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

Slovénie

Cour suprême

Slovenia
Supreme Court

ANSWERS OF THE SUPREME COURT OF THE REPUBLIC OF SLOVENIA

to the

QUESTIONNAIRE ON ECONOMIC SECTORAL REGULATION IN EUROPEAN UNION COUNTRIES

These answers are based on Slovenian legislation, judicial practice and common known facts and are limited with the competences of Supreme Court.

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?

In its case-law the Supreme Court of the Republic of Slovenia (hereinafter referred to as the Supreme Court) has been so far confronted only with the above-mentioned sectors.

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

The answer depends on the sector.

The regulatory framework for telecommunications from the year 2009 was transposed as a whole by the *Electronic Communication Act* (Zakon o elektronskih komunikacijah – ZEKom-1, Official Gazette RS, No. 109/2012, dated 31 December 2012).

The audiovisual media sector is regulated on the basis of the Directive on Audiovisual Media Services (2010/13/EU), which has been transposed by the *Act on Audiovisual Media Services* (Zakon o avdiovizualnih medijskih storitvah – ZavMS, Official Gazette RS, No. 87/2011, dated 2 November 2011).

The market of postal services is regulated by the *Postal Services Act* (Zakon o poštnih storitvah – ZPSto-2, Official Gazette RS, No. 51/2009, dated 3 July 2009, as amended by ZPSto-2A, Official Gazette RS, No. 77/2010, dated 4 October 2010), which is direct implementation of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC and as amended by Directive 2008/06/EC).

In the scope of regulation of railway market the Directive 2012/34/EU, establishing a single European railway area, was adopted. Deadline for implementation of the Directive is 16 June 2015. Ministry of Infrastructure and Spatial Planning set up a working group for implementation of the Directive into national legislation. A draft of amendment of *Railway Transport Act* (Zakon o

železniškem prometu – ZZelP), which will be adopted probably until the end of 2014, is in its final phase. As regards the implementation of Directives of the first railway package, the European Court of Justice initiated a procedure against the Republic of Slovenia due to inadequate implementation. The court established that the Republic of Slovenia did not implement Directives 91/440/EGS and 2001/14/EU adequately. Slovene legislature will resolve this issue and the implementation of Directive 2012/34/EU in the course of preparation of amendment of the Railway Transport Act.

The third package of Directives and Regulations on energy sector will be implemented by the new *Energy Act* (Energetski zakon – EZ-1).

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.)?

It depends on the sector. In the sectors of electronic communications, electronic media, postal and railway services, the Agency for communication networks and services of the Republic of Slovenia (Agencija za komunikacijska omrežja in storitve Republike Slovenije, hereinafter referred to as AKOS)[1] has the following strategic goals:

- providing the conditions for high-quality services at a reasonable price,
- ensuring the availability of universal services to all residents of Slovenia at affordable prices, regardless of geographic location,
- protecting the interests of service users, including protecting the confidentiality and privacy of electronic communications,
- ensuring effective competition in the market,
- ensuring and promoting efficiency and competition among service providers,
- promoting the development and introduction of new services and technologies for a better quality of life and economic development, by creating conditions interesting to new investments,
- ensuring and overseeing the efficient use of the radio frequency spectrum and numbering space,
- promoting the development and improvement of radio and television programs and enabling the broadcasting of program contents and multimedia services through different platforms, so that they will be available to the largest possible number of people on any device that supports their reception,
- ensuring the protection of public interests regarding program content and providing equal conditions for operations of radio and television program publishers and other audiovisual content providers by expertly supervising the implementation of the program requirements and restrictions that apply to radio and television programs and the obligations of other audiovisual content providers,
- ensuring the operation of electronic communications and the use of the radio frequency spectrum to provide services during emergency situations and to protect the national interests of the country,
- providing and overseeing fair and equal access to the public railway infrastructure and related services.

In the energy sector, Energy Agency of the Republic of Slovenia (Javna agencija RS za energijo, hereinafter referred to as Energy Agency)[2] aims to assure public utility services, internal EU energy market and consumer protection.

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 ?

1 For more information about AKOS see: http://www.akos-rs.si/akos-ang.

2 For more information about Energy Agency see: http://www.agen-rs.si/en/.

As a national regulator of the electronic communications market, AKOS is responsible for *ex-ante* regulation as it sets the rules of operation in advance. The regulatory functions of AKOS will be in details explained in the answer to question 10.

