

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

**Royaume-Uni**  
**Cour suprême**

***United Kingdom***  
***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?

*Health services are regulated by Monitor*

*Financial services are regulated by the Financial Conduct Authority (FCA)*

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

*Yes – mainly through the Competition Act 1998*

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.)?

*To provide vital consumer protections and ensure consumers' interests are promoted through efficient provision of good quality, reliable and sustainable services (BIS, Principles for Economic Regulation, April 2011, paragraph 2)*

*To promote effective competition and with protection of consumers' interests at its heart and to promote efficiency and fairness while providing companies a return on their assets and investments (BIS, Principles for Economic Regulation, April 2011, paragraph 2)*

4. Is economic sectoral regulation an *ex ante* control, aimed at defining obligations for companies in the regulated sectors *a priori*, or an *ex post* control, aimed at upholding competition provisions in case of infringement ?

*Both. Ex post competition enforcement decisions under the Competition Act can be made by the CMA and by economic regulators through concurrent competition powers. Ex ante decisions on mergers and markets are only made by the CMA (BIS, Streamlining Regulatory and Competition Appeals, paragraph 2.7)*

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?

*Yes. In most sectors, regulators have played an important role in helping to promote competition (House of Lords Select Committee on Regulators, UK Economic Regulators: Volume 1, 1<sup>st</sup> Report of Session 2006-07, paragraph 1.31).*

*The existing regulatory regime has promoted competition where appropriate (BIS, Principles for Economic Regulation, April 2011, paragraph 5)*

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

*Most of the nationalised industries had statutory monopolies and, when privatised, retained monopoly power, or, depending on the new structures, established some elements of monopoly power, which required regulation to prevent abuse of that power via higher prices and/or lower standards of service than there would have been in competitive markets. The relevant Acts of Parliament established independent sector-specific regulatory offices. Although the statutory duties set out in the Acts of Parliament which privatised the industries differed to some extent from sector to sector, regulation as it evolved tended to have common features. In particular, it is recognised that the “natural monopoly” sectors of the utilities (for example, the networks of pipes and wires used to transport wholesale gas and electricity supplies to retail customers) have to be regulated for the foreseeable future to avoid the companies exploiting monopoly power. However, in the remaining parts of the industries, pro-competition regulation is required, but only as a temporary measure until potentially competitive sectors become actually competitive. Thus the scope and size of the regulatory offices were expected to reduce over time as the parts of the industries which had become effectively competitive became subject only to general ex ante competition regulation (House of Lords Select Committee on Regulators, UK Economic Regulators: Volume 1, 1<sup>st</sup> Report of Session 2006-07, paragraph 2.2-2.4).*

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

*No comment*

## **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?

*The UK currently has a number of economic sectoral regulators and competition authorities:*

- *Civil Aviation Authority (CAA) – economic and safety regulator of civil aviation*
- *Office of Communications (Ofcom) – regulatory and competition authority for broadcasting, telecommunications and postal services*
- *Office of Gas and Electricity Markets (Ofgem) – regulates gas and electricity markets*
- *The Office of Rail Regulation (ORR) – economic and safety regulator for railways*
- *The Water Services Regulation Authority (Ofwat) – regulates water*
- *Monitor – regulator for health service providers*
- *Financial Conduct Authority (FCA) – regulator of the financial services industry*

*There is some devolution of economic regulation within the energy and water sector. Ofgem only covers the energy sector in Great Britain. Responsibility for energy and water in Northern Ireland is devolved to the Utility Regulator (NIAUR). Scotland has one devolved economic regulator, the Water Industry Commission for Scotland (WICS), which is responsible for regulating the water and sewerage sector in Scotland.*

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

*Independent regulation has been a vital part of the UK’s framework for economic regulation since the 1980s and remains central to the Government’s approach (BIS, Principles for Economic Regulation, April 2011, paragraph 20).*

*The Government is committed to preserving the independence of economic regulators (BIS, Principles for Economic Regulation, April 2011, commitment 2). It will ensure that:*

- *Regulators are legally distinct and functionally independent from any other public or private entity when carrying out their functions*
- *Regulators’ staff and management act independently from any market interest and do not seek or take direct instructions from any government or other public or private entity when making regulatory decisions*

- *Regulators can take autonomous decisions, independently from any political body, and have separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out their duties*

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?

*Most of the sector regulators hold concurrent powers in respect of both UK and EU competition rules in their respective sectors. The sector regulators have the power to make market investigation references to the CMA. Safety regulation is a larger part of the work of CAA and ORR than economic regulation.*

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

*No but they may have some input during the legislative debates.*

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?

