

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

Chypre
Cour suprême

Cyprus
Supreme Court

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´ secondary legislation (transport, energy, postal activities, electronic communication, audiovisual media). Are other sectors subject to such regulation in your country?

No.

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

Cyprus has fully transposed into national law the relevant EU Directives. In relation to electronic communication the Regulation of Electronic Communications and Postal Services Law of 2004 has been enacted.

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 aim is to introduce, among others, competition, implementing internal energy markets (for energy), define universal service obligations, consumer protection, define energy poverty and categories of vulnerable customers.

According to the **Law on Telecommunications and Postal Services of 2004 (Article 18(1))** the Commissioner of Electronic Communications and Postal Services in the course of exercising his competences and power and of performing his duties under the law he shall act in such a way as to promote:

- a. the provision to Cyprus of electronic communications and postal services for the public as a whole;
- b. the interest of consumers, with particular reference to price and quality of electronic communications and postal services provided in Cyprus;

- c. the introduction of effective competition in the provision of electronic communications and postal services;
- d. the capability to provide or dispose of a wide range of electronic communications apparatus and services.

Sectoral regulation on electronic communications aims at achieving an effective use of spectrum. Sectoral regulation has proven to promote competition in the industry of electronic communications. It's provisions encourage economic growth, job creation, provision of services in affordable prices.

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 authorities regulate ex ante the economic sectors. The ex post provisions are applied according to EU Directive provisions. Ex post control is exercised by the Commission for the Protection of Competition.

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?

In the telecommunication sector the implementation of the regulation has contributed so that new enterprises entered the market. In electricity production, new entrants from the Renewable energy sources only. No new suppliers. Independent Power producers (conventional fuel) have been granted relevant licenses but not entered the market mainly due to pending decisions (a) for the new electricity market model that will be applied in Cyprus and (b) the introduction of natural gas in the energy mix fuel market is open to competition. Gas market is not active.

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

Recently a law has been entered into force enabling a potential privatization of the telecommunications incumbent, the Cyprus

Telecommunications Authority (CYTA), which is a semi-governmental organization.

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

All sectors are adequately regulated.

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?

Sectoral regulation is implemented by the Ministry of Energy, commerce, Industry and Tourism, the Cyprus Energy Regulatory (CERA) Authority, the Transmission system Operator Cyprus (TSOC) and the Distribution System Operator (Electricity Authority of Cyprus).

The national legislation ensures that the degree of independence of each of the abovementioned entities is in accordance with the provision of the corresponding European Directives.

The Commissioner of Electronic Communications and Postal Services is an independent regulatory authority as provided in article 3 (2) of Directive 2002/21/EC.

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

The legal framework adopted in Cyprus includes all necessary provisions that ensure the independence of the regulatory authority. Other organisations operate within the framework of approved derogations for Cyprus.

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

The Cyprus Energy Regulatory Authority (CERA) has a general regulatory power through enactment of Regulations, Regulatory Decisions and Decisions. The Ministry has regulatory power through Decrees and Ministerial Decisions.

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

In relation to energy, drafting sessions involve all main stakeholders through their participation in working groups that are specifically set up for this purpose. The Commissioner of Electronic Communications and Postal Services issues orders and decisions following public consultation.

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 procedure used by all regulatory authorities when issuing sanctions is quasi judicial and must comply with the right to a fair trial as provided in article 6.1 of the Convention.

CERA is the competent authority for enacting sanctioning measures against any licensee in order to protect competition and prevent abuse of the market rules by dominant participants. The

Commissioner of Electronic Communications and Postal Services has the power to impose administrative fines, according to the procedure set out in the Order.

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

Every economic sector is regulated by a specific authority. However the Commissions for protecting competition has powers over all sectors.

CERA is the regulator for the electricity and natural gas internal markets. The Ministry of Energy, Commerce, Industry and Tourism is the regulator for the fuel quality market.

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?

The transverso authority for competition is the Commission for the Protection of Competition (CPC). The Directive provisions regarding the interactions between the transverso Authority and the Energy Regulator were transposed in the national law.

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

Under Article 146.1 of the Constitution the Supreme Court has exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission, of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of the constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

The administrative jurisdiction of the Supreme Court covers the area of executive administrative acts or decisions within the domain of public law. Excluded from the jurisdiction of the court are acts, decisions or omissions of public authorities within the domain of private law. If the decision is primarily aimed to promote a public purpose it falls in the domain of public law. Internal acts of the administration, preparatory acts, confirmatory acts and acts of government are not subject to the revisional jurisdiction of the 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?

The Commission for the Protection of Competition (CPC) is an independent body established by the Protection of Competition Law. It is entrusted with the task of examining on acts that are deemed anti- competitive and in violation of the law.

As set out in question 15 the Constitution confers exclusive jurisdiction to the Supreme Court to exercise control over administrative acts.

The decisions of the CPC are considered to be administrative decisions issued by a public body and are subject to judicial review by virtue of Article 146.

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

Under Article 146.2 of the Constitution a recourse may be made by *“a person whose any existing legitimate interest, which he has either as a person, or by virtue of being a member of a community, is adversely and directly affected by such decision or act or omission”*.

Article 186 provides that the term person includes any company, partnership, association, society, institution or body of persons, corporate or unincorporate.