Slovenian Competition Protection Agency (AVK) on the other hand acts under the Prevention of Restriction of Competition Act (ZPOmk-1), which regulates restrictive practices, concentrations of undertakings, regulatory restrictions of competition and measures to prevent restrictive practices and concentrations, which significantly restrict effective competition, where they cause or might cause effects on the territory of the Republic of Slovenia. AVK generally (with the exception of merger control) conducts *ex post* control.

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 general, the answer is positive. However, specifics of individual sectors need to be considered.

The implementation of telecommunications regulation, especially the possibility to access the transmission networks, definitely encouraged competition in the last 12 years. In most cases new entrants fitted in regulated markets. Those who did not, had various reasons, however, none in connection with the relevant regulation.

The same is valid for energy market, especially the electricity and natural gas market.

Gradual liberalisation of the postal service market in Slovenia has been under way since 1997. On 3 August 2009, the new Postal Services Act, which transposed the principles of the 2008/6/EC Postal Directive and provided for the complete liberalisation of the postal sector, came into force. The act abolished the exclusive right to provide reserved postal services (delivery of letters and cards weighing less than 50 g), and since 1 January 2011 these services can be performed by other postal service providers, including providers of interchangeable postal services, which also have the right to access the postal network.

The sector of audiovisual media is slightly specific. Namely, there are no universal service obligations or specific rules aimed at introducing competition. Regulation treats the media services more as cultural services. However, the sector has been liberalized already decades ago.

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

No, the implementation of the regulation has not induced such effects in any of the mentioned sectors. In some sectors the question of privatisation has been opened now for a couple of years, however, it is in no connection with the regulation.

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

From the viewpoint of the Supreme Court case-law there is no economic sector that needs to be addressed 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?

Economic sectoral regulation in the Republic of Slovenia is implemented by two independent

regulatory authorities. The first one is **AKOS**[3] which is an independent body that regulates and supervises the electronic communications market, manages and supervises the radio frequency spectrum in the Republic of Slovenia, performs tasks in the field of radio and television broadcasting, and regulates and supervises the postal and railway service markets. Its work is closely related also to the Electronic Communications Council (SEK) and the Broadcasting Council (SRDF), which are independent expert bodies with certain competencies in the field of electronic communications and electronic media. AKOS is committed to providing the administrative and financial support for their activities. The second one is the **Energy Agency**. Its mission is to provide for the impartiality and equality of all the participants in the energy markets, and to help set up the conditions necessary for an effective operation of these markets.

Under the EU secondary legislation[4] the independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. Slovenian national legislation (Electronic Communications Act, Postal Services Act, Railway Transport Act and Energy Act) through its provisions expressly ensures that, in the exercise of its tasks, a national regulatory authority, which is responsible for ex-ante market regulation and for resolution of disputes between undertakings, is protected against external intervention or political pressure liable to jeopardise its independent assessment of concrete matters. The Agencies may not request or receive instructions from any other state bodies, however, this shall not preclude it from consulting the body responsible for competition protection or from cooperating with other regulatory authorities or the European Commission. They also have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget is published annually.

However, an absolute independence of regulatory bodies is neither possible nor desirable. “Independent” regulators are expected to be subjects of governmental oversight and a system of checks and balances. To this end, the Government of the Republic of Slovenia shall approve the statute of the Agency, the Agency’s program of work and financial plan. Every year the Agency must prepare an annual report, which needs to be approved by the Government, and notify the National Assembly thereof. The annual report shall comprise a report on work and a business report. Supervision of the legality of the work of the Agency shall be conducted by the ministry responsible for the Agency’s area of operation. This supervision shall not include the possibility of influencing on the content of general or concrete legal acts issued by the Agency in relation to the implementation of its competencies or to other acts applying to its areas of operation. The Court of Audit shall supervise the Agency’s use of funds to verify that funds are used lawfully, for their assigned purposes and in a cost-effective and efficient manner. The ministry responsible for administration shall oversee the implementation of regulations on the administrative procedure.

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

Under Article 199 of the Electronic Communications Act, AKOS must discharge its competencies in the area of electronic communications independently of natural persons and legal entities providing electronic communications networks and/or electronic communications services.

