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The Triangular Relationship between the Commission, NRAs and National Courts Revisited

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Abstract: In this article, the authors review the relationship between the Commission, the national regulatory authorities (NRAs) and national courts in light of the Commission's proposals for reform as laid out in the 2006 Review. They focus upon the Article 7 and Article 4 procedures of Directive 2002/21. They conclude that the Commission proposals leave key questions and their implications outside of discussion and fail to address core issues such as the standard of assessment under Article 7, the accountability for decisions taken upstream of the NRA, and the scope and depth of judicial review.
Key words: Institutional framework, Article 7 procedure, accountability and judicial review.

This article takes a fundamental look at the uneasy triangular relationship between the Commission, the national regulatory authorities (NRAs) and national courts in the light of the Commission proposals for reform as laid out in the 2006 Review [1]. It focuses in particular on two interrelated issues, namely the interaction between NRAs and the Commission through the procedure of Article 7 of Directive 2002/21, and review of NRA decisions by national courts, as set out in EC law in Article 4 of Directive 2002/21 [2].

[1] Communication from the Commission to the Council, the European Parliament, the European Ecnomic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for electronic communications networks and services COM (2006) 334 final, Brussels June 29th 2006 and the accompanying Commission Staff Working Document SEC (2006) 816, Brussels June 28th 2006.

[2] Directive 2002/21/EC of the European Parliament and of the Council of March 7th 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33

■ Preliminary issue: the nature of regulatory decisions

Before dealing with the Article 7 and Article 4 procedures, however, it is useful to reflect on the nature of the decisions taken in regulatory procedures concerning electronic communications.

These decisions take place against a context of uncertainty regarding the evolution of the sector. Uncertainty is common in many sectors of the economy, but there is a general consensus that the evolution of communications is especially hard to predict. This is certainly the case with respect to technology. Indeed, besides the few cases of "calculated success" (GSM), recent history is littered with instances of unforeseen technological developments that shook up the sector (the rise of the internet), as well as predictions that failed to materialize (convergence stories of the early 1990s) or were outright failures (work on HDTV standards in the 1990s). Technological uncertainty is compounded, in the current context, by the liberalization wave of the 1990s, which led to more open markets. This implies firstly that technological progress is now a competitive factor, thus increasing the chances that operators and providers will try to introduce differentiated technological solutions and leave the market (i.e. customers) to choose what it prefers [3]. Moreover, competitive pressures might accelerate the rate of technological evolution [4]. Secondly, as a consequence, marketing might now be as important a factor as intrinsic technical quality in determining technological evolution [5].

The main challenge for lawmakers and regulatory authorities is to factor uncertainty properly into their course of action. The current EC electronic

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[3] Alternatively, if it is thought that a single solution should be adopted beforehand, market players (equipment and software manufacturers, operators, providers) might fight a standards battle behind the scenes before a technological advance is brought to the market. Witness the high-stake game that surrounded the specification of the 3G standard.

[4] Pressure to salvage existing copper pair local loops in the face of impending competition from cable might have played a role in research leading to the various xDSL standards in the past 10 years (the authors do not have any evidence regarding this point). Certainly, in retrospect, it would have been a massive waste to embark on a large-scale program of laying fiber in the local loop in the 1990s, as was advocated before xDSL arrived to give a new lease of life to copper pairs. That experience would dictate caution before enacting any legal measure that would mandate the laying of fiber in the local loops throughout a given territory, at least before this technology has proven its usefulness and attractiveness to customers (in the form of demand for services that can only be provided via local fiber networks).

[5] Witness the golden age of ISDN as a beefed-up internet access technology in the 1990s and the prevalence of SMSs today: none of these two technologies were designed for the respective uses which made them famous. Good marketing and network effects did the trick.

communications framework takes that uncertainty into account, for instance by relying on an economic analysis (inspired by competition law) for the most significant part of regulation (the SMP procedure), and by introducing the principle of technological neutrality.

By now, another consequence of that uncertainty should also be acknowledged, namely that there is no right answer to most – if not all – major regulatory dilemmas. Instead, regulatory decisions essentially tend to involve policy trade-offs. For instance, short-term gains in consumer welfare from lower prices and increased competition routinely have to be weighed against longer-term gains from investments in new technologies and increased dynamic efficiency [6]. Similarly, the interests of one category of customers often have to be balanced with those of another category [7].

If regulatory decisions involve trade-offs, then not only is there no right answer, but furthermore the decision cannot be modelled as a simple two-step process, namely the setting of a norm (by an institution endowed with legislative powers) and its application to a set of facts (by an institution endowed with executive/administrative powers).

It seems more accurate to model the process as a chain of decisions, each involving a further refinement in the trade-offs, always with a view to dealing with uncertainty as effectively as possible. At each step, complex inquiries and trade-offs are involved, ranging from the choice between symmetric and asymmetric regulation to the choice of cost basis and its implementation.

It is against that background that the procedures governed by Articles 7 (Commission review and veto) and 4 (judicial review by national courts) will be examined.

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[6] This is, of course, the core of the debate concerning investment in so-called next generation networks.

