

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

Autriche

Cour administrative

Austria

Administrative Court

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

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

Answers to the Questionnaire

Questions:

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?
1. Is the whole set of European Union' secondary legislation for economic sectoral regulation transposed into national law and/or practically implemented?
2. 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.)?
3. 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 ?
4. 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?
5. Has the implementation of an economic sectoral regulation directly or indirectly lead to the total or partial privatisation of publicly owned companies?
6. Which economic sectors would you like to address more specifically in terms of regulation?

Answer:

1 – 2) Subject to regulation are the fields covered by secondary legislation of the European Union. Legislation in Austria has been aiming to transpose the relevant EU law without gaps into national law. Therefore basically the implementing laws and provisions cover in principle the provisions contained in EU secondary law. The implementing laws and provisions are also practically implemented.

The regulatory authority concerning the sector of energy (electricity and natural gas), the „Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-

Control)“ is established by the Energie-Control-Gesetz¹ as a public law institution. The substantive laws in this field are the Austrian Elektrizitätswirtschafts- und -organisationsgesetz² and the Gaswirtschaftsgesetz 2011³.

Postal activities are ruled by the Postmarktgesetz⁴; the regulative authority to implement this law is essentially the Post-Control-Kommission (Post Control Commission), as the administrative unit of this commission operates the Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH)⁵.

The Eisenbahngesetz⁶ (Railway Code) provides for the Schienen-Kontrol-Kommission and the Schienen Kontrol GmbH (also administrative unit for the Schienen-Kontrol-Kommission) as regulatory bodies in the sector of railway traffic and transport.

For the domain of electronic communication the Telekommunikationsgesetz 2003⁷ (Telecommunications Act 2003) provides for the Telekom-Control-Kommission, which is based with its administrative unit, the Rundfunk und Telekom Regulierungs-GmbH (RTR-GmbH).

Relating to audiovisual media the KommAustria-Gesetz⁸ institutes the KommAustria GmbH and the Bundeskommunikationssenat (an independent administrative tribunal) as regulatory authorities; the administrative support rests with the RTR-GmbH (which is also established by the KommAustria-Gesetz).

3 – 4) According to the respective EU law economic sectoral regulation (such as in the field of telecommunication) introduced competition in sectors which were characterised by a State monopoly in the past, it aims beyond that – again following EU law – at the other objectives

¹Bundesgesetz über die Regulierungsbehörde in der Elektrizitäts- und Erdgaswirtschaft (Energie-Control-Gesetz – E-ControlG), BGBl I Nr 110/2010 (Energy-Control-Act).

²Bundesgesetz, mit dem die Organisation auf dem Gebiet der Elektrizitätswirtschaft neu geregelt wird (Elektrizitätswirtschafts- und -organisationsgesetz – ElWOG, BGBl I Nr 143/1998).

³Bundesgesetz, mit dem Neuregelungen auf dem Gebiet der Erdgaswirtschaft erlassen werden (Gaswirtschaftsgesetz 2011 – GWG 2011), BGBl I Nr 107/2011.

⁴Postmarktgesetz, BGBl I Nr 213/2009 (Postal Market Act, PMG).

⁵§§ 38 et seqq PMG.

⁶Eisenbahngesetz 1957, BGBl Nr 60, cf §§ 76 et seqq.

⁷Bundesgesetz, mit dem ein Telekommunikationsgesetz erlassen wird (Telekommunikationsgesetz 2003 - TKG 2003), BGBl I Nr 70/2003.

⁸Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria („KommAustria“) (KommAustria-Gesetz – KOG), BGBl I Nr 32/2001.

mentioned in question 3. Equally Austrian laws and provisions transposing EU law allow for an *ex ante* control and an *ex post* control generally spoken in the way prescribed by EU law.

5 – 7) In the area of telecommunication e.g. regulation made competition possible in telecom markets and in addition involved the partial privatisation of the state owned incumbent. Furthermore new entrants succeeded to participate in the markets; the markets however developed in the direction of a gradual reduction of participating companies.

In the following the examples are taken mostly from the sector of electronic communications networks.