3 In January 2014 The Agency for Post and Electronic Communications (APEK) has changed its name to the Agency for Communication Networks and Services (AKOS). The new name results from new legislation under which the agency also took charge of competition protection in the market of railway services in mid-2011. However, its powers remain the same, namely regulating markets of electronic communications, post and railway services. It will also manage and monitor the radio frequency spectrum and watch over radio and TV broadcasting.

4 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC.

In this Article, the independence of the Agency's work as national regulatory authority is particularly emphasized in order to ensure that it is legally separated from and functionally independent of all organisations providing electronic communications networks, equipment and services. Even in cases when the State retains ownership or control of undertakings providing electronic communications networks and/or services the effective structural separation of the regulatory function from activities associated with ownership or control is ensured.

Under Article 19 of the Railway Transport Act, AKOS must act independently also in the field of railway services. It should be organisationally, financially and legally independent from the infrastructure operators and authorities that allocate and charge for the use of railway infrastructure as well as from the competent authorities involved in the process of concluding contracts for the performance of public services in the field of railway transport.

Also in the field of postal services, AKOS acts as an independent regulatory body in the part relating to postal services and sets forth the rights and obligations of providers and users of postal services, and governs other issues relating to the postal activity (Article 1 of the Postal Services Act).

The same applies for the Energy Agency as it is organisationally, financially and legally independent from the regulated energy sector and it can take decisions on relevant regulatory issues independently.

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?

As a national regulator of the **electronic communications** market, AKOS is responsible for ex-ante regulation. This responsibility is based on the EU regulatory framework and the Electronic Communications Act, which transposes the relevant EU directives and the directive on competition in the national legislation.

Ex-ante regulation is a form of setting the rules of operation in advance. Usually this regulatory approach is applied to market segments marked by natural monopoly, where companies may hinder potential competitors from entering the market with their economic dominance. In electronic communications this usually means former national (incumbent) telecommunication operators. To prevent such companies (also labelled as operators with significant market power – OSMP) from potentially abusing their market power, the regulator has the right to issue a decision imposing on them suitable measures or regulatory obligations. The purpose of regulatory obligations is to prescribe to the OSMP how it should act in relationship with other operators, and above all that it must provide certain capacities (e.g. network elements, collocations, ducts, aerial towers...) to all interested operators at certain prices. Companies that were not recognized as operators with significant market power do not have these obligations and their operations in the market are free.

The regulatory procedure has three steps. If a certain relevant market is already excluded from the European regulatory framework, the Agency must conduct a three criteria test. If the test reveals that the relevant market is still subject to ex-ante regulation, or that it is included in the current regulatory framework, the procedure continues with an analysis of the market. In the analysis the Agency defines the relevant market (relevant markets are designated by the European Commission with a special Recommendation, based on which the Agency defines them in the General Act), analyses the market situation, and examines whether any of the companies holds a dominant position in the market. If it establishes that one of the companies holds a dominant position, it plans appropriate measures for limiting such an operator’s power and preventing the abuse of this power. When conducting the analysis, the Agency collaborates with the Competition Protection Office, which gives its opinion about the analysis.

The next step comprises a public discussion, in which everyone can take part. The Agency publishes the analysis on its website, and the interested public has 30 days to provide comments

or propose changes (it is not bound by the Agency's proposals). The Agency also consults with the European Commission and other European regulators. They may comment on the analysis and the measures, while the European Commission even has the right to veto: if it disagrees with the definition of the relevant market, with labelling an operator as an OSMP, or with the proposed measures, it may call upon the Agency to change or repeat the analysis.

The third step comprises an administrative procedure, in which the Agency designates the operator with significant market power (OSMP) and imposes on it obligations as proposed in the analysis. These measures are prescribed in the law and comprise the obligation of equal treatment (Article 24) obligation of transparency (Article 23), obligation of access to network (Article 26), the obligation of price control (Article 27), and the obligation of separating accounting records (Article 25). The strictest measure envisaged by Electronic Communications Act is functional separation (Articles 27a and 27b), which means that the OSMP must perform a part of its activities in a separate and independent business unit.

If an OSMP disagrees with the Agency's decision, it may file a lawsuit in an administrative dispute against the decision. The decision on the lawsuit is made by the Administrative Court. Against it's decision a special legal remedy can be filed to the Supreme court.