*Firms can be fined if their past behaviour is shown to breach competition law, and these fines can be very significant (up to 10 per cent of total turnover). In addition, a finding of infringement is binding for the purposes of any follow-on action for damages action (under section 58A of the Competition Act 1998) (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 4.47).*

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

*The Competition and Markets Authority (CMA) seeks to promote competition generally, both within and outside the UK, for the benefit of consumers (Enterprise and Regulatory Reform Act 2013, s. 25(3)).*

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 newly created UK Competition Network (UKCN) is an alliance of UK sector regulators and the CMA. The CMA is taking the lead to ensure close co-operation over competition activity between itself and the sector regulators.*

*Mechanisms existed through the Joint Regulators' Group (the predecessor to the UKCN) for regulators to share good practice and specific cross-sector research has been jointly commissioned by regulators on occasion (BIS, Principles for Economic Regulation, April 2011, paragraph 44)*

### **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?

*A judicial review may be available in circumstances where a regulator makes a decision and the legislation is silent on any right of appeal. For example, this is the case with Ofcom decisions specified in Schedule 8 of the Communications Act 2003, which are not subject to section 192 provisions*

contained within that Act and thus are appealable on judicial review grounds only. Similarly, there will be regulatory decisions in other sectors which have no appeal route specified by the underpinning legislation but which will be part of the inherent jurisdiction of the senior courts (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.16)

The main areas where appeals currently go beyond a judicial review are:

- Communications Act decisions
- Competition Act decisions
- Price controls
- Certain other regulatory decisions e.g. market power determinations (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 4.23)

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?

*Direct appeal routes exist in a number of sectors (electronic communications, energy in Great Britain and aviation). Regulatory references are provided for in the water and rail sector and for energy decisions in Northern Ireland (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.12)*

*In the regulatory reference model, if a regulated firm does not agree with the regulator's proposed decision, the regulator can refer a defined question to the CMA to be reconsidered. The CMA is then required to determine the matter in the overall public interest, taking into account the statutory duties of the regulator (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.10)*

*In the appeal model, an appellant can bring a challenge directly to the appeal body. The responsibility is with the appellant to identify the element(s) of the regulator's decision that they believe are wrong, and to bring evidence to support their appeal. The appeal body will judge the appeal based on the case brought by the appellant, and the counter-argument by the authority (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.11)*

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

*There is currently a complex mix of different routes for different competition and regulatory appeals.*

*Different regulatory and competition decisions are appealable to the Competition and Markets Authority, the Competition Appeal Tribunal (CAT) or the High Court (in England and Wales), Court of Session (in Scotland) and High Court (of Northern Ireland) or in some cases more than one of these appeal bodies (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 5.1).*

*The Competition Appeal Tribunal (CAT) is a specialist tribunal set up to hear appeals against a range of different decisions across all the economic regulators and competition authorities. It has expertise in competition and economic regulation matters. It hears appeals against a range of regulatory and competition decisions, including on judicial review grounds and appeals on the merits. The Competition Appeal Tribunal Rules set out in secondary legislation (S 2003/1372) how the tribunal will operate and hear cases. It provides the CAT with certain powers to enable effective management of cases. In addition, the CAT's Guide to Proceedings explains how cases will be conducted before the CAT in practice (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 5.8).*

*In some sectors, certain appeals of decisions go to the CAT but judicial review challenges against the process of decision-making taken (or not taken) by regulatory or competition authorities are heard by the High Court of England and Wales, the High Court of Northern Ireland or the Court of Session, as the case may be. Most notably, the CAT hears appeals to certain decisions (mainly concerning infringements and penalties but also including the imposition of interim measures) under the*

Competition Act 1998. But if a person seeks review of the way that an investigation is being conducted the case must be heard by one of those courts (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 5.41).

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?

*A judicial review is essentially a review to establish the lawfulness of an action. A judicial review can sometimes be brought where there is a manifest error in factual assessment, but in general, the court will not expect to conduct a full factual reassessment. The intensity of the review into the rationality of a regulatory action may vary. In general, any court conducting a judicial review is expected to show particular restraint in "second guessing) the educated predictions for the future that have been made by an expert and experienced decision maker, such as a regulator or competition authority. However, the degree of restraint may be reduced where what is proposed involves a potential interference with EU rights or human rights. The rationality test is flexible and may be adjusted to take this into account (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.17-2.19)*

*An appeal on the merits would at its highest, potentially allow an appeal body to consider all aspects of the case, rather than just aspects connected to the judicial review grounds. It may involve a consideration of whether a decision was right. An appeal on the merits may therefore succeed where a judicial review would not: i.e. where the decision was made in accordance with the law, there was no irrationality or procedural impropriety, but nevertheless, in the appeal body's judgment, the decision was wrong, based on the facts of a particular case. This judgment would usually be on the basis of the appeal body going beyond judicial review grounds and considering what the decision should have been in light of the statutory duties imposed on the regulator (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.20)*

*The grounds on which regulatory appeals can be grounds can be brought vary between the regulatory statutes. Some make plain they are the same as a court would apply on a judicial review; some that they shall be on the merits; and a number specify the grounds with more particularity; for example, in the aviation sector, legislation allows for appeal on the grounds that a decision was wrong based on an error of fact, law or in the exercise of discretion by the regulator (BIS, Streamlining Regulatory and Competition Appeals, 19 June 2013, paragraph 2.21)*

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

*The CAT is a specialist tribunal with experience and expertise in competition law and regulatory issues.*

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 of the United Kingdom hears appeals on points of law of general public importance: see forthcoming major decision in British Telecommunication Plc (Appellant) v Telefonica 02 UK Ltd and Ors (Respondent).*