II. Organisation of economic sectoral regulation

1. 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?
2. Are these authorities independent of the regulated economic sectors? If so, how is this independence guaranteed?
3. 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?
4. Do these authorities take part in drafting the relevant legislation for regulated sectors, through notice procedures for instance?
5. 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?
6. Is every economic sector regulated by a specific authority, or are there some authorities exercising their powers in several sectors?
7. How are economic sectoral regulatory authorities' competences articulated with those, when appropriate, of a transverse authority in charge of assessing compliance to competition law?

Answer:

1 – 3) Economic sectoral regulation is implemented by several independent authorities competent for the respective sector. The authorities in general follow the scheme of agencies. This approach allows a specific arrangement for each sector, in particular the inclusion the necessary specialist support in technical, commercial and legal matters. Moreover this concept allows in general a manageable size of the respective institution.

With regard to the question on independence, the authority competent to carry out the larger part of regulatory tasks in the sphere of telecommunication, the Telekom-Control-Commission, is established as an independent administrative tribunal⁹. Moreover, the independence of the management director of the RTR-GmbH - the body providing operational support to the Telecom-Control-Commission (this company was established for this purpose)¹⁰ - is guaranteed by provisions excluding in particular members of the Federal government and provincial governments (including members of [personal] offices), members of the parliaments on the federal, provincial and local level, persons who are employees of a political party or have a leading position in a political party, persons entrusted with the representation of the interests of media undertakings, persons who are employed or contracted by (or hold an interest in) an operator of a communications network or persons who are in a close relationship with anyone who makes use of an activity of the body providing operational support to the regulator.

The Telecommunications Act 2003 enumerates 20 competences of the Telecom-Control-Commission¹¹. The competences contain in particular the decision on wayleave rights, on security checks concerning the operating of communication networks, on interoperability, terms and conditions and tariffs, the financial compensation of the provider of universal service, regulation and competition (e.g. market definition procedure, access to network facilities and network functions, price control and cost accounting for access, interconnecting obligations), on frequency licensing, and the right to make requests to the Cartel Court. The competences of the Telecom-Control-Commission are limited to the enumerated duties, they represent however (as already mentioned) the core area of regulatory power in the relevant sector.

4 – 7) As a rule the Telecom-Control-Commission – like a number of other institutions – is invited to give comments on the draft legislation in the sector of telecommunication. As far as known the competent Federal ministry often involves the Commission already in the drafting

⁹Cf. § 116 and § 117 of the Telecommunications Act 2003, BGBl I Nr 70, as amended by BGBl I Nr 102/2011; cf. e.g. VwGH 21.12.2012, 2012/03/0038; VwGH 31.01.2005, 2003/03/0105.

¹⁰Cf § 4 and § 7 of the KommAustria Act, BGBl I Nr 32/2001, as amended by BGBl I Nr 84/2013.

¹¹Cf. § 117 of the Telecommunications Act 2003.

process; the same is true for the parliamentary procedures concerning legal bills. In the same way the RTR-GmbH is involved in the drafting and consultative process.

As already outlined every economic sector as a rule is regulated by a specific authority. As far as secondary legislation of the European Union provides for sanctioning powers towards companies of the regulated sector Austrian transposing legal provisions try to implement EU-law. The authorities competent to impose sanctions are independent administrative tribunals with full jurisdiction (concerning facts and legal questions), the procedures relating to sanctions are designed in line with Art 6 of the European Convention on Human Rights. As regards the competences of regulatory agencies in the field of competition law Austrian legislation follows secondary legislation of the European Union in granting these agencies the responsibility demanded by EU law; only the implementation of anti trust law (cartel law) comes within the competence of the ordinary courts.

III. Judicial review of economic sectoral regulatory authorities' decisions

1. Are all economic sectoral regulatory authorities' decisions subject to judicial review? If not, which decisions are not subject to such checks and why?
2. 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?
3. Which kind of legal recourse is open against these decisions? What are the relevant legal proceedings in this matter?
4. 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?
5. 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.)?
6. 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?

Answer:

Decisions of regulatory authorities are subject to judicial review. As these authorities are part of the administrative branch, the review competence mainly falls in the field of administrative jurisdiction.

