



Colloque de l'ACA-Europe  
Paris, 15-17 juin 2014

Paris, 15<sup>th</sup>-17<sup>th</sup> June 2014

ACA-Europe meeting

## Synthèse des réponses au questionnaire sur la régulation économique sectorielle

### *Synthesis of the responses to the questionnaire on economic sectoral regulation*

**Colloque organisé avec le soutien de la Commission européenne**

**Meeting organised with the support of the European Commission**



# Sectoral economic regulation in EU countries

## **I. The scope and the purpose of Sectoral economic regulation**

**1. Sectoral economic regulation has essentially to do with the sectors covered by the secondary legislation of the European Union (transportation, energy, postal activities, electronic communications, audio-visual media). Are other sectors subject to similar regulation in your country?**

All Member States of the EU have applied economic regulation to the entirety of the sectors listed in the phrasing of the question. Hungary states that, where postal services are concerned, economic regulation is in the process of implementation.

Certain countries, such as Austria, Slovenia, Croatia and Cyprus, have applied this regulation only to those sectors named in the question.

Most States indicate that they have extended the focus as defined in the secondary legislation of the Union to other areas. The most frequently cited among these are the pharmaceutical industry, public health, the banking sector, financial markets, capital and insurance. The sectors cited somewhat less frequently are agriculture and agro-food, water distribution, tobacco, alcohol, gambling, taxi drivers licencing, as well as management of household waste.

Other sectors were mentioned, such as data protection for Spain, building material standards for Estonia, higher education for Germany, mining for the Czech Republic, the sugar market for Turkey, cosmetics for Latvia, civil aviation for Portugal and Ireland, the book industry and greyhound racing for Ireland, and even the environment and biodiversity for Bulgaria.

⇒ **Most of the States have included various other areas in such regulation:** the pharmaceutical industry, public health, the banking sector, financial markets, capital and insurance, *etc.*

**2. Has all of the European Union secondary legislation on sectoral economic regulation been transposed into national law and/or implemented in practice?**

A clear tendency is visible in terms of the transposition and practical implementation of the full range of EU secondary legislation. The Czech Republic, Ireland and Sweden state that they have transposed nearly all (the ECJ in fact was called upon in 2013 to handle a case of inappropriate transposition of a directive concerning railroads in the Czech Republic and a case of partial transposition of the directive on the rules of the energy market concerning Ireland), also Slovenia (where the secondary EU legislation covering the energy sector is to be settled in the near future). Hungary and Austria add that, whereas it has been transposed, implementation is still underway for certain regulatory authorities.

Belgium indicates a difficulty relating to the division of competences under the federal system and the other component entities of its State.

Finally, Finland notes that the role of its administrative Supreme Court is not automatically to verify the transposition of legislation arising from the Union, but that it is competent only when such legislation is invoked in litigation brought before it.

⇒ **The level of transposition is satisfactory, and the last of the countries in which the transposition is not yet finished should not be long in closing the gap.**

### **3. Is the purpose of sectoral economic regulation only to create competition in sectors where there is a State monopoly? If not, what are its other goals (implementation of an internal market, definition of universal service obligations, consumer protection, etc.)?**

All States answer that their priority was to open these sectors to competition. With the exception of Croatia, which mentions this goal only, they all also mention the existence of other goals sought. Finally, Lithuania adds that certain companies still remain under State ownership.

Amongst the other goals one finds the implementation of an internal market, the definition of the concept of **universal/public service, consumer protection**, access by all consumers to goods and services of quality at reasonable prices (and of sustainable quality in the United Kingdom) as well as to non-discriminatory treatment, environmental protection, *etc.* Several countries (Turkey and Bulgaria in particular), state that the objective is primarily to reinforce the markets in question, making it possible to supervise competition and to punish anti-competitive practices. The United Kingdom adds that the effective implementation of competition must be reconciled with consumer interest in order to insure a fair return on investment for the companies concerned. Ireland states that its government has recently been working particularly hard to create an environment conducive to **international competitiveness**.

Certain countries, such as Luxembourg or Greece for example, emphasise the necessity of maintaining secrecy in the communications sector, protection of privacy, *etc.* Bulgaria underscores the necessity of promoting investment and of ending **corruption** in the administration through the introduction of economic regulation. Belgium mentions introducing transparency criteria and providing consumer information for making comparisons.

Nevertheless, certain countries point out that the objectives sought differ according to the sector. This is for example the case for Slovenia, which makes a distinction between the goals sought in the energy sector (service in the general interest and consumer protection), and in the other sectors (returning to the general objectives already cited and adding the search for innovations in the quality of the service provided) or for France (for the audio-visual media sector: protection of the public and of cultural and political diversity, whereas for the sectors of energy or of electronic communications, the priority is the search for equitable and non-discriminatory access for new entrants). Finland states that the number of approvals per year granted to taxi drivers is limited in order to encourage competition in this sector.

⇒ **Although ending State monopolies was the original objective, the countries all agree on expanding the outlook, in particular as concerns consumer protection and equal treatment in the services offered.**

#### **4. Is sectoral economic regulation an *ex ante* regulation, intended to define in advance those obligations applicable to businesses in the regulated sectors, or *ex post*, intended to enforce the rules on competition in the event of infraction?**

A wide majority of countries state that they apply both *ex ante* and *ex post* regulation. A similar pattern is visible virtually everywhere: the sectoral authorities set rules for regulation, supervision or approvals in advance, while the entity in charge of competition acts after the fact to sanction any abuses.

