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CENTRE ON REGULATION IN EUROPE

***Enforcement and judicial review of decisions
of national regulatory authorities***

Identification of best practices

A CERRE study

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Brussels, 21 April 2011

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About CERRE

Providing top quality studies, training and dissemination activities, the Centre on Regulation in Europe (CERRE) promotes robust and consistent regulation in Europe's network industries. CERRE's members are regulatory authorities and operators in those industries as well as universities. CERRE's management team is led by Dr Bruno Liebhaberg, Professor at the Solvay Brussels School of Economics and Management, Université Libre de Bruxelles.

CERRE's added value is based on:

- its original, multidisciplinary and cross sector approach;
- the widely acknowledged academic credentials and policy experience of its team and associated staff members;
- its scientific independence and impartiality.

CERRE's activities include contributions to the development of norms, standards and policy recommendations related to the regulation of service providers, to the specification of market rules and to improvements in the management of infrastructure in a changing political, economic, technological and social environment. CERRE's work also aims at clarifying the respective roles of market operators, governments and regulatory authorities, as well as at strengthening the expertise of the latter, since in many member states, regulators are part of a relatively recent profession.

This study has received the financial support of CERRE members. As provided for in the association's by-laws, it has been prepared in complete academic independence. The contents and opinions expressed therefore reflect only the authors' views and in no way bind the members of CERRE.



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Executive summary

While much attention is given at EU level to the design and operation of National Regulatory Authorities (NRAs), the enforcement and review of NRA decisions has been largely left to the Member States to organize.

With this report, CERRE provides a comprehensive examination of Member State law and practice regarding the enforcement and review of NRA decisions. This report is based on a study of energy, electronic communications and rail regulation in Belgium, France, Germany, the Netherlands and the UK. We review EU and Member State legislation, and the case law of national review courts. We make recommendations based on the best practices we identified.

In general, we found that that the harmonization of substantive law at EU level seems to exert a greater influence on Member State law and practice than the diversity of national procedural laws. Accordingly, the degree of divergence between the Member States under study is more limited than one might have expected at first sight. Furthermore, it is also apparent that Member States have by and large taken a horizontal approach to the design of enforcement and review regimes, since for any Member State, we observed that the solutions tend to converge as between sectors.

As a starting point, the design of the enforcement and review of NRA decisions must find a balance between three policy objectives, namely the protection of the rights of market players and interested parties, the effectiveness of the regulatory regime and the efficiency of the enforcement and review process.

Against that background, we studied 12 key issues. From our study, the following recommendations emerge as to the best practices for the enforcement and review of NRA decisions.

Enforcement of NRA decisions. It is preferable to give NRAs the power to impose penalties directly for failure to comply with their own decisions (as opposed to a power to act against breaches of the regulatory framework, which would comprise their own decisions).

Stay of NRA decisions during appeal proceedings. An appeal against an NRA decision should have no automatic or systematic suspensive effect, with the possible exception of appeals against NRA decisions ordering the payment of fines. As compared to the situation some years ago, concerns for the effectiveness of regulation, stemming from excessive use of stays of enforcement, seem to have abated.

Nature of review court. Member States should allocate the review of NRA decisions to a specialist court (or a specialist body within an existing court). We recommend a horizontal, cross-sector approach in designing the review regime, such that a single court would be responsible across the various sectors, in order to maximise the chances of cross-fertilisation and synergies between sectors.

Standing and third-party intervention. Standing to appeal against an NRA decision should be granted to all parties who are affected by the decision, subject perhaps to a requirement that the party has participated in the proceedings before the NRA. Third parties whose interests are affected should be able to join review proceedings. The NRA itself should appear before the review court in order to defend its decision. As long as the review court has the ability to join related proceedings, the study shows that the conduct of proceedings has not been significantly affected by the presence of multiple parties.

Length of proceedings. In general, review proceedings take long: in observable cases, the average duration has been close to a year and a half. An EU-level benchmark norm on duration might be envisaged. Some Member States do not commit enough resources to the handling of the appeal proceedings; in particular, enough qualified judges should be available.

Confidential information and business secrets. That information is well protected in all Member States, although procedures vary. The best practice is to allow the review court to gain knowledge of the information, which is then shared with a restricted circle of counsel for the parties to the case, without being available to the parties themselves.

Scope of review. Review courts should be entitled to review all factual, legal and policy issues, as long as the parties to the case brought these issues before the court.

Investigating powers. Since the NRA file is usually quite extensive and the parties provide the NRA with comprehensive submissions, review courts have not been using much of their current investigating powers in practice. There is no need to increase such powers.

Standard for review. All review courts should use the same standard for review, namely a full review of issues of law, a broad review of the errors of fact and a marginal review of the exercise of discretion by the NRA.