Till the end of the year 2013 a complaint ("Beschwerde") against individual decisions of an administrative authority could be directly lodged with the Verwaltungsgerichtshof (VwGH). The Verwaltungsgerichtshof reviews decisions on the basis of the facts assumed by the regulatory authority – as far as the facts are established in conformity with the respective procedural law – and within the scope of the complaint submitted¹². This control exercised by the Verwaltungsgerichtshof is focused on the decision's conformity with the respective legal provisions; a breach of procedural law leads to the repeal of a decision only in cases when the breach could have an effect on the substance of the decision. The VwGH is first of all a court of cassation; apart from exceptional cases the decisions of this Court do not replace administrative acts, they only quash the act or dismiss the complaint.

Since 2014 the system of courts and authorities concerning the administrative branch underwent a far reaching and fundamental modification¹³. The former appeal stages within the field of administrative authorities – which had to be exhausted previous to a complaint with the Verwaltungsgerichtshof – are abolished and replaced by a three stage approach: on the first stage an administrative authority delivers a decision, this decision can be challenged by a complaint with a Verwaltungsgericht (VG; Administrative Court)¹⁴; on the third stage the VwGH (now Supreme Administrative Court) decides on revision against the decision of a Verwaltungsgericht. Revision against the decision of a VG is only admissible, if the solution depends on a legal question of essential importance¹⁵. From now on administrative jurisdiction in Austria follows a two- tiers approach, composed of the VG (on the second level) and the VwGH (on the third level). The 9 Länder (provinces) have established a Verwaltungsgericht each, for the Bund exist a Bundesverwaltungsgericht (Federal Court of Administration) and a Bundesfinanzgericht (Federal Financial Court)¹⁶.

¹²Cf. § 41 Verwaltungsgerichtshofgesetz 1985, BGBl Nr 197.

¹³Cf. Art 129 seqq of the Bundes-Verfassungsgesetz (Federal Constitutional Law [B-VG]).

¹⁴Art 130 B-VG.

¹⁵Cf. Art 133 Abs 4 B-VG. A legal question is of essential legal importance mainly because the decision of the Verwaltungsgericht deviates from the established court practise of the Verwaltungsgerichtshof, such established court practise does not exist or the legal question to be solved has not been answered in uniform manner by the previously established court practise of the Verwaltungsgerichtshof. If the decision only is on a small fine, Federal Law may provide that the revision is inadmissible.

¹⁶Cf. Art 129 B-VG.

According to this new system a complaint against the decisions of a regulatory authority can be filed with the Bundesverwaltungsgericht. A Verwaltungsgericht decides on complaints upon the merits, if the relevant facts have already been established by the administrative authority or the establishment of the relevant facts by the Verwaltungsgericht itself is in the interest of a speedy procedure or connected with substantial cost saving (in administrative penal matters the Verwaltungsgericht decides in any case upon the merits).

The legal proceedings follow the structures necessary to fulfill the competences of the VG and the VwGH. The VG monitors the lawfulness of the challenged decision. The question of conformity of a decision with the respective legal provisions includes formal requirements, legal proceedings as well as the reasons for this decision. As illegality does not exist to the extent the law permits the administrative authority to apply discretion and the authority has done so in the sense of the law¹⁷, judicial control is limited in such cases to the monitoring of the respect for the borders and the core area of granted discretionary powers. According to the case-law of the VwGH¹⁸ regulatory authorities dispose of a broad scope for evaluation concerning measures and instruments of regulation within the margins prescribed by the relevant legal provisions ("Regulierungsermessen")¹⁹. The VwGH (as already mentioned) is limited to legal questions of essential importance.

The information of regulatory authorities in the course of regulatory procedures is primarily ensured by authorized experts employed by the authority; concerning their expert work these experts are not bound by the instructions of the authority²⁰. The authorities are also free to appoint – when necessary – other authorized experts. In addition the deciding body of a regulatory authority includes a specialist for the respective regulatory field. As in principle anything suitable for ascertaining the relevant facts of the case can constitute evidence²¹ there might be also room for specialised and contradictory investigation.

