

THE EU LEGISLATION ON THE SUPERVISION OF ACTIVITIES OF ECONOMIC OPERATORS: SUBSTANCE OF PROCEDURAL RIGHTS AND IMPACT ON LITHUANIAN LAW

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Abstract. This article discusses the EU legislation, regarding main procedural rights of economic operators applied in the supervision procedure of their activities and its impact on supervisory procedures in Lithuania, as well as the institute of supervision of activities of economic operators in Lithuania and regulation of main procedural rights granted to economic operators. By analysing the EU primary, secondary and Lithuanian (national) legislation, as well as the case law of European and Lithuanian judicial authorities, the insights into future challenges for both the EU and Lithuanian law are provided. It is being claimed that the EU is moving towards codification and strengthening of procedural rights, which inevitably influences Lithuanian legal system and the protection of individuals, *inter alia* legal persons.

Keywords: procedural rights, supervision, economic operators, the right to good administration, the rights of the defence, codification.

INTRODUCTION

Keeping in mind that various economic activities inescapably raise environmental, public health, safety and other fundamental issues, the question of law enforcement and control is as old as the introduction of rules and laws themselves (Blanc, 2013, p. 4). That is why the state intervenes through control as a regulator in order to ensure the smooth functioning of the economy and the protection of public interest. Legal regulation, which is an integral part of the regulatory state, is one of the necessary preconditions for the functioning of a sustainable and efficient economy, operating in the interaction between the government, economic operators² and society.

Inspections and enforcement are relevant for economic development, to achieve public welfare goals and to strengthen the rule of law. From an economic perspective, the burden of regulations on inspections and enforcement is significant, as well as protection of business rights. It is important that on the World Bank's Doing business rating, Lithuania ranks 11th in terms of business conditions (The World Bank). According to the Index of Economic Freedom of the World, Lithuania is ranked 16th out of 180 countries (2020 Index of Economic Freedom). These achievements are very closely related to the reorganization of the system of supervision of economic entities (Ambrasevičiūtė et al., 2012, p. 32). As a result, business in Lithuania is beginning to value supervisory institutions more and more (Enterprise Lithuania).

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2 In this paper the notion of economic operator is understood as a legal person.

The importance of analysis of supervision of economic operators³ and their procedural rights is based on following arguments. Firstly, both Lithuania and the European Union (hereinafter – EU) went through some serious changes in the area of protection of fundamental rights in the past decade. Secondly, the quality of the legal regulation of the supervision of economic operators is one of the most relevant topics since Lithuania became a member of the Organisation for Economic Co-operation and Development⁴. Moreover, recent cases of “Grigeo scandal” and other accidents when pollutants were released into environment have shown that in Lithuania supervision is often ineffective or focuses only on one narrow aspect – punishment (Public outcry as...; Plastic released into...). After 33 patients were infected with the coronavirus at the Klaipėda hospis and when it was determined that the permit-hygiene passport was issued for one bed only, the Minister of Health promised to tighten up inspections (Veryga: situation in...). Thereby in Lithuania the common reaction to noncompliance is usually related to punishment and increased fines. Lastly, the state regulating economic activity restricts economic freedom and applies different measures (administrative sanctions), that might have a deterrent and criminal nature. Accordingly, restriction of economic freedom triggers certain fundamental rights⁵.

Legal scholars say that “procedural justice” is one of the core reasons, why economic operators obey law (Blanc, 2018, p. 481). That means that higher protection of procedural rights presupposes higher level of compliance. In view of this, procedural guarantees in the supervisory procedures are very important not only because of the interference with the fundamental rights, but also because of higher compliance with laws and regulations. While Lithuania still struggles to ensure procedural rights of economic operators, it is important to search for inspiration for better protection.

For the above reasons in this paper I am seeking to overview the EU legislation, regarding main procedural rights of economic operators, applied in the supervision procedure of their activities, and its impact on supervisory procedures in Lithuania.