It should be stressed that ex-ante regulation is primarily aimed at the wholesale segment of the telecommunications market. If the wholesale market is operating properly, the advantages of the competition are reflected in better quality and cheaper retail services, and in competitors' focus on innovative solutions that ensure the development of the market in the future. This is also the main benefit that such regulation brings to end-users.

In the field of **postal services,** AKOS is responsible for the price regulation. The universal service provider must obtain the Agency's approval before changing its prices. Before issuing its approval, the Agency must check whether the proposed prices are in accordance with the principles of transparency, non-discrimination, and competition assurance, as well as set in accordance with Article 35 of ZPSto-2 regarding the prices of universal service.

AKOS's task in **the railway field** is to monitor competition in the railway services market in both passenger and freight transport. If the Agency finds violations of free competition or of regulations regarding the allocation of train paths or the charging of user fees, it acts in accordance with the Railway Transport Act and other regulations governing railway transport.

To perform its regulatory power AKOS issues different general acts, e.g. the General Act on Radio Frequency Utilisation Plan, General Act of Network and Service Security, General Act on the Quality of the Universal Postal Service Provision, General act on Radio or Television Broadcasting Licence, Decree on the Allocation of Train Paths and the User Fees for the Use of Public Railway Infrastructure, etc.

As an independent regulatory authority for the energy sector the Energy Agency also has a regulatory power in the electricity and natural gas markets. To perform its role as a regulator the Energy Agency decides on the issuing and revoking of licences, on the disputes relating, for example, to third-party access, issues general acts relating to the performance of public authorities with respect to the methodology for calculating the network charge, the methodology for setting the network charge, the criteria for determining eligible costs, and the system of calculating these costs, the methodology for the preparation of tariff systems, the mode of determining the shares of individual production sources and the manner of their presentation. It also gives consent to different rules, instructions, general conditions and tariff systems.

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

AKOS and the Energy Agency both have a very important role in drafting the relevant legislation for regulated sectors. In the legislation we didn't find formal obligation of the government or the parliament to include the regulatory authorities in the expert groups which are preparing new legislation or to inform the regulatory authorities of such preparation. But from explanations of the

drafts of new acts or other legislation one can notice, that the experts form the regulatory authorities were directly included in preparation of new legislation or were informed of the new legislation by a written notice so they could actively participate in an open public debate and also prepare their written comments and proposals which are usually taken into account. In some of the Acts the regulatory authorities are authorised to adopt some secondary national legislation by themselves.

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?

AKOS and the Energy Agency both have supervisory competences (inspection as an administrative procedure) as well as sanctioning power (under the penal provisions) concerning the implementation of the provisions of the relevant sectoral legislation.

The supervisory functions shall be performed by persons employed by the Agencies and holding an authorisation from the minister. If during supervision an inspector or authorised Agency employee establishes that regulations or acts whose implementation is subject to supervision have been violated, he shall have the right and duty to order measures to remedy the irregularities and deficiencies within a time limit as specified by him, e. g. notify the persons infringing the provisions in writing and offer them an opportunity to make a statement on the matter by a reasonable deadline, impose a fine for the violation, propose adoption of measures by the competent body, suspend or revoke a licence, temporarily or permanently prohibit further performance of the activity, unless performed in accordance with the relevant act or regulation.

Under the penal provisions of each relevant act for regulated sectors the national regulatory authorities have the power to punish companies of the regulated sectors. The amount of the fine depends on the seriousness of the offence (for example under the Electronic Communication Act for the worst offences a fine of up to 5% of the annual turnover generated on the public communications network and/or public communications services market in the preceding business year shall be levied on a legal entity, sole trader or individual independently pursuing an. For less serious offences a fine of between 50,000 EUR and 400,000 EUR or a fine between 20,000 EUR and 50,000 EUR can be levied. A fine for the minor offences is between 1,000 EUR and EUR 20,000 EUR).

All these supervisory and penal procedures guarantee compliance with the first paragraph of Article 6 of the CPHRFF since everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (administrative court in the supervisory procedures and criminal court in penal procedures).