¹⁷Cf. Art 130 Abs. 3 B-VG.

¹⁸VwGH 23.10.2013, 2010/03/0175 (with reference to ECJ 15.2.2005, C-12/03 (*Tetra Laval*), Nr 38 ff, and Bundesverwaltungsgericht (Germany) 12.06.2013, 6 C 10.12, Nr 19, 42.

¹⁹Regulierungsermessen demands in any case inter alia the consideration of all aspects and interests concerned according to their importance.

²⁰Cf. §§ 52 seqq Allgemeines Verwaltungsverfahrensgesetz (General Administrative Procedure Act [AVG]).

²¹Cf § 46 AVG.

It can be expected that the Verwaltungsgericht will base its procedure of taking evidence on the procedure led by the regulatory authority. If necessary the Verwaltungsgericht will have to appoint authorized experts.

The Verwaltungsgerichtshof does not conduct a procedure of taking evidence but quashes the act in case the evidence already taken is insufficient to hold the decision of the monitored body. Only in cases where the relevant facts are fully established and the case is ready to decide, the Verwaltungsgerichtshof is empowered to change the decision of the Verwaltungsgericht instead of only quashing it²².

Concerning the exchange of information in a regulatory field without connection to a specific legal procedure both regulatory authorities and courts are free to get informed on the level of universities or international sources.

The Verwaltungsgerichtshof has delivered already a number of decisions concerning regulation matters. Within the number of issues which called the attention of the Court there are several questions which seem to be suited particularly for decision by supreme administrative justice.

With regard to their margin of decision regulatory authorities dispose – as already mentioned – according to the case law of the Verwaltungsgerichtshof of a broad scope for evaluation concerning measures and instruments of regulation within the margins prescribed by the relevant legal provisions ("Regulierungsermessen")²³.

A further issue is – if provided for - the mechanism for the consultation between the national regulatory authority and the competent entity on the European level. In order to implement the rule in the Framework Directive for electronic communications networks and services, that the national regulatory authority shall take the utmost account of comments of the European Commission, the regulatory authority according to the case-law of the Verwaltungsgerichtshof has to deal with these comments in substance and to give adequate reasons in case the authority is not ready to follow the comments²⁴.

Concerning the regulation on roaming on public communication networks within the Union the Verwaltungsgerichtshof had to confirm the competence of the regulatory authority

²²Cf § 42 Abs 3 VwGG.

²³VwGH 23.10.2013, 2010/03/0175.

²⁴VwGH 28.02.2007, 2004/03/0210.

to control the compliance with the provisions on maximum financial limits for roaming charges²⁵.

In a number of cases the Verwaltungsgerichtshof asked the Court of Justice of the European Union (ECJ) for a preliminary ruling in order to clarify the legal situation. For instance in connection with non-adversarial market analysis proceedings the ECJ was asked for a preliminary ruling, because the Austrian Telecommunication Act granted party status only to undertakings (formerly) having significant power on the relevant market, but the legal protection clause in the Framework Directive for electronic communications networks and services seemed to apply also to users and undertakings in competition with such an undertaking. On the basis of the Judgement of the ECJ the Verwaltungsgerichtshof came to the conclusion, that the fundamental right to an effective remedy before a tribunal combined with the principles of effectivity and equivalence demands party status already in the proceedings led by the regulatory authority also for the users and competing undertakings²⁶.

Relating to the Directive on common rules for the development of the internal market of Community postal services and the improvement of quality of services the Verwaltungsgerichtshof had to clarify the scope of the universal service²⁷.

A railway undertaking (ÖBB-Personenverkehr AG) lodged a complaint with the Verwaltungsgerichtshof against the decision of the regulatory authority (Schienen-Control Kommission [Rail Network Control Commission]) in the field of rail passengers' rights and obligations. The Verwaltungsgerichtshof asked the ECJ for a preliminary ruling concerning the scope of competence of the authority and the exemption of the railway company from the obligation to pay compensation in the event of a delay where the delay is attributable to force majeure. The ECJ clarified that the authority responsible for the enforcement of the regulation may not (in the absence of any national provision to that effect) impose upon a railway undertaking whose compensation terms do not meet the criteria set out in that regulation the specific content of those terms; furthermore the ECJ did not accept for railway passengers an exemption from compensation for cases where a delay is attributable to force majeure²⁸.