In order to achieve this objective, major changes of the EU legal regulation regarding main procedural rights in the past decade, as well as the influence of the EU law over national law will be analysed in this article. The institute of supervision of activities of economic operators in Lithuania and main procedural rights granted to economic operators, main issues arising in this area will be discussed as well. By analysing these topics, future challenges for both the EU and Lithuanian law will be taken into consideration. For this purpose, the EU primary, secondary and Lithuanian (national) legislation, as well as the case law of European and Lithuanian (national) judicial authorities will be analysed, focusing on the past decade. The relevant legal doctrine will be referred as well.

3 The supervision of activities of economic operators includes consultation on matters within the competence of institution, inspections of activities of economic operators and application of sanctions.

4 Since 5 July 2018 Lithuania is a full member of the OECD.

5 It has been repeatedly noted by the Constitutional Court of the Republic of Lithuania that imposing administrative sanctions <...> procedural guarantees must be ensured (ruling of 5 November 2005).

1. PROCEDURAL RIGHTS OF ECONOMIC OPERATORS DERIVING FROM THE EU LAW

Various requirements arise from the EU legislation, that affect procedural rights of undertakings when their activities are supervised or under control. The Treaty establishing the European Coal and Steel Community already gave companies the right to be heard before imposing a fine. Under the Article 19(1) second subparagraph of the Treaty on European Union (hereinafter – TEU) member states have been required to establish more specific remedies to ensure the right to effective judicial protection in areas governed by Union law. From the wording of Article 296 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) derives the obligation of states authorities to give reasons, as well as from Article 298 of the TFEU (Explanations relating to...).

However, the most important achievement referring to procedural rights in the past decade is the Charter of Fundamental Rights of the European Union (hereinafter – Charter), which entered into force almost in 2010. It was clear that the Charter shall have the status of Union primary law (Article 6(1) of TEU). The adoption of the Charter has significantly strengthened the protection of individuals' procedural rights. The provisions of this document are particularly relevant to undertakings, after the Court of Justice of the European Union (hereinafter – CJEU) stated that the principle of effective judicial protection enshrined in Article 47 of the Charter must be interpreted as meaning that legal persons may rely on it (CJEU, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, par. 59). The CJEU has essentially recognized that the fundamental principles enshrined in the Charter also protect the rights of businesses.

There is no doubt that the Charter has made fundamental rights clearer and more visible and has helped to strengthen legal certainty in that way. The Charter has also contributed that economic rights are no longer considered as secondary (Hervey, Kenner, 2003, p. 1-4). It is worth to notice, that the Charter and codification also reflects the tectonic shifts in the framework of procedural rights, taking into account that previously “the EU has taken the inspiration from the case law of the European Court of Human Rights on the procedural standards of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – Convention) for sanctions that entail criminal charge” (De Moor-van Vugt, 2012, p. 5)⁶.

Legal experts say that the objective of adding Article 41⁷ to the Charter was to codify some of the most important principles of good administration and to give them the status of a fundamental right (Galletta *et al.*, 2015a, p. 11). The right to good administration is one of the “umbrella’s principle” (Gnes, 2019, p. 10) and is an important source of procedural guarantees for economic operators. It

6 Although the provisions of the Convention are still extremely relevant. The CJEU has stated that Articles 47 and 48 of the Charter provide the same protection in Union law as Articles 6 and 13 of the Convention, and that the CJEU therefore relies on the Articles of the Charter (CJEU, *UBS Europe SE*, par. 50). Article 48 of the Charter is the same as Article 6(2) and (3) of the Convention; the first paragraph of 47 Article is based on Article 13 of the Convention (Explanations relating to...).

7 Article 41 of the Charter enshrines the right to good administration, which includes rights such as the right of every person to be heard <...> (a); the right of every person to have access to his or her file <...> (b); the duty of the administration to justify its decisions (c).

is stated that according to its content, the right to good administration is the equivalent of the right to proper and efficient administrative procedures (Paužaitė-Kulvinskienė, 2009, p. 84).

