



# FLORENCE SCHOOL OF REGULATION

## *LEGAL FORUM ON UTILITIES REGULATION*

### *JUDICIAL REVIEW*

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**Report on Workshop Proceedings**

# **Florence School of Regulation**

Workshop

## **LEGAL FORUM ON UTILITIES REGULATION JUDICIAL REVIEW**

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Report

The first Workshop of the series “Legal Forum on Utilities Regulation” organised by the Florence School of Regulation gathered 34 participants from 11 European countries. The Workshop was devoted to describe and discuss the judicial review of regulatory decisions adopted mainly in the energy sector, with a comparative approach. Participants to the workshop were mostly legal experts from National Regulatory Authorities (NRAs), Courts of the Member States, the European Commission and from academic institutions.

### **Issues for comparison and discussion**

The decentralisation of antitrust authorities in the European Union has been accompanied with some ‘harmonisation’ of the rules of antitrust enforcement (although much remains to national procedural autonomy) while energy regulation does not reach even that limited degree of European harmonisation. However, a comparative analysis of judicial review in the sphere of energy regulation in Europe is appropriate for at least two reasons. Firstly, the third energy package of September 2007 proposes the establishment of an Agency for the Cooperation of Energy Regulators (ACER) and a minimum set of rules

on administrative and judicial review by the European Courts of the decisions adopted by the ACER. Secondly, a comparative analysis on judicial review in this field is complementary to the comparative analysis of energy markets and energy regulation, and it responds to the need to share information on these issues among Member States.

In the regulation of energy markets, the courts often play a primary role because they have the final word on very delicate issues that affect both firms and consumers. The Workshop provided an opportunity to outline an initial sketch of the current judicial review methods on energy regulation. Key issues for comparison and discussion were:

- a. the unavoidability of judicial review,
- b. the scope of the review,
- c. its procedure,
- d. the locus standi (right to bring an action),
- e. interim measures,
- f. the execution of the judgment and assessment of damages.

## National divergences on judicial review

In **Italy**, administrative courts enjoy exclusive jurisdiction to review every decision adopted by the Regulatory Authority for Electricity and Gas. The competent court of first instance is the Tribunale Amministrativo Regionale (TAR) located in Milan, where the energy regulator is based. The competent court of second instance is the Consiglio di Stato, in Rome. In both cases some specialisation in the energy field has been developed in one section of the Court, but there are no technicians. The nature of the judicial review is concerned with the legitimacy of the administrative decisions (violation of law, incompetence, misuse of power), and not to their merit. Against the judgment of second instance, an appeal is possible before the Corte di Cassazione only to contest the jurisdiction. An appeal is also available before the President of the Italian Republic for some cases.

In the **Netherlands**, the Dutch Office on Energy Regulation comes under the Ministry of Economic Affairs, and operates as a chamber within the Netherlands Competition Authority. This is supposed to promote consistency between the enforcement of energy regulation and competition law. Unlawful administrative action may be reviewed by administrative courts. The standard procedure for judiciary review in case of regulated industries consists, in principle, of 3 phases: (1) pre-proceeding at administrative level, in which the order is to be

reconsidered by the regulatory body; (2) an appeal to the District Court in Rotterdam, a specialised section for regulated industries; (3) court proceedings before judges specialised in handling cases regarding regulated industries and competition law. On the other hand, a distinction is to be made between a full review and a marginal review. A review on the basis of a statutory law is a full review. In other cases, the courts tend to refrain from a full review, mostly because the economics of the case are technically complicated. The criteria, besides statutory law, for review are: due process, fairness, proportionality, non-discrimination, reasonableness etc. Finally, judiciary decisions may be appealed before a court of last resort. In conclusion, the main peculiarities of the Dutch system are: the presence of one authority acting both as a competition commission and as a regulator; the role played by the associations of consumers, who operate as a filter for bringing to the courts issues of general interest; the use of a civil agreement between the authority and the regulated firms as a substitute to an administrative decision.