[7] The regulation of mobile termination rates implied that the interests of the users of fixed communications (who paid high termination rates to call mobile subscribers) were given priority over those of mobile subscribers (who benefited from the net wealth transfer from fixed to mobile), contrary to the previous staus quo. Of course, most fixed users are also mobile subscribers now, so that the overall wealth transfer might not have been that considerable.

■ NRAs and the Article 7 procedure

In line with subsidiarity and in order to heed the specificities of each EU member state, the regulatory framework for electronic communications entrusts NRAs with the main role in the implementation and enforcement of the law. NRAs take the main regulatory decisions that shape this very significant sector of the economy. Legally, NRAs must be independent from the market players and in practice, they have typically been given a large measure of independence from the government as well. Many felt that NRAs could turn out to be overzealous or ineffectual, thereby undermining the objectives of the broader regulatory reform. A number of mechanisms were put in place in the regulatory framework to ward off that risk as far as possible, including Article 7 of Directive 2002/21.

Article 7 is the cornerstone of the relationship between the Commission and NRAs, and to a large extent between NRAs as well. Three years of practical application have brought a number of issues to the fore with respect to Article 7 procedure that warant attention. This section will discuss the role of the NRA in the broader regulatory scheme (a) and, as the other side of the coin, the role of the Commission in relation to NRA decisions (b). In particular, what should be the standard for Commission review under Article 7 (c)? Finally, how does, and how should, the Article 7 procedure impact on relationships between NRA, notably as regards regulatory competition between them (d)?

What is the role of NRAs in the electronic communications regulatory framework?

The role of NRAs can be defined narrowly or broadly. The narrow definition would limit the NRA to a fact-finding function. The NRA would then deliver added value because of its closeness to the playing field, which makes it better able to ascertain the situation accurately. Nevertheless, it would essentially be "filling in the blanks" in order to complete processes where the main decisions have been taken elsewhere. The broader definition would also ascribe a policy-making function to the NRA. The NRA would then not only engage in fact-finding, but also enjoy the ability to make certain policy determinations, to the extent that the trade-offs made earlier in the decision-making chain would need further refinement.

The EC electronic communications framework does not expressly choose between these two models, but there are a number of significant indicia that point towards the broader definition [8]. Furthermore, the practice since 2003 shows that NRAs see themselves as endowed with policy-making functions and actually engage in policy-making. At any rate, the NRAs acting collectively in the ERG do deal with policy issues, which would imply that they individually possess the power to deal with those issues.

What is the role of the Commission under the Article 7 procedure?

Here there are also, broadly speaking, two options. On the one hand, the Commission could be seen as a form of review instance, which double-checks on the decisions made by the NRAs. On the other hand, the Commission could also be seen as a party in the original decision-making chain, together with legislative instances and NRAs. It would then be in charge of certain elements in the chain.

The setup of the EC electronic communications framework on this point falls into line with general principles of EC law: the second option is to be preferred. Indeed the SMP procedure (pursuant to which most NRAs decisions are taken) rests on a division of tasks between the Commission and the NRAs: the Commission, via the Guidelines on market definition and SMP [9] and the Recommendation on relevant markets [10], already carries out a significant portion of the SMP procedure. By doing so, it effectively sets the parameters for the work of NRAs [11]. As the recitals to Directive 2002/21 indicate [12], the Commission is entrusted with this task in its capacity as "guardian of the Treaty", given that (i) EC competition law, where the Commission has the lead role, is used to providing guidance for market definition and assessment; and (ii) some coordination is needed in the interest of the internal market. Article 7 should be seen in the same light: the Commission must be consulted because of its obvious interest in

8 Including the list of policy objectives at Article 8 of Directive 2002/21, the latitude left to the NRAs in the choice of remedies and their powers concerning scarce resources.

9 *Infra*, note 13

10 *Infra*, note 12.

11 See P. LAROUCHE "Coordination of European and Member State Regulatory Policy – Horizontal, Vertical and Transversal Aspects", in D. GERADIN & N. PETIT (Eds), *Which Regulatory Authorities in Europe?* (Edward Elgar Cheltenham, 2005).

12 See in particular Recitals 27-28.

competition law and the internal market, and it even receives a limited veto right to safeguard these interests. The Commission therefore participates in the SMP decision chain because of its specific tasks and for the sake of specific interests. It therefore cannot be seen as a general review instance that would police the action of NRAs.

Furthermore, such a role would be at variance with general principles of EC law, first and foremost subsidiarity and national procedural autonomy [13]. According to these principles, member states are in charge of the implementation of EC legislation (as reflected here in the role of NRAs as front-line players under electronic communications regulation) and they are also in charge of the procedural conditions for such implementation, including the review of decisions made by the national administration.

In the end, therefore, the role of the Commission under Article 7 is not to review NRA decisions fully, as this would infringe upon member states' autonomy in setting the procedural and institutional framework for safeguarding the rights of individuals bestowed upon them by EC law. Moreover, a full review would introduce an inefficient duplication of review. Rather, the Commission's role under Article 7 is no different than at other stages in the SMP procedure: the Commission is one of the players, and it is given a role in view of the specific interests (EC competition law, internal market) that it is meant to safeguard. General and full review of NRA decisions can thus be seen to rest properly with national courts.