The right to good administration is closely linked to the right to an effective remedy and to a fair trial and to the right to a fair hearing enshrined in Articles 47 and 48 of the Charter (CJEU, *M.*, par. 82). The CJEU states, that “the obligation of the administration to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand the grounds of the individual measure adversely affecting him is thus a corollary of the principle of respect for the rights of the defence, which is a general principle of EU law” (CJEU, *M.*, par. 88, *Sopropé*, par. 50).

The protection of the rights of the defence deriving from Articles 47 and 48 of the Charter is a general and fundamental principle of the EU law which must be applied to any proceedings brought against a person (including a legal person) and may result in an act adversely affecting him (CJEU, *Texdata Software*, par. 83). This principle must be guaranteed even in the absence of procedural rules (De Moor-van Vugt, 2012, p. 19). The principle of respect for the rights of the defence requires that the addressee of an adverse decision is placed in a position to submit his observations before the decision is adopted, so that the competent authority is able to take into account all relevant information (CJEU, *Glencore Agriculture Hungary Kft*, par. 41). From the case law of the CJEU it is clear that the right to be heard guarantees every person the opportunity to make his or her views known properly and effectively during the administrative procedure and before a decision is taken which may adversely affect his or her interests (CJEU, *M.*, par. 87, *Mukarubega*, par. 46), as well as the opportunity effectively to make known his views (CJEU, *Sopropé*, par. 24, 29). The case of *Sopropé* is very important speaking about the periods within which the rights of the defence must be exercised. The CJEU stated, that “it is for the Member States to establish those periods in the light of, *inter alia*, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration” (CJEU, *Sopropé*, par. 40).

According to the judicial practise of the CJEU, the right of access to the file in turn presupposes the effective exercise of the rights of the defence (CJEU, *Knauf Gips*, par. 22 p.). In recent case law CJEU stated, that requirement of the person concerned to have access to all the information and evidence is not satisfied by the tax administrator’s practice of giving the taxable person no access to that information, in particular the documents on which the conclusions are based, the minutes drawn up and the decisions taken during the relevant administrative procedures and only indirectly (in the form of a summary) selected on the basis of their own criteria, which cannot be verified in any way (CJEU, *Glencore Agriculture Hungary Kft*). In another case CJEU concluded that UPS’s rights of the defence were infringed, with the result that the decision should be annulled, provided that it has been sufficiently demonstrated by UPS that, but for that procedural irregularity (Commission did not disclose the final econometric analysis model to the applicant before adopting the decision at issue), it would have had the opportunity better to defend itself (CJEU, *European Commission v. United Parcel Service, Inc.*, par. 68).

However, fundamental rights are not absolute and may be restricted (CJEU, *Alassini and other*, par. 63, *Texdata Software*, par. 84). Such restrictions may be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents (CJEU, *Ispas*, par. 36, *UBS Europe SE*, 63 p.).

The jurisprudence of the CJEU of the past decade confirms, that the Charter has become an actively used “living” remedy. The CJEU develops application of the Charter and interprets its provisions regarding procedural rights consistently and strongly in different areas (e. g. in taxation, competition procedures), which are also relevant to inspections.

With the exception of the Charter, other procedural requirements for the supervision of economic operators are not set out or systemised in any catalogue of general procedural principles of administrative law in the EU. However, relevant requirements can be found in secondary legislation such as regulations (e.g., General Data Protection Regulation (hereinafter – GDPR), Regulation on the rules on competition) and directives (e.g., Directive on markets in financial instruments). Still, previously the EU has also been widely criticised for the lack of protection of procedural guarantees in EU directives and thus incompatible with the European Court of Human Rights’s case law, which provides flexible and enhanced protection (Criminal Procedural Laws... 2018, p. 40).