In some countries however, the sectoral authorities (this is not necessarily true in all cases: sometimes there are only a few in a given country) may themselves exercise an *ex post* control, as in Turkey and Finland. In Finland however, while an *ex ante* regulation still exists, there is no universal *ex post* regulation, as is the case in the electricity sector, pharmaceutical sector, or in the licencing of alcohol sales. The same configuration is found in Hungary, where not all sectors are subject to a systematic *ex post* control.

For still other countries, the regulatory intervention phase depends on the sector, as in Estonia (*ex ante* for telecommunications and *ex post* for postal services).

Finally, Denmark provides only for *ex ante* regulation.

- ⇒ **The countries all opt for *ex ante* regulation, very often followed by *ex post* regulation**, although this pattern may include variations depending on the country, particularly on the level of the competent authorities (transversal or sectoral).

#### **5. Has implementation of sectoral economic regulation encouraged competition in the sectors in question? Have new entrants been able to join regulated markets? If not, for what reasons?**

All the countries are in agreement that the introduction of economic regulation has encouraged competition in the sectors concerned, thereby allowing new entrants to join the markets in question.

Two countries however are slightly at odds with this general result. The first is Hungary which states that, in spite of the introduction of private capital, it observes little existent competition and that therefore the regulation occurs on a limited market with few players. The second is Luxembourg, where the small size of the country is a detriment to opening up certain sectors.

In many countries, however, the arrival of new players has varied according to the sectors. For example, several countries (Greece, Austria) state that competition is now visible in a sector such as telecommunications, but less so in other sectors (energy). Ireland states in this regard that for new arrivals, the cost of entering these markets has often been an obstacle for some, but has been overcome in the telecommunications sector in particular. Germany indicates an increase in competitors in the telecommunications sector since 2011, even though earlier operators still control nearly 30 % of the market, a configuration also found in France in both the energy sector and the postal market.

As emphasised by the Czech Republic, among others, liberalisation has often been gradual, as was the case for the energy and transportation sectors. Indeed, this country confirms that it has not yet fully opened competition in all sectors, with postal services not slated to allow competition before 2017.

Belgium, for example, reaffirms the role played by the regulatory authorities and reports a two-tiered introduction of competition on its territory: rapid for air transportation and telecommunications, slower for postal services. Here Belgium particularly emphasises the distinction to be made between network managers and companies responsible for distribution, the former being designated by the federal government whereas providers are contracted by regional governments.

Concerning Bulgaria, it indicates that it has successfully introduced sectoral competition by means of multi-year action plans. For Ireland, there is a factor of improvement in the competitive levels in markets, but competition did not originate merely from initiating sectoral economic regulation.

Amongst the sectors with the least competition, one may cite railroads in the Netherlands (reserved for the national company whereas new entrants may participate, but only locally), electricity, natural gas and telecommunications in Slovenia, the transportation, postal services and telecommunications sectors in Estonia, railroads in Lithuania, and natural gas in Finland.

Austria reports that, in the telecommunications sector, although new entrants have gained access to the market, a gradual reduction in stakeholder companies has been noted. Similarly in France, after a strong expansion in competition in audio-visual media, we now see a tendency toward concentration (acquisition from takeovers of new entrants by established operators).

It is to be noted that at present the Netherlands are engaged in a debate concerning liberalisation, which is sometimes seen as too pervasive, with some parties recommending that privatised services be placed under ministerial controls.

- ⇒ **In general, economic regulation has been conducive to sectoral competition and the arrival of new entrants**, although some countries have encountered problems in certain sectors, sometimes owing to the territorial organisation of the country. Nonetheless, certain countries report sectors where the number of players is now declining.

## **6. Has implementation of sectoral economic regulation led, directly or indirectly, to total or partial privatisation of public companies?**

It appears in general that the introduction of economic regulation has in fact led to a privatisation of public companies.

Nevertheless, it should be pointed out that Slovenia has not really seen any privatisation resulting from implementation of economic regulation and that Sweden privatised on its own initiative and not under pressure from the EU.

Amongst those countries having seen partial privatisation are Austria, United Kingdom, Luxembourg, Portugal, the Netherlands, Finland, Germany for telecommunications, Latvia (which states that privatisation is now prohibited except for certain sectors such as postal services and soon, electricity), direct partial privatisation for Croatia, Italy (except for railroads, entirely held by the State), Spain (where the privatisation movement begun in 1983 has been gaining strength since 1996) and Greece.

Other countries have experienced total or partial privatisation depending on the sectors, such as Turkey, France and Estonia (except railroads which were not privatised in either of the latter two countries), the Czech Republic (total for the gas or electricity industries and soon for postal services). Ireland likewise reports partial, gradual or total (telecommunications) privatisation, but the State retains ownership of the networks whereas gas and electricity suppliers have been privatised.

The same is true for Hungary, where full privatisation has been implemented except for postal services, which have been only partially privatised.

Lithuania reports that it has privatised certain sectors but wishes to keep others public (postal services, railroads), for reasons of national security and the public interest.