What should be the standard for Commission intervention under Article 7 of Directive 2002/21?

From the above, it would follow that the Commission should intervene under Article 7 only when the specific interests it must protect are at stake. Indeed, this is proven by the text of Article 7(4), where the parameters of the veto right are set out. The Commission can launch the Article 7(4) procedure (two-month suspension of the NRA draft measure with a possible veto) if "it considers that the draft [NRA] measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Community law

13 The principle of subsidiarity is laid down in Article 5 second indent EC. The doctrine of national procedural autonomy has been developed by the Court of Justice in its case law, starting with Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

and in particular the objectives referred to in Article 8 [of Directive 2002/21]". A mere disagreement with the NRA accordingly does not suffice for resorting to a veto: the Commission must show that the measure envisaged by the NRA would prejudice either the internal market or EC law (including competition law) [14].

Moreover, given that the draft decisions under review involve trade-offs, without there being a right answer, it is sensible not to veto an NRA unless there is a significant conflict with Community law.

In the light of the information presented above, the Commission, when acting under Article 7(4) of Directive 2002/21, should intervene only when the draft measure proposed by an NRA is such that it will hamper the internal market (on the basis of concrete evidence) or that it will significantly conflict with Community law. In its Article 7, which took effect in 2003, the Commission has indeed allowed diverging measures (or at least diverging lines of reasoning) to stand in a number of situations. Yet in its Communication on the Article 7 procedure [15] and in its 2006 Review Communication [16], the Commission sets a different standard, namely "consistency" or "coherency" across the EU. These terms are not defined any further, yet it is difficult to escape the conclusion that they mean a single harmonized solution across the EU.

The Commission decision vetoing the draft measure of the German NRA [17] effectively illustrates the difference between the standard outlined above and a "consistency/coherency" standard [18]. The Commission vetoed the draft measure because it departed from what other NRAs had done [19], without, however, explaining how that measure would have hampered the internal market or significantly clashed with Community law. Under the

14 The case-law of the ECJ concerning harmonization (Case C-376/98 *Germany v. Parliament and Council* ("*Tobacco Advertising*") [2000] ECR I-8419, para. 84; see the most recent pronouncement in Case C-154/04 *Alliance for Natural Health* [2005] ECR I-6451, para. 24-43) requires evidence of a negative impact on the internal market – going beyond mere differences between national laws – for harmonization to be justified.

15 *Consolidating the internal market for electronic communications*, COM(2006)28 (6 February 2006) at 6, 9.

16 *Supra*, note 1 at 4, 8-9.

17 Then the Regulierungsbehörde für Telekommunikation und Post (RegTP), now the Bundesnetzagentur (BNetzA).

18 Market 9 in the Recommendation on relevant markets, *supra*, note 12.

19 Commission decision of May 17th 2005, Case DE/2005/144, available at: <forum.europa.eu.int>.

standard outlined above (as opposed to "consistency/coherency"), this draft measure should not have been vetoed.

The "coherency/consistency" standard put forward by the Commission could, in fact, stem from a misconception of the precedent value of competition law decisions. There is informal evidence [20] to the effect that the Commission takes a strategic view of decisions taken by NRAs. Given that the SMP framework is inspired by competition law and that NRAs are supposedly following competition law principles when defining and assessing markets, the Commission would be worried about allowing any undesirable precedent to be set, and conversely would perhaps even like to establish some favourable precedents under electronic communications regulation, which could subsequently be used in the application of competition law. While this worry is understandable, it is misplaced. Firstly, based on a proper understanding of the role of the Commission in the Article 7 procedure and of the applicable standard, as set out above, the Commission does not approve or disapprove of the substance of NRA decisions, it rather exerts a specific form of control to safeguard the internal market and Community law in cases where serious doubts arise. Secondly, and more fundamentally, the market definition and market assessment conducted in a given case does not have a strong precedent value for subsequent cases, even if they concern the same products or services. Market definition and market assessment are intimately linked with the individual circumstances of each separate case, and therefore the precedent value of competition law decisions is limited, as the CFI (Court of First Instance) aptly noted in *GE/Honeywell* [21]. This is all the more true in cases where a regulatory decision intended to be based on competition law is invoked in subsequent competition law proceedings.

From a practical perspective, and perhaps more provocatively, the value of coherency/consistency across the EU should not be exaggerated. Driven to its logical end, only an EU-level regulator can provide complete coherency/consistency. Given the institutional choices made with the electronic communications framework, it is unavoidable that some discrepancy will arise between NRA decisions. As set out further below, such discrepancies can be advantageous in a context of uncertainty.

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[20] The authors wish to apologize for not being able to substantiate this point more solidly at this juncture.

[21] Case T-210/01 *General Electric v. Commission*, not yet reported, at para. 118-120.

In its 2006 Review Communication, the Commission proposes to extend its veto right, pursuant to Article 7(4) of Directive 2002/21, to the remedial stage of NRA decisions as well [22]. Of course, the need for a veto is not just theoretical: on market definition and SMP assessment, the Commission has already been called upon to issue five veto decisions to date, and exercise informal pressure to ensure the withdrawal of thirteen further draft measures, which otherwise would also have been subject to a veto decision. Extending the veto power to cover remedies would thus not seem too drastic a measure to be pursued. It could further contribute to reducing the tension between the deregulatory goals of the 2003 framework and the increasing amount of regulation: NRAs often impose the heavier remedies – a Commission veto could perform a useful check as to whether these heavier remedies are indeed the most appropriate ones.