Formal or substantive analysis. If marginal review is the standard, where the NRA enjoys discretion, substantive analysis would best suit review proceedings. In any event, multiple-stage review (because a review of the substance would be pre-empted by a first stage of formal review) should be avoided.

EU-level coordination. Cross-fertilisation is lacking as between the various sectors and the various jurisdictions under study. A complete and coherent case-law database on NRA review should be established, and the various Member State courts discharging the review of NRA decisions should be regrouped in a European association, on the model of the Association of European Competition Law Judges.

Retroactive effect of remedies upon review. It is difficult to choose between the *ex tunc* and *ex nunc* models, i.e. to decide whether the remedies granted by review courts should have retroactive effect or not. On balance, leaving aside dogmatic considerations arising from one or the other national legal system, it would be preferable, from a pragmatic perspective, not to give retroactive effect to the remedies granted by the review court (be it quashing of the NRA decision or substitution of a new decision by the review court).

It must be underlined that these questions are interrelated, so that for instance the risks linked with not giving retroactive effect to the remedies granted by the review court would be minimized by a shorter duration of review proceedings.

Ultimately, even when the regime of enforcement and review of NRA decisions is optimally designed and operated, this is but one of the elements which contributes to the success of regulation. Other measures can be taken to increase the quality of NRA decisions *ex ante* (better procedures before the NRA, adequate resources, etc.), so as to reduce the need for review and thereby procure even greater improvements in the effectiveness of regulation.



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1 Background

In the EU, the liberalization of network sectors was accompanied by the creation of national regulatory authorities (NRAs) in the various sectors. NRAs are part of a specific institutional model which was deliberately chosen to bolster EU liberalization policy: they are meant to be independent from market players and to a large extent from the national legislature and executive as well. They are expert authorities, whose tasks and objectives are set out in legislation but which benefit from a large degree of autonomy in the discharge of the tasks and the realization of these objectives. Given the size of the sectors which they regulate, NRAs wield considerable power in the economies of the Member States of the EU.

From a legal and political perspective, however, NRAs do not and cannot exist in a vacuum. They must fit within the existing order, which implies for instance that they are accountable for their actions both politically – through mechanisms which respect their independence – and legally – through appeals and other avenues of judicial review. The latter mechanisms are intended to submit the actions of the NRAs to the supervision of courts, as is the case with the actions of the rest of the administration. EU Act, in the various sector-specific regimes, contains few provisions concerning the review of NRA decisions. By and large, this is a matter left to Member States.

Judicial review is a complex matter, where a number of policy objectives collide:

- (i) *The adequate protection of the rights of market players and other interested parties.*

This is required not just *ex post* (NRA decisions have been taken with due respect for the rights of those involved to participate and present evidence and submissions, so that we can be confident that the result is adequate) but also *ex ante* (to ensure confidence with and support for the regulatory process);

- (ii) *The effectiveness of the regulatory regime.*

Regulation must operate effectively, i.e. the intended policy objectives must be achieved without delay and without distortion or perversion, and parties

must know what their position is. Review proceedings may themselves lead to judgments that influence the regulation of the market. Systematic appeals and lengthy procedures may create legal uncertainty for the economic agents. Decisions may be annulled retroactively by the courts, while the regulators may not adopt retroactive decisions. Courts may issue decisions that are not in line with the guidelines and practices that are set up within networks of authorities to which courts do not belong. These situations may lead to some distortions within the regulatory control of the market.

(iii) The efficiency of the review process as such.

This may be a subsidiary objective, but the review process as such should run efficiently, i.e. it should not impose undue costs because of length, complexity, amount of effort required to gather evidence and make submissions, etc.



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2 Issues addressed

Against this background, research is needed to gain a better idea of the state-of-the-art in the organisation of judicial review of NRA decisions, across sectors and across the EU, now that some experience has been gained in electronic communications and energy.

Through a comparative analysis between different court systems in the European Union, this CERRE study aims at providing a state-of-the-art perspective on the actual working of current judicial systems on the one hand, and at making recommendations in terms of best practices on the other hand.

The research analyses the characteristics of the appeal proceedings against the decisions of the regulatory authorities that were set up in the sectors of electronic communications, energy and railways. The research focuses on the appeal proceedings before the courts in Belgium, France, Germany, the Netherlands and the United Kingdom, against NRA decisions in the sectors above.

This study addresses the following questions:

Enforcement of NRA decisions

- 1.** Once the NRA decision stands, which recourses are available to the NRA and to aggrieved parties to ensure that firms comply with their regulatory obligations?

Appeals and other judicial review mechanisms

- 2.** Do the appeals stay or may cause to stay the enforcement of the decisions of the regulators until the final judgments of the courts? What is the impact of such stay of enforcement on the regulatory process in the various jurisdictions? For instance, in comparison to the number of NRA decisions and to the number of appeals, how many NRA decisions remain unenforceable, and during which average amount of time, until a judgment is rendered that dismisses the appeals?