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

Electronic communication, audiovisual media (radio and television programming), postal services and railway transport are all regulated by the same independent authority (AKOS) which is divided into several different departments (Telecommunication Department, Electronic Media Department, Radiocommunications Department, Postal Department and Railway Department). AKOS's role in the field of **electronic communications** is to provide conditions necessary for effective competition and to manage radio frequency and numbering spaces. By doing so, AKOS provides equal conditions for operators in the electronic communications market. The aim of AKOS is to ensure advanced and affordable communication services which satisfy users' needs. In the field of **broadcasting**, AKOS manages the radio frequency spectrum and supervises program content in such a way as to ensure the plurality of broadcasting media and content. In the area of **postal services**, AKOS pursues its goals of ensuring universal services, protecting consumer rights, and promoting competition in the postal market. In doing so, AKOS operates in a transparent manner and ensures that all things being equal there is no discrimination among postal service providers

and postal service users. In the field of **railway transport**, AKOS monitors the competition in the markets of railway transport services, and takes action if it finds violations of free competition or of regulations determining train routes and usage fees.

However, the energy sector is regulated by the Energy Agency, which has a mission to provide for the impartiality and equality of all the participants in the energy markets, and to help set up the conditions necessary for an effective operation of these markets.

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 fact that national regulatory authorities started to use sector-specific legislation, which was largely based on competition law principles, led to the question how, if any, conflicts between these two sets of rules should be solved. According to the regulatory practice, today these conflicts indeed arise.

It is obvious in the electronic communications sector that national regulatory authorities have to be aware of the substance of the competition law rules. Principles as significant market power, the relevant market and barriers to entry are principles which have been identified long ago by the competition law. It is therefore vital that national regulatory authorities apply these rules in cases of market analysis that they have to undertake. It is also vital that competent national authorities cooperate under the umbrella of administrative law and apply the principle of *lex specialis*. The latter implies that in case when sector regulator and national competition authority are dealing with the complaint the first should take it over, due to its sector knowledge and awareness and due to the fact that competition authorities usually do not have at their disposal the right instruments to supervise (monitor) application of the imposed remedies. However, it should be emphasized that the situation is not as clear as one might want it to be. The fact remains that some principles (e.g. extraordinary circumstances) are not clearly defined; it is also not clear what happens if national regulatory authority does not take into account the competition law. The easiest way to solve the problem is a close cooperation of the two authorities and maybe even a clear memorandum of understanding and cooperation (e.g. UK).[5]

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?

In the Republic of Slovenia all of the above-mentioned economic sectoral regulatory authorities' decisions about the rights or obligations of people or legal persons (in transport, energy, postal activities, electronic communications, audiovisual media) are subject to a judicial review.

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?

Competent authority that verifies the decisions (about the rights or obligations of people or legal persons form the administrative field) of the economic sectoral regulatory authorities is the Administrative Court of the Republic of Slovenia. The judicial administrative system in the Republic of Slovenia has two levels; the Administrative Court (with one division on the sit of the court and three external (location) divisions) on the first level and the Supreme Court (with an administrative law department) on the second level.

5 Tanja Muha: Razmerje med sektorsko regulacijo in konkurenčnim pravom pri regulaciji elektronskih komunikacij, Uprava, letnik VI, 2/2008, p. 35-53, available on: http://www2.fu.uni-lj.si/uprava/clanki/letnikVI,%C5%A1tevilka2,2008/LET_VI_stev_2_julij2008_MUHA.pdf.

When it comes to assessing compliance to competition law, the competent authority on the first instance is the Administrative Court. On the second level it depends on whether the subject of a revision is a matter of an *ex ante* or a matter of an *ex post* control. If the subject of a revision is a matter of an *ex ante* control, the competent department at the Supreme Court is the administrative one and if the subject of a revision is a matter of an *ex post* control, the competent department is the commercial one, where the decision is reviewed by a panel, specialised for such cases.

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

The relevant proceeding rules are administrative dispute rules, provided by Administrative Dispute Act (ADA). In most of these proceedings, for example, in proceedings regarding electronic communications, according to special laws, the court has to decide fast and on priority (Article 192 of the Electronic Communications Act).

On the first level of judicial review one has a legal remedy - lawsuit, which can generally be filed within 30 days after the service of the administrative act, by which the procedure was concluded. The lawsuit may be filed for removal of the administrative act (a contested lawsuit), finding of the illegality of an act (declaratory lawsuit), issuing or service of administrative act (lawsuit due to silence), amendments of administrative act (lawsuit in the dispute of full jurisdiction).

Legal remedies that can be filed to the Supreme Court are a revision and rarely, under certain circumstances, also an appeal.

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?