However, the existence of a veto power potentially puts the Commission in a hierarchically superior, controlling position *vis-à-vis* NRAs. In the light of the preceding paragraphs, the Commission proposal is problematic. Remedies are where the NRA can best attune its decision to national circumstances, which might not be properly appreciated by the Commission. Furthermore, NRAs have sought to ensure a measure of coordination as regards remedies, as well through the adoption of a Common Position on Remedies in the context of the European Regulators Group (ERG) [23]. Extending the Commission veto power to remedies would be sensible only if the role of the Commission and the standard used under Article 7 were also clarified along the lines set out above. In any event, it might be preferable to work instead with the ERG: the Common Position on Remedies can be further improved, and the ERG should be encouraged to engage more systematically in benchmarking and peer review.

Should there be "regulatory emulation" between NRAs, and if so, how?

In an earlier paper, one of the authors described how the current EC electronic communications framework – then still being finalized – could open the door to a form of "regulatory competition" between NRAs, which is perhaps better described as "emulation" [24].

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22 *Supra*, note 1 at 8-9.

23 *Supra*, note 15.

24 M. CAVE & P. LAROUCHE, *European Communications at the Crossroads – Report of the CEPS Working Party on electronic communications* (Brussels: CEPS, 2001) at 17-26.

At a more fundamental level, extending the Commission veto power – if understood as a control of consistency and coherency across the EU – to remedies would also shatter any remaining hope of seeing some form of "regulatory emulation" emerge within the EU. Such emulation can occur as a result of market pressures or more simply as a result of NRAs searching around for better solutions by comparing and benchmarking with others.

Considering the inherent uncertainty surrounding most of the major regulatory decisions, as outlined at the outset, some measure of "learning-by-doing" seems quite appropriate, in order to avoid the risk of massive failure if all authorities followed the same approach, imposed in a top-down fashion. In addition, NRAs are closer to the playing field and can respond more flexibly to new developments than when their action must be coordinated at EC level. An important pre-condition for these positive effects to occur, however, is that NRAs do take a European approach and engage with the work of their peers.

Such a bottom-up emulation process is not necessarily indicated in all cases. A trade-off must therefore be made between the advantages of consistency and those of learning-by-doing via slight discrepancies. The former are mostly static and the latter, dynamic. Obviously, where there is broad consensus already (for example, in retail markets), it might be preferable to insist more on consistency. Where a number of reasonable options are open to the regulatory authority, on the other hand, allowing some measure of divergence might be sensible to reduce the risk of failure, even if it imposes some costs in the shorter-term. Experience should then make it easier to discern which option is more adequate. At first sight, one might think that such situations arise only with regard to remedies, but emulation might also be useful for certain issues relating to market definition [25] and the assessment of SMP [26].

Where relying on emulation was appropriate, we should have witnessed NRAs from smaller jurisdictions attempting to innovate on regulation ("maverick" behaviour) in order to try to position their jurisdiction more strongly in comparison to larger jurisdictions. Other NRAs would have kept a close eye on these developments, in order to see which of the maverick

[25] For example, whether cable and DSL are in the same market for broadband access (Market 12) and transmission of broadcasting signals (Market 18).

[26] For example, the presence of collective dominance for mobile call origination (Market 15) or the impact of countervailing buyer power on the SMP findings for smaller providers of call termination (Markets 9 and 16).

NRAs appeared to have made the best choice for its jurisdiction. Discussions would have ensued within and outside of the ERG, with some benchmarking and other similar exercises, until some best practice(s) finally emerged. NRAs from larger jurisdictions would typically have refrained from maverick behaviour, given that the gains to be achieved for them would have been dwarfed by the risk of losses in case regulatory choices turned out to be inappropriate. They would have moved at a later point, and their decisions would most likely have established what the best practice was found to be.

Instead, we have witnessed the following since 2003. Typically, an NRA from a large jurisdiction takes the lead in conducting market assessments and deciding on remedies. Historically, this role fell to the British Ofcom (and its predecessor Oftel), but it appears that other NRAs, in particular the French ARCEP, are also assuming this role nowadays. The Commission is closely involved with this NRA, and will endorse its approach. Subsequently, in its Article 7 comments on draft measures presented by other NRAs, the Commission will stick to the line set out in the first major case, all the more so if it considers that it must achieve "consistency" and "coherence" across the EU. As a result, NRAs from smaller jurisdictions are prevented from engaging in maverick behaviour. Similarly, NRAs – from larger or smaller jurisdictions – that come late with their draft decision will have little if any room to stray from the "consensus".

"Regulatory competition" has thus failed to emerge since 2003. That outcome can be explained by historical factors. Ofcom (then Oftel) has always enjoyed a leadership status since its inception in 1981; perhaps the Commission and NRAs have been conditioned to follow the lead from one of the larger jurisdictions and cannot shake off the habit. That outcome can also be explained, however, by the Commission's use of a "consistency/coherency" standard in its Article 7 practice.