Finally, Belgium sees itself as a special case, where privatisation means collaboration between public companies, some of which are even monopolies, and the private sector, with the single purpose of providing the State the liquidity to reduce the public deficit.

⇒ Generally speaking, **most of the sectors have been privatised** or soon will be, for those still held by the State. These privatisations have been either total or partial.

## **7. What sectors of economic life would you most specifically wish to address in terms of regulation?**

It seems clear from the answers that some States didn't understand the question. A certain number of them even refrained from answering.

Nevertheless, amongst the answers expressed, several sectors stand out: telecommunications (Bulgaria mentions on this topic that it was sanctioned by the EU shortly after its admission by reason of the lack of liberalisation in this area), energy (in particular for Lithuania, which is still very dependent on imports), the banking sectors and capital markets (Turkey, Hungary), the postal and transportation sectors (Italy and France, in particular for rail carriage), health and pharmaceutical services (Denmark), the tobacco, alcohol and waste management sectors for Lithuania, the media (the Netherlands), and the uses of crop lands (Latvia).

A specific request was also made by Spain, which wishes to study in greater depth the issue of the articulation of powers between the transversal competition authority and the sectoral authorities.

⇒ **Subjects most often mentioned: telecommunications and energy.**

## II. The organisation of Sectoral economic regulation

### **8. Is sectoral economic regulation implemented by one or several independent Government authorities? If so, what considerations have led to this choice and what means are provided to guarantee their independence?**

The most widespread configuration apparent in the answers given is the existence of several authorities.

**The exception to the rule is Germany**, which has a single authority, competent for electricity, gas, telecommunications, postal services and railroads. This autonomous high federal authority is placed under the minister of economy and energy.

As for Slovenia, it has only two independent authorities, one for railroads, postal services and telecommunications, which works with independent experts, and a second for energy.

Where there are multiple authorities, the general principle seems to be the competence of one authority per sector, as is the case in the Czech Republic, Italy, and Bulgaria, although in other States, the authorities may also be competent in several sectors, with each country showing its own specific organisational variations. For example, Sweden has four principal authorities with horizontal responsibilities and sectoral authorities.

The United Kingdom has various authorities. Certain sectors, such as water and energy, are regulated by decentralised authorities: thus there is one authority in charge of energy in Great Britain, another in charge of water in Scotland, and yet another regulating energy and water in Northern Ireland.

**Yet, one may observe** in Spain (after a tendency towards proliferation of regulatory authorities in 2011), as well as in Ireland or the Netherlands, **a tendency towards consolidation of sectoral authorities in recent years**, merging several sectors into a single entity, indeed also eliminating certain authorities as was the case in Spain. The argument most often advanced is the need to reduce costs involved in running these regulatory agencies.

Finland is a special case since the Finnish Council of State was appealed to for awarding approvals for postal services. In other countries, one also finds a regulation of certain areas directly supervised by ministries, as in Turkey or the Czech Republic (although there is discussion of attaching transportation to a specific, dedicated authority). Such is also the case in Denmark where certain sectors are not regulated by independent public authorities, but rather by governmental agencies integrated within ministries.

In the question of the independence of the authorities, the situation varies from country to country, and sometimes even among authorities in the same country (Lithuania for example whereas the Netherlands are in the process of harmonising the structures and functions of its various agencies).

Generally speaking, the authorities (except those cited above and attached to ministries) enjoy a certain degree of independence overall (required by an organic law in Luxembourg). But not all are established as legal entities. France for example, has two types of authorities: independent administrative authorities (which are not judicial entities), and independent public authorities, which are legal entities.

Members are appointed by the Government or the Parliament for a pre-determined and typically non-renewable term (Czech Republic, Lithuania, France, Belgium, Spain...), through a special recruitment procedure (Greece), or are otherwise subject to the common statute for civil servants (Turkey).

Certain authorities enjoy both functional and institutional independence from the government (as in Latvia with its “autonomous public institutions,” in Sweden, Italy, Hungary or Turkey, where the independent authorities are not subject to ministerial hierarchy), whereas others are founded on a contract with a governmental authority establishing the framework and conditions appropriate to their activities and are under the supervision of a governmental authority allocating their budget (Estonia).

In Slovenia, the structure is somewhere between the two: agencies may neither invite nor receive instructions from the Government and have their own budget which is published annually (in the interests of transparency) as well as their own methods for recruitment of personnel; yet their status, work schedule and budget management remain subject to Government approval.

In Luxembourg also, these authorities, which have the status of public institutions, enjoy managerial autonomy but remain subject to the supervisory power of the public authority.

In Greece, where certain rights regulated by the independent authorities are constitutionally guaranteed, the authorities are expected to exercise their functions impartially, without the possibility of being influenced by the Government. Hence their administrative and financial independence.

In Belgium, there are two configurations: the politically responsible authority may exercise oversight (which may take various forms) of the appropriateness of the decisions by the regulatory authority, which even so has considerable leeway in its evaluations. On the other hand, if the regulatory authority has limited discretion, the politically responsible authority monitors only the legality of these decisions.

Concerning the considerations leading to these choices, the recurrent theme is the desire to provide uniform regulation for each sector and to furnish a solution adapted to its special needs, while entrusting supervision of the markets in question to specialised entities. For its part, Luxembourg more specifically mentions reasons of a political nature.