When the Administrative Court receives a lawsuit, it has to conduct a preliminary testing. All through the procedure it has the competence to *ex officio* reject the lawsuit, if any of the formal predispositions, determined in Article 36 of ADA, is not given.

Otherwise it applies as generally provided in the ADA. The subject of judicial control is the application of the procedural and substantive law. The control of the correct finding of the state of facts can also be exerted at the court of first instance. In that regard the Administrative Court has to decide a case according to the claims, made by the parties and within the limits of the reasons invoked by them. Under these terms the court examines the compatibility of administrative decisions with all relevant substantive rules *ex officio*. This applies also to the Supreme Court. However, in case-law the judicial review is limited to the application of the procedural and substantive law, and not to the expert questions (court considers the competent agencies as the experts in their fields).

Generally, the control of the Administrative Court is limited to finding of the illegality of an act. Exceptionally, according to Article 65 of ADA (dispute of full jurisdiction), the court may also remove the administrative act and decide on the matter with a ruling if this is permitted by the nature of the matter and if the data on the procedure provide reliable basis for it or if only the facts of the case were established at the main hearing. That is particularly if the removal of the contested administrative act and the new procedure at the competent body would cause damage for the plaintiff which would be difficult to redress and if after the administrative act has been removed, the competent body issues a new administrative act, which is contrary to the legal opinion of the court or its positions on the procedure.

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.)?

If the Administrative Court decides that it will itself establish the relevant facts of the matter (because it is of the opinion that administrative authority did not correctly or fully investigate the state of facts of the matter) the administrative judge, presiding the judicial panel, must (according to Article 45 of ADA), even before the main hearing, carry out everything necessary and acquire the necessary data for a swift resolution of the dispute.

When taking evidence the administrative judge can make all the investigations necessary. As the judge in a civil law proceedings according to Civil Procedure Act (Zakon o pravdnem postopku, ZPP) the administrative judge can make the on-the-spot investigation, order an expertise, demand data from administrative authorities, agencies etc. Rules on taking of evidence are entirely regulated by ZPP. However, unlike in civil procedure, the administrative judge is not limited by the evidence proposed by the parties, but may take any evidence which it considers to contribute towards the clarification of the case and towards a just and legal ruling (Article 20 of ADA). If the Administrative Court is convinced that factual issues are clear, no investigations are carried out. In this case it rules only on the legality of the disputed administrative act, according to the facts established in the administrative procedure.

Regardless of the above-mentioned provisions of ADA and ZPP, in matters of economic sectoral regulation, the court is reserved when it comes to the appointment of experts, while it considers the competent Agencies as bodies, which have the most skills in their areas. An example is Judgement of the Supreme Court, No. X Ips 459/2012, dated 30 May 2013, which considers the postal price regulation. In the mentioned case the Supreme Court ruled that plaintiff has to prove reasonable doubt in the method for determination of the prices for accessing the network, used by AKOS. If he does not succeed, the interpretation of the Agency is crucial, as it is the expert in its field.

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 Court decides mainly on revisions and rarely on appeals. A request for revision may be lodged due to an essential violation of the provision on administrative dispute procedures and due to an erroneous application of substantive law. It cannot be lodged due to incorrectly or incompletely established state of facts.

As the highest level of judicial review the Supreme Court presides on the most important cases and only where certain conditions are met. Revision is allowed only if the value of the contested part of the final administrative act or final ruling, when the court took substantive decision, in the matters where the right or obligation of a party is expressed in monetary value, exceeds EUR 20.000; if the substance of the matter concerns the decision on a relevant legal issue or if the ruling of the court of first instance deviates from the case law of the Supreme Court with regard to the legal issue that is essential for the decision, or if there is no uniform position concerning this legal issue in the case law of the court of first instance and the Supreme Court has not yet adjudicated on the matter; or if the decision that is being contested in the administrative dispute, has very grave consequences for the party.

An appeal may be lodged against a ruling passed in an administrative dispute if the court itself established facts, which are different to those established by the defendant, and if it changed on the basis thereof the contested administrative act and also in certain cases where it was evaluated, whether human rights and fundamental freedoms of an individual were violated.

Here are some more important decisions of the Supreme Court, Administrative Law Department:

(1) Judgement of the Supreme Court, No. X Ips 459/2012, dated 30 May 2013
In the case at issue the Supreme Court concluded that the method, used by the Agency to calculate the price for access to the postal network, is a matter of rules of professional conduct.