■ Accountability, judicial review and the role of national courts

The prime mechanism to hold authorities to account in the current EC electronic communications framework is judicial review by national courts, as provided for in Article 4 of the Framework Directive. The same considerations – including subsidiarity – that dictate that NRAs must have

the primary responsibility for the implementation of the regulatory framework in principle leave it to member states to devise the judicial structures within which such decisions can be challenged. However, in electronic communications regulation, the need for a proper judicial review mechanism was felt strongly enough to warrant that a number of procedural rules be fixed in EC law directly, at Article 4. The mechanisms of both Article 4 and Article 7 offer a check on the considerable discretion and wide competences of NRAs: Article 7 allows the Commission to safeguard certain interests (internal market, Community law) in the course of the decision-making procedure, while Article 4 calls upon national courts to ensure *ex post* overall control of the finished end-product.

Accordingly, whilst accountability is the basic concern, this section will take judicial review by national courts as a starting point, in order to discuss: the interpretation of a 'challengeable act' (a); the court or tribunal with jurisdiction to review the challenged act (b); the proper breadth and depth of judicial review (c); and finally, the effectiveness of judicial review (d).

For which acts should authorities be accountable?

The conventional view would suggest that since only NRA decisions at the end of the chain actually affect the rights and obligations of individual undertakings directly, accountability would be sufficiently ensured via judicial review of these. This view, however, ignores the practical realities of regulation in the electronic communications sector. NRA decisions are greatly influenced by activities that take place earlier in the decision-making chain.

Firstly, Commission recommendations and guidelines (hereinafter the "Commission soft-law instruments") determine the scope and exercise of NRA actions. Articles 14(2) and 15(3) of Directive 2002/21 expressly provide that NRAs must take these measures into account when carrying out the SMP exercise [27]. The Commission has indicated that the extent to which NRAs have indeed done so is an important factor in the assessment of the

[27] See also Article 19 of Directive 2002/21, calling upon NRAs to take the utmost account of recommendations issued under that legal basis. It should be noted that it is thus the Community legislature obliging NRAs to take into account soft law instruments, adding considerable legal force to this duty.

proportionality and legality of NRA decisions under Article 7 [28]. In practice, the Commission instruments are thus highly influential and it would seem particularly apposite that the Commission should be accountable for them.

Secondly, the ERG is developing as an important institutional player, whose actions also have considerable ramifications for NRA decisions [29]. It is likely that these documents will be followed by NRAs in individual cases, for the simple reason that NRAs (as ERG members) have been actively involved in the drafting and adoption of these documents. Moreover, the very purpose of ERG Common Positions is to coordinate decision-making practices across the European Union [30]. Accordingly, while an undertaking faced with an adverse NRA decision can challenge that decision before a national court, its ability to do so will be hampered if the NRA can hide behind an ERG documents. Some form of accountability mechanism – judicial review or otherwise – for ERG documents would thus be advisable [31].

Finally, the Commission "letters of comment" issued pursuant to Article 7(3) of Directive 2002/21, its "serious doubts" letters and veto decisions pursuant to Article 7(4) all circumscribe NRA discretion in the decision-making process. NRAs are bound to heed the latter, while they are well-

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28 Para 7. Currently, the phraseology of Article 7(4) is also wide enough to accommodate a Commission veto for the (sole) reason of failure to follow the Guidelines.

29 Examples of ERG documents include Common Positions on remedies (ERG (03)30, now replaced by ERG (06)33), wholesale international roaming (ERG (05) 42 and ERG (05)20 Rev1), wholesale bitstream access (ERG (03)33Rev1 and ERG (03) Rev2) and accounting separation (ERG (05) 29). In addition to ERG Common Statements, there are also ERG Reports which allow NRAs to engage in benchmarking, e.g. the Report on Broadband market competition, ERG (05)23, Report on Transparency of retail prices, ERG (05) 52, the Report on Experiences with Market Definition, Market Analysis and Applied remedies, ERG (05)51 and the Public Mobile Termination Rates Benchmark ERG (06) 24.

30 Compare in this respect also the wording of Article 7(2) of the Framework Directive, stating that in order to ensure the consistent application of the 2003 Directives, NRAs and the Commission shall "seek to agree on the type of instruments and remedies best suited to address particular types of situations in the market place".

31 If it would prove unpracticable to subject ERG documents to judicial review, an alternative option would be to open the ERG procedures and make them more transparent. The model of the NPRM under the US Administrative Procedure Act (APA) could be used by analogy. The ERG would then issue a notice that it intends to deal with a given issue, setting out what the points to be decided are, what its options are and which information it would like to obtain from market parties and other participants in the procedure. The ERG would then build up a file, perhaps conduct hearings, and then reach a conclusion, in which it would address the submissions received. The U.S. procedure can be branded monstrous and unwieldy, if one looks at the amount of paperwork and resources that go into it, but it does force the authority to listen to observations and engage them in its decision. In the absence of judicial review, this may be the best safeguard.

advised to take the "serious doubts" letters into account in order to avoid a veto. As for the letters of comment, the Commission sometimes points therein quite precisely to weaker elements in the draft NRA decision [32].