From recently adopted EU legislation it is determined that EU legislator tends not to specify procedural rights in every legal document, but to provide, that the supervisory authority shall ensure procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process⁸. This presupposes that on the EU level exists the equivalent degree of procedural rights that must be granted each time when any individual measures that could affect economic operator adversely are taken. The main principles of these procedural rights are codified in the Charter.

At the same time, it is very interesting what kind of disputes regarding procedural rights will arise over data protection, when GDPR allows extremely severe sanctions. Legal scholars assert that “the more intrusive the sanction becomes, the higher the safeguards need to be” (De Moor-van Vugt, 2012, p. 5.). Thus, the challenge to ensure procedural rights in the data protection, as well as the challenge of ensuring uniform procedural guarantees and procedural fairness throughout the EU are in front of whole Europe.

2. THE IMPACT OF THE EU LAW OVER NATIONAL LAW

In the legal doctrine it is stated that “the administrative power to dispose inspections which, as an authoritative act, could affect fundamental rights, requires specific guarantees to ensure that there will be no arbitrary exercise of the power” (De Benedetto, 2014, p. 3). As it was already mentioned before, because of fundamental rights the problem of “preserving a reasonable balance between agency powers and target rights” arises (Bagby, 1985, p. 319).

⁸ E.g., procedural rights in GDPR are not specified in detail: Article 83 (8) provides that: “The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.”

In relation to the Lithuania's institute of supervision of activities of economic operators it is necessary to remark, that Europeanisation and financial crisis were main reasons to reform this institute. What is more important, in 2014 national legislator has enshrined in the Law on Public Administration of the Republic of Lithuania main procedural rights of economic operators (Article 36⁸). This can be referred as an attempt to systemise or even to codify main procedural rights. Comparing to the Charter, these changes can be evaluated as being made following European tendency of codification. Moreover, new enshrined procedural rights reflect principles of good administration, established in the Charter. Although from *travaux préparatoires* it is determined that the main intention to strengthen procedural rights was based on compliance with the Convention (Resolution No. 1304).

It is worth to mention that the codification of principles of good administration was not only one initiative towards codification in the EU. European Parliament resolution for an open, efficient and independent European Union administration, which laid down the procedural rules which shall govern the administrative activities of the Union's administration, is a real proof that procedural rights were hugely significant on the EU agenda in the last decade. Moreover, the discussions on good administration within the EU led to the creation of a network of legal scholars from different EU Member States – the Research Network on EU Administrative Law that published “ReNEUAL Model Rules on EU Administrative Procedure” in 2014. However, this initiative was not successful and lacked political support, since “[t]he Commission considers that a binding EU Law on Administrative Procedure might be largely detrimental for the administration, as it would bring excessive rigidity and slow down decision-making” (Galetta *et al.*, 2015b, p. 10). Although legal scholars admit “that an administrative procedure act can contribute to balancing the need for sector-specific rules with clear generally applicable procedures as well as clearly defining individual rights whilst ensuring effective and efficient administrative decision-making” (Galetta *et al.*, 2015b, p. 8). Therefore, another challenge in the future EU might be more detailed codification of procedural rules. Initiatives on codifying general principles of EU administrative procedural law demonstrated that there is a real capacity to create a codified document on the EU level. Perhaps with some more political will, it might be implemented.

Concerning the EU law influence it should be added that the Supreme Administrative Court of Lithuania (hereinafter – SACL) in its case law developed substance of procedural rights, that have been inspired by the EU law. This court also determines that the Charter (Articles 41, 47, 48) expresses general legal values, that may be taken into account as an additional source of legal interpretation, when the content of the principle of good administration is under consideration (SACL, administrative cases No. eA-328-556/2017, No. A-585-415/2019). Therefore, although applied indirectly, Articles 41, 47 and 48 of the Charter can be called a fundamental list of procedural rights in supervisory procedures of economic operators. The case law of the CJEU was particularly significant in the administrative case No. A-638-492/2017 of the SACL, when the restricted right to be heard of a television broadcaster established in the United Kingdom has been under consideration. Especially in the competition cases the SACL often relies on the presumption of innocence (Article 48 of the Charter) (SACL, administrative

cases No. A⁸⁵⁸-1516/2012, No. A-97-858/2016). Moreover, Lithuanian administrative courts are being encouraged to rely on the Charter more actively (Andrijauskaitė, 2016, p. 572-573).

