

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

**Pologne**  
**Cour administrative suprême**

***Poland***  
***Supreme administrative Court***

**Association of the Councils of State and Supreme Administrative Jurisdictions of the  
European Union**

**Questionnaire**

**Poland**

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**QUESTIONNAIRE ON ECONOMIC SECTORAL REGULATION IN EUROPEAN  
UNION COUNTRIES**

**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?**

It is indicated in the Polish legal writings that the **heating sector** - due to the local nature of the district heating network – is submitted to national legislation<sup>2</sup>. The Energy Law of 10 April 1997 (*Journal of Laws of 2012, Item 1059*) stipulates the legal framework for three

network-based energy sub-sectors: electricity, gas and district heating. The President of the

Energy Regulatory Office (**ERO**) regulates the activity of the energy enterprises, including those that act in the sphere of heating sector. The purpose of the heating sector regulation is, *inter alia*, the protection of customers against an unjustified increase of prices and charges for heat. The President of the ERO approves heat tariffs and submits, within 7 days from approval, the approved tariffs for heat for publication in the territorially appropriate Voivodeship Official Journal. In the process of approving heat tariffs, the President of the ERO aims at balancing the interests of the energy enterprise and the customers.

The other example is the **water supply and wastewater management sector**, regulated by the provisions of *the Law of 7 June 2001 on collective water supply and collective wastewater management (Journal of Laws 2006, No. 123, Item 858 with later amendments)*. The regulatory authority of this market is the local - municipal council. Under this sector regulation, permits for collective water supply and collective sewage transportation and disposal are issued. Tariffs and regulations for water supply and sewage disposal for companies rendering services are adopted for each municipality.

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<sup>1</sup> Answers to the questionnaire by Dr hab. Jacek Chlebny, judge of the Supreme Administrative Court of Poland. The views expressed herein are my own and do not necessarily represent those of the Supreme Administrative Court.

<sup>2</sup> A. Walaszek-Pyziół, *Szczególna regulacja działalności przedsiębiorstw w sektorach sieciowych* in R. Hauser et al., *System Prawa Administracyjnego* (2013), vol. 8b, 137.

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

Basically it is totally transposed. However, some problems are posed by the electricity and gas sector. In actions brought by the Commission on 20 December 2012 (**case C- 598/12**) and 31 January 2013 (**case C-55/13**), Poland was declared to have failed to fulfil its obligations under Article 54(1) of *Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC* and to have failed to adopt all the laws, regulations and administrative provisions necessary to comply with Directive 2009/72/EC. As a result of withdrawal by the Commissions above mentioned actions, upon the orders of President of the Court of 22 November 2013 and 18 December 2013, these two cases has been removed from the register.

There are still pending two cases before the Court of Justice of the European Union (CJEU):

- **case C-320/13** (European Commission v Republic of Poland) – the proceedings were initiated by the European Commission on failure to adopt the laws, regulations and administrative provisions necessary to ensure compliance with *Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC*
- **case C-36/14** – (European Commission v Republic of Poland), on applying by Poland a measure which is disproportionate and incompatible with Article 3(2) of *Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC*.

**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.)?**

The economic sectoral regulation is also aimed at ensuring the universal availability of the services through accessibility of the service to all its potential customers, it's affordability and its high quality by determining its specific quality parameters in its provision. This is crucial in telecommunication services and energy, where the poor quality of service leads to consumer service deprivation. Sectorial regulations which guarantee the quality of services, force the subjects operating on the regulated market to ensure an appropriate level of consumer protection. These other purposes are declared in the respective regulations. For example:

- creation of the conditions for sustainable development of the country, energy security, efficient and rational use of fuels and energy, development of competition, counteracting negative consequences of natural monopolies, consideration of natural environment protection requirements and obligations stemming from international agreements and balancing the interests of energy enterprises and fuel and energy customers – Article 1.2 the *Act of 10 April 1997 r. - Energy Law (Journal of Laws of 2012, Item 1059)*.
- assurance of energy security, economical and rational use of fuels and energy, the development of competition, the negative effects of natural monopolies, integrating environmental protection requirements, obligations arising from international agreements and balancing the interests of energy companies and consumers of fuels and energy - *Article 1 of the Law of 7 June 2001 on collective water supply and collective wastewater management (Journal of Laws 2006, No. 123, Item 858 with later amendments)*.
- creating conditions for the development and use of modern telecommunications infrastructure, ensure the governance of the economy numbering, frequencies and orbital resources, provide users with maximum benefit in terms of choice, price and quality of telecommunications services, ensure technological neutrality and ensure that end users who are persons with disabilities access to telecommunications services equivalent level of access enjoyed by other end-users (*Article 1(2) of the Act of 16 June 2004 on the Telecommunications Law /consolidated version of Journal of Law of 2014, Item 243/*).