⇒ **Overall, the countries prefer to divide the various sectors subject to regulation among several authorities with greater or lessor independence as regards the Government.**

## **9. Are these authorities independent of the economic sectors regulated? If so, what means are provided to guarantee such independence?**

What emerges is a clear consensus in favour of the independence of the authorities from the economic sectors regulated. This is true in the recruitment procedures of the various authorities, as seen in question 8, insuring the impartiality and independence (sometimes relative) of members, who are sometimes also subject to restrictions (professional incompatibilities) prescribed by law (Greece, Austria, Portugal, France, *etc.*), in order to avoid any conflicts of interest and guarantee the transparency of various procedures (decisions, appointment of members, *etc.*). In Ireland, for example, the bodies and their personnel are governed by public ethics legislation and by codes of good practice.

Moreover, in their operations, many authorities are prohibited from taking instructions from the Government, in this way insuring, autonomy in their actions. The authorities also enjoy independence as regards the private sector and thus from operators involved in their area of responsibility.

Generally speaking, **the authorities would like to see measures taken affording them greater independence**, such as the German Authority which is under the supervision of the federal ministry of finance and which would like to see its independence enshrined in the Constitution.

Certain countries have special features. For example, in Austria the telecommunications authority is established as an independent administrative tribunal.

⇒ **These authorities clearly appear to be independent of the economic sectors they regulate**, both in their operations, and in the prestige enjoyed by their members.

## **10. Do these authorities have regulatory power? If so, is this regulatory power general throughout the sectors at issue or strictly limited to certain aspects of the regulation?**

This question elicits very disparate answers.

The power of the authorities must be delegated by the Parliament or the Government (legislative authorisation) and is often very narrowly defined, limited either by law or in their charter. The Netherlands justifies this choice by the fact that Parliament legitimately establishes the general rules by virtue of the principle of primacy deriving from the election of its members.

In fact, the Government retains the regulatory power and only delegates power limited to certain aspects of regulation on the sector concerned. Moreover, the countries use a varied vocabulary, some citing a "regulation by administrative actions" (Denmark, Slovenia *etc.*) while others use the term "autonomous regulatory power" (Italy, Luxembourg, Belgium, France, these countries specifying that the latter remains nevertheless sectoral and narrowly defined).

Certain authorities have "broad" powers (determination of the methods of calculation in matters of establishing prices, protection of consumer interests, issuing licences...) or powers initially restricted but which have been broadened to enable them to respond more efficiently to certain expectations (Ireland). Both of these configurations may exist in a single country, as the power granted varies from one authority to another (Netherlands, Lithuania, Latvia, Ireland). For example, in France, some of these authorities have no regulatory power.

In the special case of Germany, the regulation established by the single authority must be approved by the various ministries concerned by its activity.

At the same time, certain authorities have a legislative competence such as is the case in the Czech Republic.

⇒ Thus **almost all of these authorities have a regulatory** (even legislative) **power**, more or less broad depending on the country and the authorities.

## **11. Do these authorities participate, for example through assent procedures, in the development of legislation applicable to the regulated sectors?**

Generally speaking, but with variations from one country to another, **the authorities do play a part in the development of legislation for the sectors of interest to them**, with the exception of Germany where there is no provision for any form of participation.

A distinction must be made between two procedures: participation (direct or indirect) and consultation.

**Participation** is the more common procedure, involving the developmental stages, the possibility of initiating public debate (Slovenia), providing information or also the presentation, even modification of the proposals of or comments on potential reforms. In Hungary, the authorities even perform a leadership and coordination role in negotiations. In Lithuania, certain authorities may even draft legislation.

Here again, the competences of each authority may vary within a single country. In Ireland, the authorities, whereas independent, may be responsible for various parliamentary committees and as such, make their observations heard. Their *de facto* role is rather more supervisory, since the final decision remains under the competence of the ministries or Parliament.

**Consultation** is practised in Cyprus, Portugal (under the framework-law of 2013, the authorities must act at the behest of the Assembly of the Republic or the Government on initiatives concerning the regulation of their sector), in France or Italy (in these two countries, it is possible to give non-binding opinions on draft texts). In the United Kingdom, regulatory authorities may – on an informal basis – contribute during legislative debates.

Finally, several countries use both procedures (Denmark, the Netherlands, Luxembourg) in particular in providing impact studies concerning the proposed legislation.

- ⇒ **The authorities do in fact play an active role in developing applicable legislation**, and in general, they are **expressly** authorised to do so and thus contribute their specialised expertise to the debate.

## **12. Do these authorities have powers to impose sanctions against companies in the regulated sectors? If so, what kinds of sanctions may they impose and under what procedures? Do these sanctioning procedures guarantee compliance with the stipulations of article 6§1 of the ECHR?**

In principle, **all authorities have powers to impose sanctions**, in addition to broad supervisory powers. For Denmark, only two authorities (in the field of energy) have such powers, the sanctioning power for other sectors belonging to the competent ministries and the Authority on competition. In Ireland, the authorities do not have such competence: only the courts have the power to sanction.