In sum, there are four parts of the decision-making chain that should be subject to some accountability mechanism (judicial review or otherwise): Commission instruments (guidelines and recommendations); ERG output; Commission comments under Article 7 of the Framework Directive and NRA decisions. Given that only the latter are currently subject to judicial review, there is at first sight an accountability deficit in the decision chain of EC electronic communications regulation.

Who is best placed to carry out judicial review?

On the assumption that some form of judicial review might be the easiest means of introducing accountability for the acts discussed above, several institutions come into question.

At this juncture, given that only NRA decisions are actually subject to judicial review, national courts are the natural forum and this much is recognized in Article 4 of Directive 2002/21, giving them the competence to decide on appeals against NRA decisions. However, national courts can also be something of a 'loose cannon' in the general scheme of EC law. The current electronic communications framework does not at any point attempt to induce national courts to see the EC dimension of regulation. There is thus a risk that an NRA, even if acting suitably in line with the EC consensus, can be overruled by a national court, if the latter's perspective remains confined to the member state in question. This danger is all the greater since EC electronic communications law is couched in directives, so that the implementing national legislation often obscures the EC dimension. This defect can be remedied, however. The EC perspective of national

32 As the experience with mobile origination in Ireland shows, the elements on which the Commission expresses reservations can end up being those on which the decision falls before national courts. There the Irish Communications Appeal Tribunal annulled the decisions of the Irish NRA (ComReg) finding that Vodafone and O2 had collective dominance on the Irish wholesale mobile access and origination market and imposing a series of remedies, Decision No 08/05 of the Electronic Communications Appeal Tribunal in respect of Appeal Numbers ECAP6/2005/03, 04, 05, 06, 07 and 08. Both decisions had been duly notified to the Commission under Article 7(3) of Directive 2002/21.and although the Commission made observations, it did not initiate the procedure of Article 7(4), Case IE/2004/121, DG Greffe (2005) D/200269, Brussels January 20th 2005

courts can be strengthened by informal measures, such as training courses provided by the Commission, or an exchange programme for judges. Furthermore, national courts could be given the express competence to ask the Commission for information of a factual, legal or economic nature [33]. Finally, if national courts were required to notify their judgments relating to electronic communications to the EC level, the Commission could then, as it has done in EC competition law, compile an electronic database in which national judges can access decisions by their counterparts on the same issues they are grappling with.

National courts, however, are not suitable for judicial review of the other three categories of documents. Under Community law, Commission soft-law instruments as well as Commission comments pursuant to Article 7 cannot be challenged before national courts. As far as ERG output is concerned, national courts cannot truly be expected to engage in an examination of the ERG output upon which the NRA decision is based. They might also feel uneasy questioning a document that has been drawn up and endorsed by all NRAs, as well as by the Commission.

For these three categories of documents where national courts appear unsuitable, judicial review could be entrusted to the Court of Justice. The ECJ (European Court of Justice) seems the natural forum for Commission soft-law instruments and Article 7 comments and decisions. It also seems better placed than a national court to entertain a challenge to ERG documents, i.e. 'final' documents that have been promulgated as such and are expressly intended for 'external' usage. The ECJ/CFI is used to review economic policy matters and furthermore is best equipped to take the European dimension of the ERG actions into account. However, Commission recommendations – and a fortiori guidelines and other soft-law instruments – seem immune from scrutiny: they are expressly excluded from the ambit of Article 230 EC [34]. As regards ERG documents, it must be noted that the ERG is not a Community institution within the meaning of Article 230 EC; even if this were the case, the ERG output probably does not fall under

[33] On the model of Article 15 of Regulation 1/2003 for competition law. While the comments made by the Commission in the course of the Article 7 procedure will already be of considerable assistance to national courts, it cannot be excluded that national courts require further elaboration on the Commission's thinking or want the Commission's input in assessing how the NRA has dealt with the Article 7 comments.

[34] Of course, the ECJ could always find that a recommendation is in fact a decision without the name, but this appears unlikely. It is interesting to note that the original proposal for the Framework Directive provided for a decision on relevant markets and not a recommendation.

the list of acts that are covered by that Article [35]. Judicial review would thus require an amendment to the constituent decision for the ERG, providing for the possibility of a judicial challenge before the ECJ [36]. Even if these hurdles are overcome, locus standi remains a problem. Under the current interpretation of Article 230 EC, challenges to general acts by private parties are not possible and individuals are, moreover, unlikely to succeed in demonstrating the requisite individual and direct concern to be found admissible [37]. The undertaking to which the NRA decision now vetoed was addressed might perhaps be able to claim standing applying the TWD case law [38] per analogy. But competitors who have merely been involved in the national procedure giving rise to the Commission decision will see their challenge fail because of the inability to show 'direct and individual concern' under Article 230 EC [39].

A third option could be to conceive of the Commission as a judicial review instance for NRA decisions. However, establishing the Commission as a (general) review instance would be at odds with the purpose of the Article 7 procedure and fly in the face of well-established general principles of Community law.