Sectoral regulator (agency), which is responsible for legally consistent and effective functioning of a particular area, has a decisive role in interpretation of such rules. Therefore, in case of doubt whether the rules of professional conduct were correctly applied, the judicial control is limited. In this regard, the judicial control is restricted. It can only be exercised if the opposite partly manages to rise justifiable doubt as regards to the correctness of the rules applied and in the present case that is not the case.

(2) Judgement and Decision of the Supreme Court, No. X Ips 22/2012, dated 8 November 2012
In the case at issue a question was addressed to the Supreme Court whether the holder of the same kind of radio frequencies is a user 'affected' or undertaking 'affected' (an interested party) according to the fourth paragraph of Article 36 of Electronic Communications Act (ZEKom-1). The mentioned provision determines: *„Where the Agency determines, on the basis of the response of interested parties ("interested public") and of other relevant information at its disposal, that specific radio frequencies will not be made available to all interested parties, it must carry out a public invitation to tender prior to issuing decisions allocating radio frequencies. In the opposite case, the Agency shall issue decisions allocating radio frequencies under the provisions of the act governing the general administrative procedure."* The Supreme Court interpreted the cited provision so as the interested party may also be the operator, who is already the holder of the same kind of frequencies. The fact that the Agency has s policy that the same kind of radio frequencies can only be entrusted to one operator is not relevant for the interpretation of the provision at issue.

(3) Decision of the Supreme Court, No. I Up 94/2011, dated 23 February 2011
In the case at issue the plaintiff (Post of Slovenia) was ordered to lower its prices for specific services. The plaintiff initiated an administrative dispute against the decision and requested the Administrative Court to suspend the implementation of the contested act until the issuance of a final decision, because its implementation would otherwise cause him damage that would be difficult to redress. According to the second paragraph of Article 32 of the Administrative Dispute Act, the court, when deciding on an interim measure (injunction), shall take into consideration the detriment of the public right and the benefits of opposing parties in accordance with the principle of proportionality. The Supreme Court relied on the first paragraph of Article 57 of the Postal Services Act (Zakon o poštnih storitvah, ZPSto-2), which determines: *"In performing its tasks, the Agency shall pursue the objectives of universal service provision, the protection of users' rights and the encouragement of competition on the postal services market. In pursuit of these objectives, the Agency shall take action proportionate to the objectives that it seeks to achieve."* Considering the latter provision the Supreme Court assessed that such actions cause specific financial consequences, however, such is utterly legitimate and expected consequence of the obligation imposed by the Agency. It concluded that an issuance of an interim measure injunction would (disproportionately) harm the public interest and confirmed the decision of the Administrative Court, which rejected the plaintiff's request.

(4) Decision of the Supreme Court, No. X Ips 492/2008, dated 30 December 2010
In this decision the Supreme Court dealt with the market analysis procedure. The first question raised by the plaintiff was weather it is acceptable that the Agency's General Act on relevant markets (Splošni akt o določitvi upoštevnih trgov) defines the relevant markets only in broad and general terms. The Supreme Court held that the definitions of relative markets are satisfactory and that the relevant market can only be precisely defined after the statistical and analytical work, taking into account the rules regulating competition, telecommunications and economics, is done. The over-detailed definitions in General Act on relevant markets would have adverse effects regarding the purpose of the regulation of telecommunications sector, i. e. providing a competitive environment in this sector. With it's market analysis the Agency defined in detail which products and services are in the relevant market, taking into account the current state of technology and competition.

The second issue raised was weather the plaintiff that was labeled by the Agency as an operator with significant market power (in a administrative procedure conducted after the result of the

market analysis procedure) should have been the party in the market analysis procedure. According to the Supreme Court, since the market analysis is not an administrative act itself, an operator with significant market power can not be regarded as the party of the market analysis procedure. However, the court held that a party in the administrative procedure for the determination of operators with significant market power can have access to the files and data used in the market analysis procedure (except categories of data that are excluded), if it demonstrates its legal interest, i.e that the data used was the basis for the measures adopted by he Agency and that the data not correct or was used incorrectly. The plaintiff in the administrative procedure for the determination of operators with significant market power did not submit nor demonstrate such legal interest.

Ljubljana, 26 February 2014

Prepared by:
Nika Hudej
Julija Oremuž
Rada Malijanska
Luka Kovač
Martina Lippai