The penalties imposed vary greatly:

- simple recommendations,
- possibilities of reparations for wrongful behaviour,
- warnings,
- reprimands,
- corrective measures,
- provisional measures,
- injunctions (suspension or prohibition of companies from exercising their activities, particularly in cases of risks or of a public interest in terminating them, or of violations constituting a direct and serious threat to the public safety, or liable to cause serious economic and operational problems),
- financial penalties at the administrative level (fines, punitive actions),
- licence withdrawals,
- *etc.*

Powers to impose sanctions may vary among the authorities of a single country, constituting a wide range of possibilities within these institutions.

The regulatory authorities take action in cases of failure to observe the rules of competition: abuse of dominant position, cartels, concentrations of power, obstructionism, infractions, supplying false documents, supplying services without the necessary licence, *etc.* Often the list of infractions is set by law as are the amounts of the fines (Bulgaria, Belgium...) or contained in a "code of administrative infractions" such as in Lithuania.

**The majority of States provide for the possibility of legal recourse against these decisions** (Czech Republic, Latvia, Slovenia, Turkey, etc.).

Other countries such as Greece, have a procedure (including a hearing of the company's representative) before pronouncing the sanction.

Certain authorities, such as those in Germany or Austria, are themselves courts ("independent administrative tribunals") with the power to sanction, while still guaranteeing the same rights as other courts. The Netherlands prefer an internal process of appeal to a higher authority up to referral to a Court.

The countries indicate that the procedures they use in cases of sanctions by authorities are in compliance with article 6§1 of the ECHRFF (fair and equitable trial, impartiality and independence of the courts, rights to a defence, adversarial, reasonable time frame, the principle of *non bis in idem*, etc.), Turkey specifying that such is "generally" the case.

- ⇒ **The powers to sanction are largely similar from one country to another**, even if they are specific to each authority and may differ among the authorities of a single country. **An appeal of the sanction is nearly always provided for**, either before a court, or before the authority itself, insuring all the guarantees provided for by the ECHRFF.

**13. Is each economic sector regulated by a different entity (whether a body arising from Government or from an independent authority) or do certain entities exercise this jurisdiction in several sectors?**

The **principle**, that the majority of the countries surveyed seem to apply, is **of one authority per sector** (Czech Republic, Hungary, Croatia, Greece, Austria, Lithuania, Belgium, Cyprus, Turkey, Portugal).

These countries may however present a few exceptions such as Greece, Belgium and France (in the latter two countries, a single authority is competent for the sectors of telecommunications and postal services), Hungary (with its authority in charge of media and telecommunications), as well as Italy.

Most of the countries also have, in addition to the sectoral authorities, a **transversal authority competent to regulate competition** in all sectors. Thus, Sweden has four transversal authorities and sectoral authorities. Latvia also has several authorities with transversal competences. Slovenia has an authority competent in many areas divided into departments competent in a single sector and mono-sectoral authorities.

Moreover, as we saw in questions 8 and 9, governmental authorities, even ministries, may themselves be competent for the regulation of certain sectors.

Such as has already been stated, a broad **authority merger movement** has begun in Spain, Ireland, the Netherlands and the Czech Republic.

Other countries, such as Denmark, Finland, Luxembourg, tend to favour the configuration with trans-sector authorities dominating.

Estonia states that an authority may be competent in several sectors but that also, several sectors may come under various authorities.

Finally, as recalled previously, Germany has only one authority, intervening in several sectors.

⇒ **One notes a very fragmented pattern, in which two clear tendencies are visible** (one authority per sector and multi-sectoral authorities) and a multitude of countries mid-way between these two configurations where the situation is not yet settled for a number of them which are currently undergoing consolidation.

#### **14. How do the competences of the entities responsible for Sectoral economic regulation mesh, where applicable, with those of a transversal entity in charge of compliance with competition law?**

Across the board there is collaboration, both among sectoral authorities, and between these authorities and the entity in charge of competition. All countries report that there is cooperation between these various entities: authorities act in compliance with the rules of competition and make their decisions in cooperation with the authority in charge of competition and, as emphasised by Germany, make every effort to adopt a uniform interpretation. Doing so involves various techniques: regular consultation, exchange of information and best practices, mutual warnings, collaboration, joint working groups ...

Most of the countries (Denmark, Finland, Italy, Hungary, Latvia, France, Greece...) report that the competences of the transversal competition entity and those of the sectoral authorities are different, thereby avoiding overlapping powers, the former acting generally after the fact to sanction abuses discovered in their sectors, thus the rules of the authorities and of the entity are complementary. For example, in Greece, if a sectoral authority uncovers a case of violation of the rules of competition, it takes it to the entity in charge of competition which will pursue enquiries and take the appropriate measures.

Certain countries, such as the Czech Republic, have entrusted the task of arbitrating overlapping competences to their administrative supreme court. The same is true in Estonia (where the court generally applies the rule of *lex specialis derogat legi generali*), and in Lithuania.

In certain countries, this collaboration is actually written into the texts: while in Bulgaria the authorities and the entity in charge of competition jointly prepare and publicise their rules of coordination, Spain has enshrined the principle in its constitution.

Finally, certain countries such as Italy, Belgium, Ireland or the Netherlands have memoranda of understanding or of cooperation amongst authorities. In Portugal, this is an option available to the authorities as part of their duty to cooperate. In Belgium, the relationship between the authorities and the entity in charge of competition is set by law.

