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Supreme Court of Spain

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Convergence of the supreme administrative courts of the European Union in the application of Community law

THE CONTRIBUTION OF THE EU'S SUPREME ADMINISTRATIVE COURTS TO IMPROVING THE PRELIMINARY RULING PROCEDURE: CONCLUSIONS OF THE HAGUE WORKING GROUP

Level and types of monitoring regulatory bodies by the EU supreme administrative courts: Lithuanian experience

Goda Ambrasaite – Balyniene

Cour administrative suprême de Lituanie

SANTANDER

8, 9 and 10 September 2008

Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Speaking about the difficulties that the courts face when controlling the activities of Independent regulatory authorities (IRAs, Regulators), two main problems may be identified. The first one is indeed the high technicality of those activities and, inevitably interconnected with that, the need for special technical knowledge, which is by far not always possessed by the court. The second problem, which is closely interconnected with the first one, is a high level of discretion that IRAs enjoy in their activities. Indeed, there is also a third problem – the time, or, to be precise, the length of judicial proceedings, as significant regulatory decisions must be taken promptly. However, taking into account the fact that the length of judicial proceedings is relevant in any topic related with judicial control, today I will leave this problem aside.

Starting with the first problem – the technicality of the judicial control of IRAs activities – it must be said that while the mere concept of **independent** regulatory authority enables us to conclude that there can hardly be any better form of control over IRAs activities, for ensuring their accountability, than judicial control (as the system where appeals against decisions made by regulatory authorities go to the relevant ministries can undermine the independence of a Regulator), speaking from the perspective of judiciary, the task of controlling IRAs activities is far from simple. Even such a, at a first sight, purely legal procedure as judicial control of normative administrative acts can take another form when we speak about the acts passed by IRAs. Regulators have a high level of technical expertise, which enables them to define technical standards and norms. And that is exactly the reason why independent regulators are granted this function. But when it comes to judicial control – i.e. what a judge should do when he realizes that the legal norm, legality of which is contested before the court, instead of being a wordy legal rule he is used to, is a mathematical formula that looks something like - Kk = 1 + ((Iinfl. - Eef) / 100) + q + X?

When it comes to such everyday regulatory functions as for example imposing obligations on undertakings with significant market power, the situation gets even more complicated. Market analysis and the assessment of the state of competition on national markets are the necessary preconditions for any intervention by IRAs with the goal of ensuring or restoring effective competition on the market. Not surprisingly, complaints against IRAs decisions invariably involve disputes over complex economic, technical, and legal matters. In most cases so far heard by the Supreme Administrative Court (SAC) of Lithuania concerning relevant decisions of IRAs, economic evaluation was at stake, and very often it was namely the correctness of the relevant economic evaluation which was contested before the court. That is where we come to the question of the level of judicial control of IRAs activities - do courts have the competence to judge on the substance of such economic evaluation? If the answer is “yes”, then – to what extent?

Those questions arise not only because of the highly technical knowledge which is needed to fulfill this task, and which courts and judges possess only to a very limited extent, but also because of the great level of discretion which IRAs enjoy in determining economic issues. This discretion is

emphasized not only at the national, but also at the EU level. For example, following the European Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services, "in the exercise of their regulatory tasks under Article 15 and 16 of the framework Directive, IRAs enjoy discretionary powers which reflect the complexity of all the relevant factors that must be assessed (economic, factual and legal) when identifying the relevant market and determining the existence of undertakings with SMP". Speaking about Lithuania, one more obstacle for the substantial control of economic issues may be found in the wording of Article 3 of the Law on Administrative Proceedings unequivocally stating that "the administrative court shall not offer assessment of the disputed administrative acts and acts (or omission) from the point of view of political or economic expediency and shall only establish whether or not there has been in a particular case a violation of a law or any other legal act, whether or not the entity of administration has acted within the limits of its competence, also whether or not the act (action) complies with the objectives and tasks for the purpose whereof the institution has been set up and vested with appropriate powers."