**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 types are used. Polish regulatory authorities frequently use the instruments affecting the future which largely stemmed from a low level of sustainable competition in regulated markets. In various infrastructure sectors (mainly telecommunications market), due to increasing competition in services, the regulatory authorities increasingly often derogate its previously taken ex ante actions. For example, they impose on the dominant company certain obligations related to ensuring access to the market (not to obstruct the entry), such as the use of undue preference or setting reduced or inflated prices. It can be considered *ex ante* instruments, such as the decisions taken by the President of the Office of Electronic Communications on imposing on a telecommunications undertaking with significant market position in a given retail market the obligations to refrain from: 1) setting excessive prices for services; 2) distorting market entry of other undertakings; 3) limiting competition by fixing prices below the costs of their provision (*art. 46 (2) points 1-3 of the Telecommunications Law*)

**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?**

An answer to this question may be illustrated by examples stemming from the electricity market, telecommunications market and postal services.

The electricity market in Poland operates on two main levels: of the wholesale market (wholesale market) and retail (retail market). Despite the introduction of a number of market mechanisms, these two markets are subject to strong regulation and only in certain areas there is an electricity trading on competitive terms. In the area of regulated retail market distribution companies provide energy supply for consumers and the energy trading takes place according to the tariffs approved by the President of the Energy Regulatory Office. Within this market, however, there is also a competitive area in which different groups of electricity users, according to the schedule (the criterion of annual purchases of electricity) in the coming years were given the right to choose their supplier (TPA - third party access). This did not apply to the selection of the transmission service provider. The smallest end-users (households) were granted that permission in 2007. Currently, the regulatory authority of the electricity market analyzes the moment of the release of electricity prices in the retail market, which continues to be governed by the tariff approved by the President of the ERO.

Telecommunications market in Poland, during the introduction of the first regulations to increase the competitiveness of the market, the market was monopolized by one company. Currently, as a result of effective actions taken by the regulatory authority, there has been a number of active telecom operators operating within a competitive market. This has led to a significant drop in prices for end consumers of telephone and broadband access services. In the opinion of the regulatory authorities, the current situation allows to admit, with respect to each of the relevant markets, that there are no high and non-transitory barriers to entry into that market. It is also a result of anticompetitive activities of its shareholders.

In recent years the competitiveness of the postal services in Poland – resulting from the gradual reduction of the so-called "area reserved for the public operator", was also provided. The opening of the postal market for parcels weighing up to 50g took place however in the last possible date provided for by Directive 2008/6/EC, ie after 31 December 2012. According to the information of the postal market regulatory authority - President of the Office of Electronic Communications, after the full liberalization of the postal services there are 267 subjects holding operator status (on 31 December 2013 - 276 subjects). Universal service obligation has been entrusted for a period of three years to the present dominant company (public operator). After this period, as a result of an open competition announced by the UKE a new operator will be chosen to provide universal service.

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

The introduction of sectorial regulations most often takes place irrespectively of the increasing privatization of enterprises with monopoly infrastructure markets. For example, action taken by the regulatory authority, aiming at the introduction of competition in the telecommunications market, were addressed to already privatized enterprises.

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

It is very difficult to give a firm answer to this question. Nevertheless, it could be argued that the telecommunication market may require more specific regulation in order to provide the users with the maximum benefit in terms of choice, price, and quality of the telecommunication services. The same could be said about the energy and gas market, because it is a very sensitive market for the national security.

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

The following regulatory authorities play the most significant role: President of the Office of Electronic Communications, President of the Energy Regulatory Office, President of the Rail Transportation Office, President of the Civil Aviation Authority. They operate in the defined in law particular areas of services.

The guarantees the independence of sectorial regulators have different characters and could be classified as, for example:

- Institutional - for example, they enjoy status of central public administrative authorities.
- Procedural - supervisory administrative authority (Ministry) has no influence on the individual decision issued by the sectorial regulatory authority. The party of the proceeding is entitled to appeal to a court (civil) or to the administrative court
- Legal – the legal status, structure, competences for operational activities are defined in the special laws adopted by the Parliament. It is also worth mentioning that National Council of Radio and Television has its legal basis for operation in the Constitution (Articles 213 – 215 of Polish Constitution).

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

Authorities of economic sector regulation are the public administrative authorities and act on the basis and within the limits of the law. Their independence is reflected, *inter alia*, by the special positions of their heads: tenure, specific professional requirements for appointments and guarantees against dismissal.

**Examples:**

- the President of the Energy Regulatory Office may be dismissed by the Prime Minister before the end of the term, only if: gross violation of the law; conviction by final judgment for an offense committed intentionally or fiscal offense; ruling a ban on holding managerial positions or function of particular responsibility in the bodies of state; illness which permanently prevents execution of tasks; resignation (Article 21 paragraph 2m of The Energy Law).
- recruitment for the post of the President of the Energy Regulatory Office is conducted by a team appointed by the Head of the Chancellery of the Prime Minister under the authority of the President of the Council of Ministers, and composed of at least 3 people, whose knowledge and experience provides a guarantee to identify the best candidates. In the course of recruitment, the professional experience of the candidate is estimated, the knowledge necessary to perform the tasks of the position for which recruitment is carried out, and managerial competence (Article 21 paragraph 2e)

**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?**

A regulatory power needs always to be clearly visible in law and it is difficult to draw a general conclusion. An illustration of the regulatory power could be considered the competence of the President of the Rail Transportation Office. It cooperates with other relevant bodies of the public administration in matters of prevention of the use of monopolistic practices and it coordinates the functioning of the railway market and the rights of passengers (art. 13. 1 point 7 of the Railway Transport Act).