The EU's role in antitrust infringements is twofold. Firstly, in certain cases, the national competition authority and the national courts have the power to assess directly the compatibility of the conduct of undertakings with the EU law. Secondly, in cases where the provisions of EU law are not directly applicable when deciding on the application of sanctions, the EU law acts as an additional source of application and interpretation of the law (SACL, administrative case No. A-899-858/2017).

As regards the relationship between the rights of the defence and the right not to incriminate oneself, in historical *Orkem* case the CJEU has recognised the right of undertakings not to incriminate themselves and held that the Commission could not require an undertaking to answer questions in such a way that could incriminate it directly (CJEU, *Orkem*, par. 28, 36). The practice of supranational courts also seems to be followed to some extent in national courts: the SACL provided that Competition Council may not maliciously compel the investigated undertakings to admit the infringement (SACL, administrative cases No. A³⁹-1939/2008, No. A⁴⁴²-715/2008).

However, the analysis of the case law of the SACL over the last 5 years confirms that the parties to the proceedings, challenging the decisions of the supervisory authorities, relied on the Charter very rarely (e.g., SACL, administrative cases No. eA-240-822/2019, No. eA-378-629/2019). It can be argued that the Charter is not well known or familiar to national economic operators even as an additional legal remedy.

3. THE INSTITUTE OF SUPERVISION OF ACTIVITIES OF ECONOMIC OPERATORS IN LITHUANIA AND MAIN PROCEDURAL RIGHTS

The institute for supervision of activities of economic (business) operators, established *expressis verbis* in Lithuania in 2008, thus existing for more than a decade, still raises relevant questions in the context of the entire national legal system. The main initiative to reform this institute has been started in 2009. The main outcome of the reform was that the state was no longer positioned as a punisher, but more as an advisor for business. In 2010 and later revised Law on Public Administration has incorporated a comprehensive chapter (Section 4) on supervision, which refers to supervision rather than inspection and emphasise an integral approach to promoting compliance. Although on the international level the revised Law on Public Administration is being considered as one of the most innovative primary legislation on inspections (OECD, 2015, p. 31; Council of Europe, 2015, p. 26), this institute generally lacks attention and more detailed critical legal assessment, based on a holistic approach.

Though the Law on Public Administration codified main procedural rights of economic operators⁹, this attempt of codification was not very successful. Various procedural rights are still enshrined in different special laws and almost each law has a separate procedure (Law on Competition; Law on

⁹ Article 36⁸ provides the right to be informed of a breach; the right to have access to the file; the right to provide explanations; the right to a justify decision; the right to appeal against the decision.

Alcohol Control, etc.). Moreover, procedural provisions of Law on Public Administration in certain areas have only the status of recommendation, e.g., in taxation, competition, data protection, financial market supervision procedures. It is questionable whether that kind of exclusion is necessary. Nevertheless, the mentioned law seeks to unify and to strengthen procedural rights applied in supervisory procedures and this indeed is a positive thing.

It is essential to determine, what kind of impact on procedural rules and to the protection of economic operators the reform has made. From the case law of the SACL it is indicated that the application of sanctions in administrative court quite often is declared illegal due to the fact that a state authority (regulator) has violated the procedural rights that must be granted for economic entity during the inspection. The most common procedural irregularities are related to the right to be heard (SACL, administrative cases No. eA-725-822/2018, No. eA-328-556/2017, No. A-638-492/2017), which is usually deriving from *lex specialis*, and the right to a justified administrative decision (SACL, administrative cases No. eA-1307-556/2019, No. eA-2405-662/2019), which is stated in the Article 8 of Law on Public Administration (*lex generalis*).