However, when an extensive judicial review may impose severe burdens on judicial system, given the need for technical and economic expertise that is often involved and threaten to violate the limits of discretion of IRAs, judicial review process limited to procedural aspects, on the other hand, offers only limited guarantees to the litigants, and they can claim that their constitutional right to judicial protection is violated. That is exactly what happened in Lithuania when the SAC had to give an answer to the above-mentioned questions and to draw possible limits of judicial control concerning the discretionary powers of IRAs. In the case finally heard by the SAC of Lithuania[1], the biggest telecommunication operator of Lithuania applied to the administrative court contesting the order of the Communications Regulatory Authority by which the applicant was recognized as having significant market power in the broadband market. The main argument of the complaint was that the Communications Regulatory Authority in carrying out the relevant market analysis had wrongly defined the broadband market. The applicant did not point to any procedural deficiencies of the decision in question – the only thing he was contesting before the court was a relevant economic analysis which was carried out by the Communications Regulatory Authority. The defendant - Communications Regulatory Authority – on the other hand insisted that the procedure of market analysis was a procedure to perform a future-oriented economic evaluation, and that this analysis could not be subjected to any legal criteria, therefore control of such evaluation was outside the scope of judicial control. The defendant also relied on its wide discretion following the European Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community

[1] Judgment of the SAC of Lithuania of 18 December 2006, case No. A[7]-2203-06

Regulatory Framework for Electronic Communications Networks and Services and the above mentioned provision of the Law on Administrative Proceedings preventing administrative courts from controlling the economic expediency of administrative acts.

The first instance court (regional administrative court) supported the position of the defendant and refused to analyze the content of the market analysis ~~itself~~ stating that it was an economic analysis which the administrative court could not verify following a national provision forbidding assessment of disputed administrative acts from the point of view of economic expediency. In the opinion of the 1st instance court, judicial control of the market analysis had to be limited to the purely procedural control, namely, to the extent of controlling whether the IRA had followed all the legal procedures before adopting the relevant decision. Consequently, the 1st instance court rejected the complaint basing/supporting its judgment with the argument that there was no evidence that in carrying out market analysis, the Communications Regulatory Authority had breached any formal procedural requirements.

But when the case came before the Supreme Administrative Court of Lithuania, the latter disagreed with such a position. The SAC noted that the position of the first instance court in this particular case in fact meant that the first instance court refused to hear the complaint, as the only argument of this complaint was the wrong definition of a market. Therefore, the 1st instance court refused to grant the judicial protection to the defendant.

The SAC of Lithuania agreed that the Communications Regulatory Authority enjoyed a high level of discretion in assessing economic matters, however, in the opinion of the SAC, it was within the competence of administrative courts to assess whether the administrative authority had not breached the limits of this discretion. Even enjoying a high level of discretion in assessing economic matters, the defendant was obliged to base its conclusions on the evidence and arguments collected during a precise and comprehensive survey and to present detailed reasons for its decision. The courts could verify the fulfillment of those duties pursuant to the legal criteria.

In making such a conclusion, the SAC of Lithuania also referred to the practice of Community courts in respect of the limits of judicial control when it comes to the discretionary powers. In particular, reference was made to the ECJ judgment in Tetra Laval case (C-12/03 P), where the ECJ, in answering the Commissions argument that the Court of First Instance infringed Article 230 EC by exceeding the limits of its power of review established by case-law, stated that :

“whilst the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it”.

Therefore the answer of the SAC of Lithuania to the question whether the courts can verify the economic evaluation carried out by the IRA, was – yes, they can, and have to, otherwise the constitutional right of every person to judicial protection would be violated. The court emphasized that this constitutional right was also applicable when the administrative act contested before the courts was adopted within the limits of the discretionary powers enjoyed by the relevant administrative authority.