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

Primarily, the regulatory authorities may signal significant issues to relevant actors during the legislative process in the so called "consultation process" of they are also part.

**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?**

Sectorial regulatory authorities conduct administrative proceeding in line with the Code of Administrative Procedure. They have the power to impose fines if it is provided in the law. The party has the right to participate in the proceedings, in particular the right to be heard. It is secured by the code. The administrative decision taken by the regulatory authority may be challenged before the court. It can be the Court of Competition and Consumer Protection - CCCP (for example, if a decision is taken by the President of Energy Office) or the Administrative Court (if a decision is taken by the President of the Civil Aviation Authority). CCCP examines the matter "*de nouveau*". An administrative court controls the legality of the decision.

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

As a principle, in Poland every economic sector is regulated by a specific authority. It is however worth mentioning that the President of the Energy Regulatory Office (ERO) exercises its powers not only in the field of energy, but also in the field of a district heating.

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

Both regulations (the law on competition and the sectorial regulation law) have not the same objectives. The purpose of competition law is above all the protection of competition and the purpose of the sectorial regulations to create conditions that will enable effective competition.

In Polish legal literature<sup>3</sup> it is indicated that if a law regulating the sector is sufficiently detailed, it could be regarded as a *lex specialis* in relation to the provisions of Competition Act.

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<sup>3</sup> J. Baehr, A. Stawicki, *Rozważania wokół równoległego stosowania prawa konkurencji i instrumentów regulacyjnych* (Considerations about the parallel application of competition law and regulatory instruments), edited by C. Banasiński, *Ochrona konkurencji i konsumentów w Polsce i Unii Europejskiej* (Competition and consumer protection in Poland and the European Union), economic and legal studies, Warsaw (2005), 157 and

Rafał Stankiewicz, *Między ochroną konkurencji a regulacją sektorową: ustrojowe granice rozdzielania obszarów ingerencji państwa w gospodarce* (Between protecting competition and sectoral adjustment: constitutional boundaries separating areas of state intervention in the economy), *Ekonomia i Prawo* (Economics and Law), Volume VIII, No. 1/2012, sec. 165.

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

All decisions of the regulatory authorities are subject to judicial review of administrative or civil courts.

**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?**

Decisions of regulatory character (*eg decisions on finding significant market position; on the imposition, withdrawal, amendment or cancellation of regulatory obligations; on the imposition of penalties; decisions issued in disputes, excluding decisions on a general exclusive frequency license following a tender, an auction or a contest and the decision finding the tender, auction or contest unresolved*) are subject to revision of the civil court - the Court of Competition and Consumer Protection (CCCP). The same court controls also the decisions of the President of the Office of Competition and Consumer Protection, which is a competent authority in matters of competition and consumer protection.

Other decisions of the regulatory authorities, which are not expressly mentioned by the relevant provisions, are subject to review by the Regional Administrative Court in Warsaw with possibility of appeal to the Supreme Administrative Court as the last resort. For example,

- Decisions of the President of the Office of Electronic Communications in defining the amount of payments designed to compensate the operator designated universal service cost (judgment of the Supreme Administrative Court on 5 December 2013 , case. No II GSK 1167/12 )
- Decisions on changes in the offer on access to the telecommunications infrastructure, addressed to other operators than owner of the infrastructure (resolution of the Supreme Administrative Court of 28 September 2009, case No. II GPS 1/09 or judgment of the Supreme Administrative Court of 5 February 2013, case No. II GSK 2107/11 )
- Decisions of the President of the Railway Transport Office concerning the correctness of the calculation by the owner of rail infrastructure charges for access to it (judgment of the Supreme Administrative Court of 26 February 2014, case No. II GSK 1906/12).

It is also worth mentioning that the decisions taken by the President of the Civil Aviation Authority fall exclusively within the jurisdiction of the Regional Administrative Court in Warsaw with a possibility of appeal to the Supreme Administrative Court as the last resort.

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

See an answer to the question no 16 above.

**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 scope of control exercised over an administrative decision is not dependent on the type of decision, but depends whether an appeal goes to a civil or an administrative court. The civil court - Court of Competition and Consumer Protection - applies procedure “*de nouveau*”. The Administrative Court of the first instance exercises judicial control of the lawfulness (procedure and substantive law) of an administrative decision *ex tunc* (with the view of facts and law that were in place at the time an administrative decision is taken).

**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 Competition and Consumer Protection operates under the rules of civil procedure and may admit any evidence *ex proprio motu* or on the party’s request. The judgment of the administrative court is based on the file of the case collected by the regulatory authority and the court does not admit any evidence save for documents.

**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 Administrative Court controls the case within the limits of the cassation and the legal grounds (it can be both procedural and substantive law) included there. It takes *ex officio* into account only the invalidity of the judicial proceedings. The impact of the case law of the Supreme Administrative Court is particularly visible in the area of regulatory action on the market broadcasting.