

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

Roumanie

Haute Cour de Cassation et de Justice

Romania

High Court of Cassation and Justice

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

**Answers to the Questionnaire on behalf of the High Court of Cassation and
Justice of Romania**

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

PRELIMINARY NOTE

This is to highlight that we are not in the capacity to respond to the questions listed under points (I) and (II), below, due to the fact that according to Romanian Constitution as well to relevant applicable laws, the High Court of Cassation and Justice of Romania (HCCJ) has no competences in issuing pieces of legislation, nor any regulation in the economic sectors as mentioned in the questionnaire. This means that we do not have the required expertise to cover the proposed area in the questionnaire and thus, we believe that we should not provide general information related to the proposed topic either, as such exceeds obviously our competences and current activities. Finally, we do not want to present deficient or even incorrect data.

In Romania the whole activity concerning drafting and transposing into national law of the whole set of European Union' secondary legislation for economic sectoral regulation was carried out by the executive bodies, namely by Governmental Agencies and/or by the relevant departments in various ministries, all of these acting definitely under or within the executive power.

A special role in this lawmaking process is played by the Legislative Council which, according to art. 79 of the Constitution, „*is an expert advisory body of the Parliament, which shall give opinions on the draft normative acts, for the purpose of the systematization, unification and co-ordination of the whole legislation*”. At the same time, the Legislative Council keeps also the official record of the legislation of Romania having also a consultative function in the sense that, it analyzes and gives opinions on the draft laws submitted by the Government, the legislative proposals, the draft ordinances as well as normative decisions of the Government, which are to be adopted or approved, as the case may be.

In order to facilitate the comprehension of the specificity of such proceedings as well as the tasks of the judiciary, we present below the following general information regarding the competences of the administrative jurisdiction in Romania.

According to the competences established by the organic law, in Romania, the court for administrative disputes, in general, solve the litigations where at least one of the parties represents a public authority and the conflict had come out either by issuing or concluding an administrative act, or by not solving in legal time or by giving an unjustified refusal for solving a petition regarding a right or a legitimate interest.

In Romania the administrative jurisdiction is part of the judiciary system, meaning that at the level of tribunals, courts of appeal and of the HCCJ administrative divisions are functioning together with the civil and criminal ones. The procedural rules governing the administrative litigations are provided for and specified in the Law No.554/2004, *regarding the administrative contentious* ("Law no. 554") as further amended in 2005, 2006 and more significantly in 2007 (Law No.262/2007), as well as in the Civil Procedural Code, governing all civil litigations. In fact, the Law no 554 contains quite limited procedural rules and as a matter of principle does not confer in favor of the administrative courts "special jurisdictional powers" compared to the other courts.

We do not have in Romania special nor separate administrative courts.

According to Law no.554 (article 18 combined with article 8) the administrative judge, following the object of the complaint, may pronounce one of the following decisions, (i) the annulment, in total or just partially of the contested administrative act, (ii) to oblige the administrative authority to issue a certain administrative act (meaning rectification of the infringements identified in the court decision), or (iii) to oblige the administrative authority to deliver another documentation or to perform a certain administrative operation. The court is fully competent to decide upon the legality of the administrative act as well as upon the preliminary operations that were taken prior to the issuance of respective administrative act and shall also decide upon material and moral damages, but only if requested as such by the injured party.

In other word, the administrative court has only the competence to pronounce decisions in which, measures to insure recognition of the full recovery of the injured party's rights, including as mentioned, adjustment of an administrative decision, shall not be considered as an intrusion within the competences of the public administration.

Possibly, the reasons for which under the Romanian administrative legal system the power of the court is solely limited to the annulment of the contested administrative act resides in the fact that according to Law no. 554, prior to file a contestation with the court, the injured party has the *obligation* to file an administrative preliminary complaint with the administrative body that issued the contested act/decision. The purpose of such *mandatory preliminary procedure* is in detail regulated in Law no 554 (article 7) and its main purpose is to offer to the administration authorities the opportunity to either revoke respective act or rectify it. That would avoid further litigation, if all parties involved are satisfied with the offered administrative solution.

I. Scope and purpose of economic sectoral regulation

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

6. Has the implementation of an economic sectoral regulation directly or indirectly lead to the total or partial privatisation of publicly owned companies?
7. Which economic sectors would you like to address more specifically in terms of regulation?

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?
9. Are these authorities independent of the regulated economic sectors? If so, how is this independence guaranteed?
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?
11. Do these authorities take part in drafting the relevant legislation for regulated sectors, through notice procedures for instance?
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?
13. Is every economic sector regulated by a specific authority, or are there some authorities exercising their powers in several sectors?
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?

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?