Finally, a European Communications Appeal Tribunal (ECAT) could be created. The advantage of this option is that it would be possible to concentrate all judicial review actions relating to EC communications law in a single court. The ECAT could thus accumulate the requisite experience and expertise to effectively dispose of judicial challenges. A single European tribunal would moreover be intimately familiar with the European dimension of the communications rules. This option is theoretically pleasing, but disconnected from practical realities. Member states will, for constitutional

35 It is expressly provided in ERG Common Positions that they do not possess legally binding effects and a perusal of the text of Article 230 EC makes clear that the Community Courts only decide on the legality of binding acts.

36 This approach is taken with respect to the decisions of a number of European agencies.

37 Case 25/62 *Plaumann and Co v Commission* [1963] ECR 95; reaffirmed in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR II-6677.

38 Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833.

39 Admittedly, there is always the possibility of an indirect challenge pursuant to Article 234 EC. However, this route is beset with problems. Firstly, it is uncertain as the market party will have to wait for a negative – and challengeable – decision to be adopted by the NRA and then hope that the national court where he challenges this decision will actually decide to send a preliminary reference to the ECJ. Secondly, the preliminary reference procedure is cumbersome and lengthy, making it particularly inappropriate for a sector as dynamic as e-communications.

reasons, be loathe to surrender judicial scrutiny for decisions of national state organs to a European body.

In the end, there is a clear danger of too much judicial review. Numerous steps of the decision-making chain, which are, it must be remembered, all part of one and the same translation of general policy into individual decision, would be susceptible to judicial challenge. In the simplest terms, this amounts to an unnecessary waste of resources. It also leads to considerable uncertainty among market operators and authorities alike as it will not be easy to determine when an NRA decision is final and must thus be obeyed. The answer to this problem involves a trade-off between the effectiveness of regulatory decisions (in the widest sense of the word) and protection of individual rights. We have not yet been able to conduct a more elaborate analysis of this problem with the help of economic tools. At this point in time, we would tentatively argue that it might be preferrable to have a single shot at in-depth judicial review and that this shot should occur where the "hunch" is in the decision chain, i.e. where the transition between general policy and (individual) decision takes place.

What should be the breadth and depth of judicial review?

This section seeks to address the problem with the interface between Article 4 of the Framework Directive and national legal systems. Article 4 gives national courts the competence, and indeed imposes the obligation upon them, to take the 'merits of the case duly into account'. This phrase in Article 4 is a reaction to case law where national courts used their jurisdiction to annul NRA decisions on primarily formalistic grounds, which was seen as counterproductive [40]. They restrictively interpreted the competences of NRAs and often found them wanting, leading to the

[40] Cf. the following statements from the Commission Annual Implementation Reports: "In many cases the courts are empowered to reach decisions on appeal only on the procedural aspects of the case". [Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Sixth Report on the Implementation of the Telecommunications Regulatory Package Brussels, December 7th 2000 COM (2000) 814 14] and "The practice under the existing framework has in many cases been for the appeal bodies to examine process rather than substance." [Eight Report from the Commission on the Implementation of the Telecommunications Regulatory Package, Brussels 3.12.2002 COM (2002) 695 final 53]. This was the case notably in the Netherlands, see, for example, M. ANDENAS & S. ZLEPTNIG, "Telecommunications Dispute Resolution: Procedure and Effectiveness" [2004] 15, *European Business Law Review*, 477, 543 et seq.

annulment of their decisions. It is important to appreciate why national courts ended up annulling NRA decisions on formal grounds. On the Continent, a number of national legal systems do not readily admit that independent authorities be given wide, discretionary powers, usually for reasons of a constitutional nature. The primacy of politics dictates that major decisions must be made by, or under the authority of, elected officials, although it has been shown that traditional constitutional principles are difficult to reconcile with the realities of regulation in the electronic communications sector and the decision chain model. Many courts felt uncomfortable with the onset of independent regulatory authorities and hence strictly controlled competence issues. Article 4 attempts to address this problem by stipulating that Community law requires a control of NRA decisions that goes beyond procedure, the effectiveness of control being of ever greater importance considering the enhanced position of NRAs under EC communications law. To recall, the aim behind Article 4 is to bring about effective judicial review. This aim is to be achieved by broadening the breadth of judicial review to encompass procedure and substance. This is evident from inter alia the German, French and Dutch language versions of the provision which speak of "Ümstanden des Falles"; "le fond de l'affaire"; and "de feiten van de zaak" [41]. The English version speaks of "merits". English law operates according to a fundamental distinction between the role of courts on appeal and the role of courts on review [42]. Judicial review attaches to the procedure according to which the decision was arrived at, which includes scrutiny of the contested decision for errors of fact and law [43]. On appeal, conversely, the correctness of the decision as such is under question, and courts are more interventionist. In English law, consideration of the merits is only possible in appeal. By mandating a review of the merits, Community law thus requires a full appeal of Ofcom decisions. In other words, where the aim of Article 4 was to dictate the breadth of review, in response to undesirable behaviour on the part of Continental courts, it impacts on the depth of review in Common law courts, with the concomitant danger that the appeal body might indeed develop into the shadow regulator feared by Council [44].

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41 The Dutch translation is arguably too narrow; substance involves more than looking at the facts of the case at hand.