In **Spain**, regulatory decisions are taken by the Regulatory Commission for Energy (CNE) whose independence with respect to Government has been questioned. In general, all the regulatory decisions may be appealed before the Ministry of Industry and Energy, and this remedy is obligatory in order to appeal to judiciary authorities. However, the resolutions of CNE that decide disputes on the economic and technical management of the system are exempt from this remedy: they end the administrative procedure and open the door to the judicial review. The competent jurisdiction is the Contentious-Administrative Division of the National High Court (whose decisions may only be appealed before the Constitutional Court for violation of fundamental rights). The magistrates are specialists in administrative law, and although they do not need a specialisation in the regulation sector for their appointment, they are usually competent in this field because of their experience and previous dedication to the matter. The scope of the judicial action concerns formal defects in the administrative procedure, substantive rights and the proportionality of the act.

In **Germany**, the BundesNetzAgentur (BNetzA) regulates postal services, telecommunications and railways and has taken up competence on electricity and gas only in July 2005. Competences are split between BNetzA and Regional Regulatory Authorities. Legal action taken against BNetzA's decisions falls within the jurisdiction of a special cartel divisions of the civil courts; this is an exception from the general rule, according to which administrative courts decide over

public law matters, with an aim to guarantee a uniform application and interpretation of the law. Since 2005 more than 900 court proceedings have been initiated. The competent court to deal with BNetzA's decisions is the Higher Regional Court of Düsseldorf. It examines both facts and legality and a special procedure applies, similar to administrative court proceedings. The court shall inquire into the facts ex-officio, and it proceeds to a strong review of the regulator's decision. An appeal on the legality of the decision is possible before the Federal Court of Justice, which is bound to the findings of the facts.

In **Austria** the regulatory function is shared between Energy Control Ltd (E-Control, a state-owned company) and the Energy Control Commission. The latter is also the appeal body against decisions of the former. The successive competence for judicial review is held by civil courts, which apply the civil procedure act implying some limitations such as the prohibition of introduction of new evidence. After exhaustion of all stages of appeal, an action is possible before the administrative and Constitutional courts. It is to be noted that the civil courts often lack technical expertise. Half the judgments of the civil courts deviate from the decisions adopted by the regulator. Another drawback is linked with the decentralisation of regulatory decisions, increasing legal uncertainty. There are reform plans for the creation of specialised chambers in the administrative court as a second instance, while the E-Control Commission would be the first instance.

In **Norway** the energy regulator is the Norwegian Water Resources and Energy Directorate (NVE). Appeals shall be first sent through NVE for its own review, then to the Ministry as the immediate superior administrative agency. The appeal instance is competent to make a full review. The appeal process is free of charge and a party may be awarded to pay only the necessary costs to get the decision altered. The review by the judiciary is done by ordinary courts and is based on errors of facts, procedure and law; since the plaintiff runs the risk of paying the costs of the case, it is not common in Norway to use the ordinary courts to review decisions. Complaints against the regulator's decisions may also be lodged before the Ombudsman, which is competent to investigate and evaluate injustice, maladministration and human rights violations by the public authorities; the Ombudsman may pass an opinion, but not take legally binding decisions, yet its opinions are widely respected and public agencies usually comply with them.

In the **United Kingdom** the Competition Commission (CC) is the appeal body against decisions adopted by Ofgem, the energy regulator and by other network industries regulators, besides having direct competence on competition cases: it has a double role. The review is on merits, substantive and the CC may re-open the case. One important case that should be mentioned is the regulator's decision on charging mechanisms for taking gas out of the network. This decision was taken following a three years discussion, as well as a cost benefit analysis. The decision was challenged on every conceivable ground by E.ON. The tightrope was to decide whether the decision was wrong, without deciding which was the right one. The appeal was allowed in part (subsequently not all costs were awarded for payment by the regulator) and the decision quashed. The regulator is still considering the 'right' answer. On the other hand, the Competition Appeals Tribunal (CAT) is the appeal body for decisions adopted by the Office of Fair Trade, the Competition Commission and the telecoms regulator. The CAT is primarily judicial, not economic, and it is chaired by a judge. When the challenged decision is very technical, there is a referral back from CAT to CC.