Response:

As a matter of principle, all economic sectoral regulatory authorities' decisions, which are administrative acts, are subject to judicial review. In respect to art.2 par.1 letter c) in Law No.554/2004, an *administrative act* is defined as being the unilateral act having either individual or normative character, issued by a public authority as part of its competences, in view of organizing the execution of law or for the concrete law execution, which generates, modifies or terminates legal effects.

According to the above mentioned provisions, only the decisions which eventually are considered not to have an *administrative nature*, shall be exempted from the judicial review by the administrative court. Also, according to the same provisions, laws and governmental ordinances are exempted from the judicial review of the administrative court, but, for a different reason, as these are pieces of legislation that may be subject to the constitutionality control exercised by the Constitutional 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?

Response:

With regard to the administrative and fiscal disputes, the Romanian law provides two degrees of appeal (recourse).

Following the rank of the public authority in the hierarchy of the public administrative bodies (regional or national), that issued the administrative act challenged in court, as well as according to the value of the fiscal debts, the administrative – fiscal tribunals, or as the case maybe, the administrative and fiscal departments of the Courts of Appeals are competent to solve in first instance the administrative disputes.

The appeals exercised against the decisions pronounced by the administrative – fiscal tribunals are judged by the administrative and fiscal disputes department of the Court of Appeals, and the appeals declared against the decisions pronounced by the administrative and fiscal disputes departments of the Court of Appeals are in the competence of the administrative and fiscal department within the HCCJ.

In connection with the second part of the question above, to the best of our knowledge, assessment of the compliance to competition law is part of part of the drafting process, meaning that the competent authority, in this respect, is the same one which is in charge with the preparation of the respective decision.

The court shall exercise a legality control, only if an interested and presumably injured person is requesting for such a control. In other words, the court shall not exercise an *ex officio* verification over the content of the administrative decision, including its compliance with competition law.

We also indicate that administrative courts in Romania are competent to exercise the judicial review of the decisions issued by the Romanian Competition Council through which breaches by individual companies of the competition legislation are sanctioned.

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

Response:

As mentioned above (*Preliminary note*), according to article 1 and article 8 in Law no.554, any person who is injured by an administrative act (decision) issued by a public

authority may challenge such act in front of the administrative court.

The administrative judge, following the object of the complaint, may pronounce one of the following decisions:

- (i) the annulment, in total or just partially of the contested administrative act;
- (ii) to oblige the administrative authority to issue a certain administrative act (meaning rectification of the infringements identified in the court decision), or
- (iii) to oblige the administrative authority to deliver another documentation or to perform a certain administrative operation.

The court is fully competent to decide upon the legality of the administrative act as well as upon the preliminary operations that were taken prior to the issuance of respective administrative act and shall also decide upon material and moral damages, but only if requested as such by the injured party.

When indicating that the judge is fully competent to decide upon the legality of the administrative act, we also mean that the judge, exercising full control as a rule, has the possibility to also analyze the opportunity of the document's issuance, but only in the whole context of the legal analysis.

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?

See the response to question 17 above.

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

Response:

Due to the fact that the administrative jurisdiction is not separated from the common judiciary system, the rules of the Civil Procedural Code shall apply together with the provisions stipulated in Law No.554/2004, mentioned above.

According to article 330-339 in the Civil Procedural Code, while exercising his power of judicial review, the judge may decide, *ex officio* or upon the request of the parties involved in the litigation, to appoint one or three experts in order to prepare an expert report in the case. However, such expertise can not be ordered during the appeal (recourse) proceedings.

The other means indicated (e.g., specialized and contradictory investigation, resort to universities, international sources consultation) can be either be submitted by one of the parties involved in the litigation, assuming that such evidences were accepted in the course of the oral contradictory proceedings, or may be utilized during the time involving the individual preparation of the case by the judge, together with the assistant-magistrates at the level of the HCCJ.

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?

Response:

We presented already the legal possible solutions that may be issued by the HCCJ when ruling in appeal (recourse) upon cases regarding the decisions taken by national administrative bodies in regulating the economic sectoral matters.

See, for example, just few of the Governmental decisions that were subject to the revision of the HCCJ, when pronouncing the appeal decisions in various cases:

- Governmental Decision No.1088/2011, regarding the functioning of the State Agency for the Control of the Road Transport (HCCJ Decision No.5283/2012);

- **Governmental Decision No.69/2012, regulating the infringements of the Regulation (CE) No.1071/2009 of the European Parliament (HCCJ Decision No.7495/2013);**
- **The Order No.245/2008 issued by the Transportation Minister for approval of the tariffs applied by the National Roads Company (HCCJ Decision No.4811/2011);**
- **The Order No.1284/2011 jointly issued by the Energy Minister and the president of the National Agency for Mineral Resources regarding the discipline in the area of the natural gas resources (pending).**

Responses prepared by:

Judge Dana Iarina VARTIRES & Chief Assistant Magistrate Bogdan GEORGESCU

High Court of Cassation and Justice of Romania - Administrative and Fiscal Division