Luxembourg adds that the newly elected government (in October 2013), hopes to reform the operations of these authorities and bring them closer together.

- ⇒ In all countries, **cooperation procedures exist amongst the various authorities**, which act under rules set by the entity in charge of competition. In certain countries, there exists a text specifically regulating such articulation, but this situation is in the minority, while other States provide recourse to the courts in order to designate the competent entity in case of overlapping competences.

### ***III. Judicial control of the decisions by the entities responsible for sectoral economic regulation***

#### **15. Are all decisions by the entities responsible for sectoral economic regulation subject to judicial control? If not, which decisions are not and why not?**

**All countries report that the decisions are - in principle – liable to be subject to judicial control.** For some, such as Germany, Spain or Turkey, it is even a constitutional requirement.

Not subject to review by the courts are preparatory and implementing acts (such as the publication or notification of a sanction), in Belgium, for example. Likewise exempt from review by the courts are actions taken by the Luxembourg regulatory authority when it intervenes as mediator between parties or, in Cyprus, those falling within the realm of private law. Romania excludes from such control those decisions of a non-administrative nature, and France, actions without adverse effect in the field of “soft law” (the court however remains competent to monitor their legal classification). In the United Kingdom, judicial control of decisions by regulatory authorities depends on the sectors involved and is possible only if the law does not provide out-of-court remedies (“appeal”) against the decision being challenged.

A majority of countries recognise the competence of the administrative order of jurisdiction for hearing regulatory actions. There are, however, some exceptions to this rule, such as in Denmark or the Netherlands where the actions of the regulatory authorities are invocable before the civil courts. For countries such as Finland, Sweden, Hungary or Latvia, the competent jurisdiction varies according to the type of entity having made the decision (*Market Court*, Regional Administrative Courts or Administrative Supreme Court for Finland). Virtually the same pattern is found in Sweden and Latvia (either in common court or an administrative court or, when actions taken by ministries are involved, the Constitutional Court).

⇒ With rare exceptions, **the decisions made by the regulatory authorities are liable to be subject to judicial control.**

## **16. What order of jurisdiction is competent for reviewing these decisions? As applicable, is the same order of jurisdiction competent for reviewing decisions by the entity in charge of compliance with the rules of competition?**

**In cases both of sectoral regulatory authorities or “transversal” authorities in charge of monitoring competition, most countries have opted for the competence of the administrative order.**

Exceptions, however, are many:

- in Ireland – which does not recognise dual jurisdictions – the High Court is competent for decisions by both the sectoral authorities and the authority in charge of competition;
- In the United Kingdom, depending on the sector, appeal is possible either before the authority in charge of competition, or before an “appeal body;”
- **in Hungary**, the common courts review decisions by the authorities;
- **in Denmark and in the Czech Republic**, competence is conferred on either order of jurisdiction depending on the right at issue, with a judicial body empowered to rule in cases of overlapping competences;
- in Finland, the *Market Court* or the administrative jurisdictions are competent in the first instance, appeal falling under the jurisdiction of the Administrative Supreme Court;
- in Latvia, the rule is an appeal to the administrative order, although decisions of one of these authorities may be taken to a civil court or to arbitration;
- in France, there are two authorities not subject to the competence of the administrative order but rather to the Paris Court of Appeals, as are certain decisions by the Authority on competition;

In the Netherlands, certain administrative courts are specialised in such litigation and, for the entity in charge of competition, the Court of Appeals of Commerce and Industry is competent in first and last instance. Nevertheless, the civil judge may also intervene in cases of damages caused by actions of the authorities or when the administrative judge does not have jurisdiction. In this regard, the courts of both orders engage in regular meetings and consultations. In Portugal, the administrative courts are competent but an entity in charge of competition may be likewise.

In Romania, the High Court of Cassation and Justice is composed of civil and criminal chambers as well as administrative, and the rules of administrative litigation are prescribed by a specific law and by the Code of Civil Procedure. Nevertheless, there are distinct lower administrative courts, which are competent for hearing decisions originating with the Council on Competition.

For Luxembourg, the administrative judge is competent except in cases involving the liability of the administration by reason of its regulatory activity and its individual decisions, which fall under the jurisdiction of the judiciary order.

In the case of Bulgaria, only the Administrative Supreme Court is competent, both in the first instance and in cassation before a different panel, but in the face increasing numbers of cases on the docket, a separate administrative Court has been proposed which would head cases in first instance in order to reduce the backlog of cases before the Supreme Court, which would remain the instance of cassation.

Finally, in Belgium there is a split system, with the judiciary magistrate competent in cases involving individual civil rights, whereas the administrative authorities fall under the jurisdiction of the Council of State and the Court of Appeals of Brussels (judicial power) for decisions by certain authorities, and by the authority in charge of competition, the decisions of which may be appealed before the Court of Cassation.

- ⇒ **The administrative jurisdiction is most often competent for reviewing decisions**, although certain countries have a composite system of review in which the judiciary also participates, fully or in part. Without forgetting the *common law* countries which make no distinction between the two orders.

## **17. What types of appeals are available against these decisions? What judicial procedures are applicable in such matters?**

The situations vary greatly, as the type of appeals brought often depend on the decision to be reviewed and therefore determine which courts are theoretically competent, in both first instance and on appeal.