²⁵VwGH 26.06.2013, 2013/03/0065.

²⁶VwGH 26.03.2008, 2008/03/0020 (with reference to ECJ 21.02.2008, C-426/05 [*Tele 2*]).

²⁷VwGH 18.02.2014, 2011/03/0192.

²⁸VwGH 23.10.2013, 2013/03/0105 (with reference to ECJ 26.09.2013, C-509/11 [*ÖBB-Personenverkehr*]).

Besides the possibility of appealing to the Verwaltungsgerichtshof, there also exists the possibility of an appeal against individual decisions to the Verfassungsgerichtshof (Constitutional Court; VfGH). Until the end of 2013 such an appeal could only be lodged after exhaustion of all administrative remedies; since the introduction of the new system of administrative jurisdiction in Austria, there exists the possibility of an appeal against all decisions of the Verwaltungsgerichte²⁹. However, there exists no appeal against decisions of the Verwaltungsgerichtshof to the Verfassungsgerichtshof; the Verwaltungsgerichtshof and the Verfassungsgerichtshof both act as supreme courts, there being no further remedy against their decisions on the national level. It is in the hands of the affected party to challenge a decision of a Verwaltungsgericht either simultaneously before both the Verwaltungsgerichtshof and the Verfassungsgerichtshof or only before one court; a complaint solely lodged with the Verfassungsgerichtshof can be referred to the Verwaltungsgerichtshof in cases where the Verfassungsgerichtshof dismisses the complaint (on formal or material grounds)³⁰.

The power of the Verfassungsgerichtshof in case of such an appeal is restricted to examine whether the decision of the Verwaltungsgericht has violated fundamental rights ("constitutionally guaranteed rights") or if the decision of the Verwaltungsgericht has been based on an illegal general norm (unconstitutional law, illegal regulation); in case of such an infringement the decision of the Verwaltungsgericht can only be quashed.³¹

As one can see, there is a clear separation of competences between the Verwaltungsgerichtshof and the Verfassungsgerichtshof: The latter only decides on questions of infringement of fundamental rights or the constitutionality of the legal rules that have been applied; all other questions of legality – including compliance with European Union law – falls within the ambit of the control executed by the Verwaltungsgerichtshof.

Sectoral regulation does not take place only by individual decision but can also take the form of a general regulation; for instance the regulatory commission of the E-Control has the power to regulate the fees for the use of electricity nets ("Systemnutzungsentgelte") in the form of a general regulation.³² Such regulations are subject to control of the

²⁹Cf. Art 144 B-VG.

³⁰ Cf. Art 144 Abs 3 B-VG.

³¹Cf. – concerning the regime until the end of 2013 VfGH 27. 9. 2007, B 1992/06.

³²Cf. §§ 51ff EIWOG.

Verfassungsgerichtshof.³³ Such a procedure can be initiated by any court – including the Verwaltungsgerichte, the Verwaltungsgerichtshof and the Verfassungsgerichtshof – that has to apply such a regulation, by the federal and the regional governments – depending by which authority the regulation has been enacted – and also by individual persons who are directly affected by such a regulation in cases where no individual decision is taken on the basis of the regulation. In such a procedure the Verfassungsgerichtshof has to examine the legality of the regulation in all aspects, including the procedural and material rules determining the regulation, and can in principle also take evidence. If the Verfassungsgerichtshof finds a breach of the relevant legislation he has (only) the power to quash the affected parts of the regulation; in this case he can set a delay until the annulment of the regulation comes into force, on the other hand he can also quash the regulation with retroactive effect. In this connection the Verfassungsgerichtshof has a wide discretion. Decisions on such questions have been taken in several cases.³⁴

³³Cf. Art 139 B-VG.

³⁴Cf. VfGH 12. 12. 2013, V 48/2013 et al.