular proceedings, i.e. when examining the case on its substance. The interest needs to be individual as

only in strictly indicated cases the collective interest is a legitimate basis to hear the question in a court. The court shall accept a petition for the protection of state or other public interests lodged if an applicant is empowered to protect those interests before the courts by respective law (e.g. the prosecutor).

The relevant procedure is the primary determination of admissibility of a claim executed by the court of first instance before the case continues to the preparatory stage (exchange of written statements, collection of evidences) and adjudication procedure (assessment of evidences and arguments of the parties). The decisions of the court stating the claim is inadmissible or unfounded might be appealed.

The most common remedy sought before administrative courts are annulment of the decision. A party concerned can also file a claim for damages inflicted by the unlawful decision of the authority.

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?

The judge exercise control regarding both the formal requirements and the merits of a case. She evaluates the regulatory decision in the light of the procedural requirements, analyses whether it is reasoned enough, examines the factual premises of the decision.

The judge does not have a limited control on any of decisions. However, it is worthy to note that, according to the Law on Administrative Proceedings, judges are limited to assess the economic and political intent of decisions. Therefore, the regulatory bodies usually maintain a discretion regarding the complex economic evaluation and the political choices. The court is capable to annul the decision due to the deviations from formal or procedural requirements. Furthermore, the court is analysing whether the facts are accurately stated, whether there has been any manifest error of appraisal or a misuse of powers and whether the regulatory agency provided all the relevant reasons in the decision.

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.)?

The judges are often required to give their judgement on the circumstances of specific technical, medical or other scientific kind. However, they may refer to expertises. The Law on Administrative Proceedings provides that if questions arise in the administrative case which requires special knowledge in the sphere of science, art, technology and crafts, the judge shall appoint an expert. It is a prerogative of the judge to establish the task for experts and the subject matter of expertise. Therefore, the questions shall be finally determined by the court. The expert's opinion is not binding on the court and it is assessed according to the general rules of evidence. However, the court must provide good arguments for its disagreement with the expert's opinion.

In addition to this, the parties also tend to submit their own surveys regarding the subject-matter of a case during the proceedings. Noteworthy, the basic principle is that all evidences have equal legal value and based on careful, thorough and objective evaluation of all the evidences submitted, the judge is free to make such findings from them that the judge finds to be just, reasonable and well-founded.

There is no common practice to refer to the universities in case expertise is needed. The judge is entitled to analyse any evidence provided. Moreover, she has a right to ask the opinion of other institutions and persons dealing with the subject-matter. It might include a formalised procedure for a preliminary ruling in the Court of Justice of the European Union as well as less formalised requests to various institutions asking them to provide their opinion regarding the issue of the case.

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?

Although the Supreme Administrative Court of Lithuania is a court of appeal in administrative cases, according to the Law on Administrative Proceedings, it is a merit court which has a right to assess and rule on both questions of fact and law. Therefore, it is capable to rule on a substance of a case if there is enough data provided. It can return the case to the court of first instance in case there is a substantial need for further or substantially different type data / evidence collection and analysis. If the Supreme Administrative Court (as well as administrative courts of first instance) finds an appealed decision of the regulatory authority to be unlawful or unreasoned, it shall usually annul the decision. It is not a task of administrative courts to act as or instead of an administrative authority, therefore, administrative courts have rather limited powers to change, modify or rectify administrative decisions.

There are several recent important decisions on matters of economic sectoral regulations. One of them is the judgment No. A¹⁴³-2908/2012 of December 11, 2012. The issue of the case was the vagueness of the heating sector regulation. The case arose due to the inability of the heating provider “Vilniaus energija” to recoup the investments into heating facilities through the price of heating. The question was politically sensitive as heating prices is the issue which is important for many members of the society and the Government. On the other hand, the heating provider has a right to recoup reasonable investments through the price of heating which is fixed by the National Commission for Energy Control and Prices. The Supreme Administrative Court has ruled that the obligation to fix the new methodology of heating price calculation needs to be handled by the Government, the institution maintaining the highest level of competence regarding this question according to the law.

Another interesting example is the judgment No. A¹⁴³-2834/2013 of December 23, 2013. This case arose due to the modification of regulations in the solar panels market. The claimant was disputing the new regulation according to which the fixed price for the energy produced in the solar plant was reduced in comparison to the previous price which had been set in order to induce persons to build solar plants few years ago. The Supreme Administrative Court has stated that the claimant did not prove that there was a breach of a legitimate interest in the present case and it is a part of natural risks of every entrepreneur that price related regulations might be modified. Still the court pointed out that changes to the regulation should be proportionate, adequate to the objective sought and cannot refute essence of the acquired rights.

There were also important cases regarding the alcohol and tobacco related markets regulations. For instance, the Supreme Administrative Court has been dealing with the issue of electronic cigarettes in the case No. A⁸⁵⁸-1131/2011 of April 26, 2011. The issue was related to the classification of electronic cigarettes, i.e. whether they might be identified as a specific type of the tobacco product or not. The outcome of the case would have determined whether the requirements for the tobacco products are also applied for electronic cigarettes. The alternative option was the classification of electronic cigarettes as a good imitating cigarettes and tobacco. The Court has equalised electronic cigarettes to the regular tobacco products, which has lead to the result that electronic cigarettes can be sold in Lithuania. In case electronic cigarette is

considered as a good imitating tobacco product, it would be forbidden to sell it on Lithuanian market, because the goods imitating tobacco products are banned in Lithuania.