It is important first of all to remember that certain authorities, as in Germany or Austria, are themselves courts of law.

Estonia has a system of appeals before a court of first instance, then appeal, and then cassation. The same is true in Romania or Portugal.

Other countries allow only one appeal after the first instance: Latvia, Cyprus (in these two countries, the appeal goes before the Supreme Court), Luxembourg, Denmark (for civil cases). Finally, other countries provide for an appeal in cassation after referral to the court of first instance: Austria starting in 2014, Bulgaria (in these two countries before the administrative Supreme Court), and Spain. In the case of France, the Council of State is competent as the first and final instance, with the recently introduced exception of actions against decisions by the Superior Audio-visual Council (under the competence of the administrative court of appeal of Paris).

Italy reports that the administrative tribunals are competent in the first instance, with the final decision made by the Council of State, except in cases of conflicting jurisdictional competences, which are decided by the Court of Cassation.

For Hungary, an appeal is possible after referral to a tribunal of first instance; an appeal before the "Curia" of Hungary is unusual, however.

Concerning Slovenia, after the courts of first instance, the Supreme Court is competent both on appeal (a rare occurrence) or in cassation.

Competence varies depending on the nature of the decisions at issue in the Netherlands (administrative courts specialised by field), in Greece (the nature of the decisions determines referral to the Council of State or to an administrative court of appeal before an appeal or referral in cassation, before the Council of State), in Croatia, in Sweden (in principle the administrative courts are competent, then the challenged decision may be appealed to the government or the Supreme Court), in Belgium and in Finland.

The United Kingdom has various possibilities depending on the sector. Thus, an appeal is possible either before the authority for competition, before the Competition Appeal Tribunal or before the High Court competent for that territory.

Finally, the Czech Republic presents the peculiarity of distinguishing between civil and administrative appeals.

In certain States it is possible first to lodge an *ex-gratia* appeal with the authority which made the decision before referral to the courts: Spain, Luxembourg, Hungary... In Turkey, prior to referral to an administrative Court, then to the Council of State, the applicant must first make an *ex-gratia* appeal through administrative channels for the repeal, withdrawal, modification or replacement of the act at issue.

In Poland, the Court of Competition and Consumer Protection, 7th Division of the Court of the District of Warsaw, is alone competent to hear cases of economic regulation.

⇒ **Quite diverse situations**, based primarily on the subject matter of the decision challenged; but in all cases an appeal or an appeal in cassation is possible.

## **18. What review of these decisions is made by the court? Does it examine the form, the procedure and/or the reasons behind these decisions? For what kinds of decisions does it have limited control? Conversely, for what kinds of decisions does it have broad control?**

All of the countries answer that the judicial review, at least in first instance, examines both the factual and legal aspects, bearing equally on the form and the substance of the decision in question.

On the other hand, the power of the court varies depending on the country.

The court **reviews for abuse of authority** which may lead, if warranted, to the annulment of the decision made in Denmark, Finland, Hungary, Croatia, Latvia, Lithuania, Turkey, Belgium, Bulgaria and Cyprus.

In other countries, the court carries out **a full review**, with the most extensive powers, consisting of the ability to amend the decision, even to replace it with a new one. This is the case for example in Sweden, Portugal and Estonia.

Certain countries present the peculiarity of using both arrangements, on the basis of the individual case.

Thus, in the Czech Republic, the decisions of the civil courts replace the administrative decisions at issue whereas the administrative order reviews for abuses of authority.

In Slovenia, the court rules on the legality of the decision but is empowered, in an exceptional situation, to amend it if it could potentially cause serious injury to the plaintiff, but on a temporary basis, pending a new decision from the competent authority.

This was also the case in Austria; but the possibility of a full remedy action was eliminated there with the reform of 2013.

In Italy the court reviews for legality except for financial sanctions, in which cases it has the power of full remedy.

Both of these are also applied in Greece, Germany, and the Netherlands (depending on the sector involved and of the kind of decision taken).

In France, an appeal on the grounds of abuse of authority is theoretically possible (barring specific legislative provisions calling for a full remedy action) and the court systematically reviews the competence of the author of the decision, the regularity of the procedure and the reason behind it (if it is unfavourable).

In Luxembourg, individual administrative decisions may be subject to appeals for amendment or annulment and, for regulatory decisions, only an appeal for annulment is possible.

In Romania, the court may set aside part or all of the challenged decision, require the administrative authority to issue a new decision (rectification), submit other documents or initiate a specific administrative process.

Finally Belgium, Luxembourg and Germany require the court to exercise a control of proportionality.

In Ireland and the United Kingdom, a test of irrationality is used in order to verify that the evaluation of the facts made by the authority is correct.

- ⇒ **Most countries practice a review of abuse of authority and some a review of full remedy;** but some use either one or the other, depending on the nature of the decision challenged.

## **19. In the performance of its judicial review, how does the court gather information (appointment of experts, specialised, adversarial hearings, consultation with universities and international sources, etc.)?**

All countries report the possibility for the court to seek **expert opinions**, with the experts consulted appointed either by the parties (Finland) or by the court (Netherlands).