In contrary to the CJEU, which actively relies on the Charter and interprets procedural rights, from the national case law (starting from 2014) it is identified, that administrative courts quite rarely apply or analyse systemised procedural rights catalogue of economic operators, enshrined in the Section 4 of Law on Public Administration (SACL, administrative cases No. eA-2252-629/2019, No. eA-57-602/2019, No. eA-1228-662/2017, No. eA-1489-858/2017). On the other hand, administrative courts are in favour to apply common rules of public administration in case of infringement of procedural rights, for example Article 8(1) of Law on Public Administration, which provides general requirements of an individual administrative act and the obligation to give reasons for sanctions applied (SACL, administrative cases No. A-1668-629/2020, No. A-397-822/2020, No. eA-290-525/2020, No. A-70-602/2020). In a certain sense the Article 8(1) duplicates the requirements of Section 4, which provides special procedural rules for economic operators. Analysing the case law it is identified that there is a room for application of procedural rules of Section 4, although the SACL does not apply procedural rules of Section 4 *ex officio* (SACL, administrative cases No. A-1554-822/2019, No. A-638-492/2017). Moreover, administrative courts tend to interpret the Article 8(1) broadly, as also covering the right to be heard, instead of invoking Section 4 (SACL, administrative cases No. eA-1135-822/2019, No. eA-1402-629/2019). However, according to the wording of Article 8 there is no reason to derive the right to be heard from it. Additionally, the Article 8(1) is not equal to the whole Article 41(1) of the Charter and expresses only one part (c) of it. Though procedural rights of Section 4 might be evaluated as in full expressing the principle of good administration. Therefore, the potential of these procedural rules is not fully exploited.

These implications might suggest that maybe there was no reason to systematise these procedural rights at all. That kind of approach might be denied since administrative courts rely on common rules of procedural rights and apply *lex generalis*. Consequently, it might be finalised that administrative courts are still developing the case law and they are still searching for the best way to incorporate the Section 4 into the unified case law.

In summary, more detail codification of procedural rules might be challenging Lithuania in the future. On the whole, single cases of violations and the pressure from society should not change the state's attitude towards supervisory procedures and undermine procedural rights.

CONCLUSIONS

1. Procedural rights and codification were hugely significant on the EU agenda in the last decade. However, the biggest achievement of the past decade is the Charter, which not only marks the tectonic shifts of the EU in the framework of procedural rights, but also is a "living document", demonstrating the equal degree of procedural rights that must be granted each time when any individual measures that could affect economic operator adversely are taken. Still, the requirement to ensure uniform procedural guarantees also in supervisory procedures throughout the EU is challenging the whole Europe.

2. The EU law has made a significant impact on legal regulation of supervision of economic operators and their procedural rights in Lithuania. The impact of the EU law over national law is determined not only by comparing initiative of codification of main procedural rights, but also analysing the jurisprudence of national courts. The provisions of the Charter regarding procedural rights in the national legal proceedings are being considered as an additional source of legal interpretation. Although indirectly applied to national institutions, Articles 41, 47 and 48 of the Charter can be called a fundamental list of procedural rights in supervisory procedures of economic operators.

3. Although the codification of main procedural rights of economic operators was not fully successful and the status of Law on Public Administration as a *lex generalis* requires to be enhanced, the mentioned law seeks to unify and to strengthen procedural rights applied in supervisory procedures. However, it must be acknowledged that administrative courts removing procedural irregularities quite rarely apply or analyse systemised procedural rights catalogue of economic operators enshrined in Article 36⁸ of Law on Public Administration, even though these procedural rules express in full the principle of good administration. Nevertheless, from the national jurisprudence it might be concluded that the need for common procedural standards is clearly expressed, that could also inspire more detail codification.

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