## Judicial review from a common regulatory perspective

Judicial review is necessary and inevitable. The difficulty to compare in a systematic way the system of judicial review in different countries was recognised. To understand better each of them, it would be necessary to take a hypothetical case and see how it would be dealt by the judiciary system of each country. One issue is whether it is realistic to expect some harmonisation on judicial review without further harmonisation of powers and competences of national regulators. Since the procedures for judicial review are set at national level according to the subsidiarity principle, harmonisation is to be considered mostly at the level of principles: proportionality, non-discrimination, reasonableness, rule of law, non arbitrary decision. Judicial review in the energy field raises some common concerns in countries where independent regulatory authorities have been set up in the wake of liberalisation. For instance, administrative remedies prior to access to the judiciary can be seen as a political influence contrary to the regulator's independence. Different countries have tackled the same problem in different ways: when the law to implement the European directives was discussed in Spain, the energy regulator asked for the removal of the appeal to the Ministry; in Italy

there is a case pending concerning the appeal before the President of the Republic with constitutional implications. Moreover, the administrative remedies may delay the judicial proceedings unnecessarily. It was argued that all national regulators should have the power to challenge the Ministry's decisions on energy matters. The hierarchy of laws should be homogenous at the EC level in order to have some legal certainty.

The National Regulatory Authorities are independent both from the political and from the economic power. Its administrative procedures and its administrative decisions need to be controlled only by courts through judicial review. While the degree of control over the regulators by the judiciary leads to distinction between 'strong' or 'weak' review, it is commonly established that courts cannot modify or replace administrative decisions. On the contrary, courts can declare the illegitimacy of the flawed decision and set its annulment. Then, the NRA concerned has to adopt a new decision that complies with the judgment.

An important difference among countries is the existence of specialised courts in some countries. In the Netherlands, there are generally positive comments with regard to the creation of a specialised branch of the judiciary. In Austria, there are plans to create a specialised chamber in the Federal Administrative Court as second instance. On the other hand, in other countries like Spain, magistrates become experts on regulatory matters through experience. In any case, NRAs should not be considered as a counterpart of the judge, but rather as a public authority that assists the judge in a common interest, that is, better regulation. In that regard, specialisation of the judiciary might not be the appropriate expression; judges should be rather well informed.

The discussion also raised the locus standi issue, which is dealt quite similarly in all countries. The right to bring an action belongs to those parties whose interest is directed affected by an order: the addressees. Third parties must prove an individual and direct interest: for instance, competitors and consumer organisations. However, individual consumers are not entitled to challenge the regulator's decisions, because this would open the door to an unlimited number of complaints. On the other hand, consumers have the right to challenge their specific contract with the energy company before ordinary courts.

The economists did not miss to underline the merit of a cost-benefit analysis of judicial review. In the early times of liberalisation, there

were many claims related to the perception and calculation of tariffs, where there is a lot to be gained; but this is changing with the elimination of tariffs for final consumers. Moreover, when the administrative procedure that led to the challenged decision was submitted to broad consultation and gathered a wide consensus, there will be little to be gained in appealing it. In countries where fees for the lawyers are extremely high, it might not be worth going to court.

Other cost-benefit elements might be the impact of the judicial action on the share price of the energy company when its shares are traded in stock exchanges. Finally, the company management might prefer not to go through tedious judicial proceedings since it could affect the smoothly daily running.

In conclusion, the Workshop showed the need for better understanding of the different judicial systems in the European countries. All countries might benefit from understanding which arrangements have proved most satisfactory, regardless of the fact that they have a long experience in regulatory institutions like the UK, or a recent one like Germany. An increased amount of information and analysis is needed in order to avoid the mistakes of the others. In this respect, a major involvement of the European Commission might be needed. The idea would not be to attain convergence, but to set up error-correction mechanisms.

Finally, the Workshop has confirmed the usefulness of the "Legal Forum" initiative and the interest of participants in further meetings.