The countries generally recognise that they use the **same techniques**: statements from witnesses, investigations, requests for information both from regulatory or public authorities and from other bodies, document inspection, public reports, consultation of university professors, and international sources or organisations.

Luxembourg states that the court may order **investigatory measures** carried out by an expert leading to a report to an assembled body by the technician. Belgium does on-site verifications (France also provides for the possibility of a **visit to the site**) and occasionally calls in experts. Slovene and Latvian courts are not bound by the evidence supplied by the parties, while the Greek court depends essentially on the documents and opinions supplied by the parties. Lithuania prepares an exhaustive list of specialised knowledge requiring consultation of experts, whose conclusions, however, are not binding on the court. Finally, the Czech Republic adds the possibility of asking the parties for medical examinations.

In **Ireland**, a *common law country*, it is the duty of the parties to present whatever evidence they deem necessary. Occasionally the authority itself may commission an investigation by experts.

- ⇒ **All countries are allowed recourse to expert consultation** although some do so less generally. They all have approximately the same methods for informing the court.

## **20. What is the role of the Supreme Administrative Court with regard to these decisions? What major decisions are made by the Supreme Administrative Court in matters of sectoral economic regulation?**

Here again, the situations differ greatly from country to country.

Denmark and the United Kingdom have no Administrative Supreme Court but rather a Superior Court for cases of particular significance.

In Lithuania, there is actually an appeals court for administrative cases, ruling on points of fact and of law and qualified to send the case to the court of first instance or to quash the decision.

In Luxembourg, there is an Appeals Court, which is not a court of cassation.

In Belgium, the Council of State, in matters of economic regulation, may directly receive appeals for the annulment or suspension of decisions made by regulators.

In France, the Council of State, as we have seen above, is competent in first and last instance (with one exception).

In Croatia there is an administrative Superior Court, which is competent in first and last instance in matters of economic regulation.

In Germany the Federal Administrative Court acts on appeals of decisions made by the authority.

In Turkey, the Council of State acts on appeals in matters of economic regulation both for lower courts and in situations when the Council of State has ruled in first instance. It may annul and defer a decision.

Finally, in the Netherlands there are several superior administrative courts with the regulated sectors divided amongst them.

For Ireland, apart from certain exceptions, the Supreme Court acts as the court of appeal for decisions by the High Court. The Constitution amended in October, 2013, created an Appeals Court which will become the court of appeal of the High Court and from which the Supreme Court will hear appeals. However, in cases of particularly strong urgency ("leap-frog appeal"), the Supreme Court will be competent to hear appeals from the High Court without going through the Appeals Court.

The following countries have Supreme Courts:

- Spain,
- Sweden,
- Cyprus (it confirms partially or wholly or else annuls the decision),
- Latvia (the decisions are rendered by the Department of Administrative Affairs of the Supreme Court acting as the court of cassation),
- Hungary,
- United Kingdom,
- Italy (appeals of decisions rendered by the administrative courts before the Council of State which makes the final ruling),
- Czech Republic (the Administrative Supreme Court is the court of cassation for the decisions of Regional Courts),
- Slovenia (it acts more often in cassation than on appeal, and is competent only for matters of particular importance),

- Finland (the Administrative Supreme Court is competent in last instance in matters of economic regulation),
- Estonia (it acts in cassation and partially or wholly annuls the decision or may defer it or even pronounce a new decision itself, and may also decide to initiate a review of the constitutionality of the standard at issue),
- Greece (Council of State),
- Austria,
- Portugal (the Administrative Supreme Court may hear, directly or in review, a question of law against the decrees of the Administrative Courts of Appeal and the decisions by the Administrative Tribunals. For decisions by the Competition Tribunal, appeals are brought before the competent Court of Appeal, which decides in last instance),
- Bulgaria (at present, only the Administrative Supreme Court is competent, both in first instance and in cassation before a different panel).

As concerns the decisions rendered, the number of decisions handed down by these Courts differs greatly depending on the country: 30,000 rulings since 2005 in Turkey directly affecting the regulatory authorities against only one in Luxembourg (pertaining to telecommunications), while Bulgaria reports an average of around 335 cases per year (pertaining primarily to water and energy regulation). Poland states that it has a yearly average of 150 cases pertaining to energy against a dozen concerning railroads and more than 70 in the area of telecommunications. Portugal reports that, up to the present, the Administrative Supreme Court has not made any major decisions in this area.

Concerning the substance of the cases, as reported by the countries, it appears first of all that the cases have primarily to do with general questions of competition and access to markets by different operators, methods of setting prices, conditions for issuing licences, *etc.*

Major principles are reiterated or clarified in various countries, for example providing the same service throughout the territory, the forms of “essential services” in Germany and of “universal services” in Austria, and return frequently to the question of defining certain intrinsic concepts such as the abuse of dominant position or the meaning of the word company.

The decisions of the Courts show a **desire to encourage competition** between the various operators and especially access for all to the sectoral market, while reconciling it with the concept of the public interest.

Certain countries, such as Austria for example, indicate that they often ask, when considering specific cases, **the ECJ for preliminary rulings**, in the interest of insuring coherence between the position of the Court and European Community law.

⇒ **Thus the role of the Supreme Courts varies greatly from one country to another both in function and in name, but all encourage competition, and seek unity of interpretation, in particular with the ECJ.**