The proceedings for annulment must be taken within 75 days from the date when the decision challenged is published, or if not published, from the day when it comes to the knowledge of the applicant.

If there is doubt or uncertainty as to the commencement of the period, such doubt has to be resolved in favour of the applicant.

The Supreme Constitutional Court Rules of 1962 provide that a specific form must be filed. This form must contain the name of the court, the year in which the application is instituted, the Article(s) under which it is made, the name and address in full of the applicant, the administrative organ that issued the decision, name and address in full of the applicant's advocate, if any, and an address for service in Nicosia.

It must also contain a statement of the case of the applicant setting out in a summary form all the material facts relied upon, the requested remedy and the legal grounds of the application. The application must be accompanied by copies of all the documents, referred in the application, which are in the possession or power of the applicant.

The Respondent must file an opposition in a specified form. An interested party may intervene if he has a legitimate interest as to whether or not the act is annulled. Written submissions are filed by the parties, which specify the issues under dispute:

Firstly, the written submission of the Applicant is filed.

Secondly, the Respondent and interested parties file their submissions; and finally, the Applicant may submit a written answer

The Supreme Court exercises both original and appellate jurisdiction. At first instance, cases are heard by one judge and following an appeal by a bench of at least five. Where the case involves issues of particular importance, it is heard by all of the Supreme Court judges.

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 Supreme Court will examine whether the necessary formal prerequisites for judicial review are fulfilled.

Firstly, it will examine, as already stated above, whether the administrative act is within the domain of public law and it is an executory one. Secondly whether the recourse has been filed within 75 days from the date the decision was published or came to the knowledge of the applicant and thirdly whether the applicant has the legitimate interest (*locus standi*)

The jurisdiction of the Supreme Court is limited to the review of the legality of the act and cannot go into the merits of the decision under review and substitute the decision of the administrative organ with its own decision. Such an act would violate the strict separation of powers safeguarded by the Constitution.

General principles of administrative law such as those of lawfulness, the principle of equality and non discrimination, rules of natural justice are applied by the court when reviewing an administrative act or decision.

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.)?

Although the Cyprus legal system is adversarial, the Supreme Court in the exercise of its revisional jurisdiction follows the inquisitorial system. Therefore it reviews the administrative actions independently of the participation of the litigants. The Court has the power and responsibility to regulate the production of evidence in accordance with the requirements of the due discharge of its competence under Article 146. In dealing with documentary evidence the court will take the position from the document before it, which the court will, if necessary, construe or interpret and will not admit evidence to explain or interpret the contents of the document

Furthermore under Rule 11 of the Supreme Constitutional Rules 1962, the Court has power to summon any person to give evidence or produce documents for the purpose of enabling the court to come to a just decision in 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?

According to Article 146.4 the Supreme Court may confirm the decision, act or omission, in whole or in part, declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever or declare that such omission, either in whole or in part, ought not to have been made and whatever has been omitted should have been performed.

The Supreme Court has no jurisdiction to award damages to any person aggrieved by any decision or act declared to be void. This jurisdiction rests on the District Court.

Decisions of the Supreme Court in economic sectoral regulation matters are the following:

Petrolina (Holdings) Ltd v. Commission for the protection of Competition (2006)3 CLR333

The case concerned alleged violation of the **Control of Concentrations Between Undertakings Laws 1999 to 2000** and in

particular article 10 which provides that a concentration which creates or strengthens a dominant position in the affected markets within the Republic shall be declared incompatible with the conditions of the competitive market.

The court stated that after the liberalization of the oil market, there was no need for special analysis to arrive at the conclusion that the addition to the existing structure of the appellants other fifteen stations selling petroleum products would increase significantly the share of this company in the market for the sale of petroleum. Therefore the reason for the necessity of placing the fifteen stations in the new company is obvious. It is to strengthen competition by introducing the possibility of a new company to enter the Cypriot market. Such a move certainly strengthens the existing competition.

In Recourse no. 1367/2009 CYTA v Commissioner of Telecommunications and Postal Regulations, 2.11.2011, the power of the Commissioner to impose regulatory obligations to any provider of electronic telecommunications without a market analysis, was challenged.

The court held that the Commissioner had no obligation to make a new market analysis. Following the enactment of Law 112 (I) / 04, the Commissioner held a market analysis, thus established that the applicants were organisation with Significant Market Power. Therefore, the duty of the Commissioner to conduct a market analysis under the various provisions of the Law had been fulfilled.

The surveys and market analysis do not expire, but are valid until replaced with new ones or until the time set by law to conduct new analysis has elapsed. Article 46 (8) of the Act provides that market analysis and identification of the appropriate proportional regulations, "will take place at least every two years by the Commissioner." In the present case the time period stated has not expired.

The court also held that the Commissioner when issuing the Decree had taken into account all necessary issues and elements required and particularly research and market analysis, the **model/ specimen (Υποδειγμα)** of tender and the position of the applicant as presented in a public hearing.

In the recourse Organisation of the Cyprus Dairy Industry v. Republic through the CPC (2005)3 CLR 795 The court held that

the administrative control of the competence and wisdom of the decisions of the applicants, as an administrative body entrusted by the State with the handling of milk, is outside the mission of the Commission, whose object is to safeguard free competition.