42 *Kemper Reinsurance Company v Minister of Finance* [2001] 1 AC 1 at 14.

43 The test of judicial review is that first set out in *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 2 All ER 680, and now summarized by Lord Diplock in GCHQ (n 31) to encompass illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness).

44 Indeed, in the context of competition law, the CAT when dealing with appeals against decisions by the OFT has not shown any great deference, for example, *Institute of Indepenent*

Article 4 might thus go too far where it need not do, and not far enough where it ought to. Its emphasis on the breadth of review ignores the fact that even if a court duly takes the substance of the matter into account, that is not the sole determinant of the outcome of the case. Equally, if not more important, is the depth of review. As such, Article 4 does not guarantee that Continental courts will amend their behaviour to develop into the effective control instruments the Commission aims for [45]. Furthermore, the effects that Article 4 (presumably unintentionally) has on the depth of review in Common Law countries might go beyond the effects it should have [46]. Even if a court is competent to inquire into the "merits" [47] of any particular case, presumably it should only annul the decision under attack in "extreme" cases, namely those where the decision under challenge is blatantly wrong or inappropriate or where fundamental principles [48] or procedural rights [49] have not been respected. Article 6 of the Framework Directive provides for extensive consultation with stakeholders. Market parties have thus had the opportunity to communicate their point of view and convince the NRA. A court should not subsequently re-do the NRA's work.

Insurance Brokers v Director General of Fair Trading 1002/2/1/01(IR) [2002] CAT 2; *Aberdeen Journals v Director General of Fair Trading* 1009/1/1/02 [2003] CAT 11; *BetterCare Group Limited v Director General of Fair Trading* 1006/2/1/01 [2002] CAT 7; *Freeserve.com PLC v Director General of Fair Trading* 1007/2/3/02 [2003] CAT 5; *IBA Health Limited v Office of Fair Trading* 1023/4/1/03 [2003] CAT 27; *Hutchison 3G (UK) v Office of Communications* 1047/3/3/04 [2005] CAT 39.

45 The Commission has also been having some difficulty in ensuring that all member states indeed provide for national courts to take the merits of the case into account.

46 In principle, judicial review should be sufficient, especially given the intensity of judicial review as applied by the CAT. Consider, for instance, *Unichem Limited v Office of Fair Trading* 1049/4/1/05 [2005] CAT 8, where the CAT favourably noted the similarity of the scope of judicial review in merger cases by the UK and the Community Courts. The CAT has to review mergers using judicial review principles.

47 Merit is often loosely used by non-common law lawyers to refer to the substance of the case, as opposed to the procedure followed.

48 In EC communications law, examples would include the regulatory principles as set out by the Commission in the 1999 Green Paper, such as non-discrimination, or the objectives listed in Article 8 of the Framework Directive.

49 Such as *audi alteram partem*, where the authority is acting ultra vires or if the decision does not contain a statement of reasons.

The effectiveness of judicial review: the non-suspensive effect of appeals

The last point to discuss in relation to judicial review concerns the suspensive effect of appeals. In order to avoid the automatic suspension of NRA decisions pending the outcome of judicial proceedings as practised in many member states, a provision was included in the Framework Directive to the effect that appeals do not automatically suspend the NRA decision being challenged, although the competence of national courts to order interim measures (i.e. suspension) remained unaffected. The provision has not delivered the desired result. Suspension is still granted too readily in some jurisdictions, with all the concomitant damaging effects for the establishment of a competitive e-communications market.

The Commission proposal to amend Article 4 to specify the conditions under which NRA decisions can be suspended pending appeal is therefore to be welcomed.

■ Conclusion

The Commission proposals remain superficial. They leave key questions and their implications outside of discussion and fail to address core issues. Legislatures, policy-makers and lawyers should appreciate the uncertainty that characterizes the electronic communications sector in devising the institutional framework and relationships between the various players. In particular, traditional conceptions on judicial review and accountability cannot be applied without at least some degree of modification. Secondly, the role of the Commission under Article 7 of Directive 2002/21 and the role of national courts under Article 4 of that Directive need sorting out. The Commission should be clearly conceived as party in the original decision-making chain and not as a general review instance. Moreover, the threshold which must be met before a veto can be pronounced should be more stringently phrased to require proof of a serious prejudice to the internal market or Community law. Amending the role of the Commission along these lines should also allow for a greater degree of regulatory competition amongst NRAs than is currently the case, which, in turn, is in keeping with basic principles of EC law as subsidiarity and national procedural autonomy and can contribute to a more prominent role for the ERG as regards peer review and benchmarking. The role of national courts is squarely that of

reviewing NRA decisions for general compliance with the law. While the intensity of review should be higher than that exercised by the Commission under Article 7, it should not lead to a judicial practice where NRA decisions are annulled simply because the courts would have preferred another outcome. Thirdly, as regards accountability of Commission instruments and comments and ERG documents, an economic analysis of the decision-chain model should be employed to determine which part of the decision-making chain should be susceptible to more in-depth judicial review. For those other parts, accountability can be ensured through more marginal review or through opening the procedure for the adoption of the measures concerned and making them more transparent.