But even when we have an answer to the question whether the discretionary powers of IRAs are subject to judicial control, there still remains another question – to what extent. It is obvious that the scope of judicial control differs when it comes to discretionary powers. When drawing the limits of judicial control, the SAC of Lithuania also referred to the practice of Community courts, in particular to the judgment of the Court of First Instance in Shanghai Teraoka Electronic Co. Ltd v. Council (T-35/01), where the court stated that:

"in the sphere of measures to protect trade, the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case T-162/94 NMB France and Others v Commission [1996] ECR II-427, paragraph 72; Case T-97/95 Sinochem v Council [1998] ECR II-85, paragraph 51; Thai Bicycle, cited in paragraph 46 above, paragraph 32; and Case T-340/99 Arne Mathisen v Council [2002] ECR II-2905, paragraph 53). It follows that review by the Community judicature of assessments made by the institutions must be limited to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power (Case 240/84 Toyo v Council [1987] ECR 1809, paragraph 19; Thai Bicycle, cited in paragraph 46 above, paragraph 33; and Arne Mathisen, cited in paragraph 48 above, paragraph 54). The same applies to factual situations of a legal and political nature in the country concerned which the Community institutions must assess in order to determine whether an exporter operates in market conditions without significant State interference and can, accordingly, be granted market economy status (see, to that effect, Case T-155/94 Climax Paper v Council [1996] ECR II-873, paragraph 98)."

The SAC also referred to the judgment in Kish Glass v. Commission (T-65/96):

"the Court of First Instance observes that, according to consistent case-law, although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of the competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers".

Following the above-mentioned criteria, the SAC of Lithuania has ruled that at the national level, judicial control of complex economic evaluations made within the limits of discretion of IRAs must be limited to checking whether:

1) the defendant followed the procedure of market evaluation;

2) the facts that support the conclusions of the defendant are factually correct;

3) the defendant was not misusing powers and was not basing its conclusions on improper motives;

4) the defendant, when evaluating the market, took into account the criteria that were legally relevant and did not refer to legally irrelevant criteria;

5) the act (action) of the defendant is not contrary to the purpose for which the defendant was established and granted with certain powers;

6) the defendant has not made any manifest evaluation mistake.

Such control, in the opinion of the SAC, does not limit the discretion but only states the normative limits thereof. Moreover, only such judicial control may grant the comprehensive legal protection to the claimant.

It can be easily noticed that almost all of the evaluation criteria determined by the SAC of Lithuania refer more to the, let's say, external formal legal factors, where the last criterion – manifest evaluation mistake – at least at the first sight, points to the very substance of the economic evaluation at stake. Seeking to avoid interpretations, that in order to verify whether the manifest evaluation mistake was not made the court must or can replace the Regulator, the SAC of Lithuania has explained in the same judgment that in order to establish whether the defendant has not made a manifest evaluation mistake, the court should carry out the legal control of interpretation of the economic data. Such control should include:

1) verification of the consistency, reliability and truthfulness of the evidence presented;

2) verification whether the evidence presented resemble all the essential data, which should be taken into account when evaluating a complex situation;

3) verification whether the conclusions were made on the basis of the totality of the evidence presented.

In the opinion of the SAC, such control cannot be equated with the control of economic expediency for the purposes of Article 3 of the Law on Administrative Proceedings, as the court in this case does not verify if the criteria set by the defendant for market definition are economically grounded and rational, but if the data collected by the defendant is sufficient both in quantity and quality to support the conclusion that the economic criteria set by the defendant are fulfilled.

In other case, the SAC of Lithuania went even further, stating that "manifest evaluation mistake is an obvious divergence from the rule when carrying out evaluation. In order to conclude that a manifest

evaluation mistake was made, such a mistake must be established that can be noticed by both persons enjoying the special knowledge and persons who enjoy the special knowledge to the limited extent"[2].

In summary, it can be said that when assessing the possibilities of the judiciary to control the activities of IRAs, the SAC of Lithuania took a careful approach by stating, on the one hand, that even the economic evaluations which fall within the discretion of IRAs are subject to judicial control and, on the other hand, by drawing the necessary limits of such control. This position is a result of both an attempt to balance the constitutional right of every person to judicial protection and the capacity of the judiciary to control the complexity of all the relevant factors that must be assessed and the aim to follow the line drawn by the Community courts in similar legal situations.

[2] Judgment of the SAC of Lithuania of 7 June 2007, case no. A^{17} – 589/2007