3. Which courts or bodies have jurisdiction to rule on the appeals against the decisions of the regulators? Are these appeals considered as public law litigation or private law litigation? Are these appeals lodged with ordinary or specialised courts or bodies? Is there a correlation between the kind of appellate courts having jurisdiction, and the percentage of judgments quashing appealed decisions?
4. Who can lodge an appeal against the decisions of the regulators? Do the regulators appear before the courts? Which are the parties that may be involved in the appeal proceedings? What is the impact of these appeal proceedings on the number of cases between competitors? For instance, what is the average number of competitors involved in appeal proceedings against NRA decisions?
5. How do the appeals move forward from the day they are lodged till the day they are judged by the courts? What is the average length of the proceedings?
6. Do the business secrets, professional secrets and other confidential information remain protected within the framework of the appeal proceedings? What is the impact of these appeal proceedings on the flow of information between the competitors in the market? For instance, in comparison to the number of appeals involving competitors, how many appeals lead to a competitor gaining additional information thanks to the appeal?

The role and powers of courts

7. Which issues are subject to review from the courts in appeal proceedings (facts, proceedings, substantive law and/or regulatory policies)? Are the claimants in appeal entitled to define the scope of the judicial review and to what extent? Is there a correlation between the scope of review and the percentage of judgments quashing appealed decisions?
8. Which means are available to the courts in view of investigating the market conditions and the regulatory issues? Do the courts only rely on the file of the NRA and on the arguments/or and exhibits of the parties? Or do the courts also rely on own powers of investigation, economic staff and/or experts? Is there a correlation between the extent of the court powers of investigation and the percentage of judgments quashing appealed decisions?

- 9.** What are the standards of review by the courts in relation to the merits of the appealed decisions of the regulators (full review or marginal review)? Do the courts (have to) leave some discretionary power to the regulators? Is there a correlation between the standards of review and the percentage of judgments quashing appealed decisions?
- 10.** Do the courts usually apply a formal analysis of the regulatory issues or do they rely on a substantive approach of economic regulation? Is there a correlation between the kind of court analysis and the percentage of judgments quashing appealed decisions?
- 11.** Which recourses are available to the Courts to ensure that their decisions are coordinated with other court decisions across the EU and across sectors? In comparison to the number of court judgments, how many rely on foreign case law and/or case law from other sectors? Is there a correlation between the reliance on foreign case law or on case law from another sector, and the percentage of judgments quashing appealed decisions?
- 12.** What are the powers of the courts to rule on the regulatory issues themselves? May the court judgments regulate the market on some topics or must they refer them to the regulators if the appealed decisions are annulled? What is the impact of a “regulating power” of the courts? For instance, in comparison to the number of judgments quashing appealed decisions, how many judgments regulate thereafter the market in another way than what was decided by the NRA?



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3 Legal provisions, available case law and scope of review

As a first stage, the study recalls the legal provisions that are applicable to the proceedings under review, both at the EU and national levels. The study also provides a succinct description of the available case law in most of the various jurisdictions and sectors under review¹. Although it cannot be guaranteed that all and any judgments of the competent courts have been reviewed, this research project is broad enough to provide a reliable overview of the existing judicial systems.

The obvious focus of this study is on the appeal proceedings against the NRAs decisions that regulate the markets of electronic communications, energy and railways. This is the reason why the study does not mention rules and judgments relating to appeal proceedings against other kinds of decisions, such as decisions towards the personnel of the NRAs.

In relation to the issues addressed, this study is mainly based on a functional comparative approach. Rather than taking a dogmatic approach starting from national legal systems and their specific theorizations, the study takes a pragmatic view, looking at the role of enforcement and appeal proceedings and the consequences of various design choices on the regulatory process today. These consequences were examined through the review of the applicable legal provisions and, as much as was practically possible, through the review of the available case law of the most recent years.

3.1 Electronic communications

According to Article 3, para. 1 to 3, of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)², Member States shall ensure that each of the tasks assigned to national regulatory

¹ Information about the appeal proceedings in Germany was gathered with the precious assistance of Alexandros Chatzinerantzis and Dr. Christian Schmitt (partner and associate at Linklaters) in the sectors of electronic communications and energy, as well as Stéphane Hoffmann, Fabienne Stahl and Felicitas Stern (students at Tilburg University) in the railway sector. However, the contents of the report remain under the sole responsibility of its authors.

authorities in this Directive and the Specific Directives³ is undertaken by one or several competent and independent bodies, which exercise their powers impartially and transparently.

Article 4, para. 1, of the Framework Directive provides that Member States shall ensure that effective mechanisms exist at national level under which any user or firm providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body, that may be a court, and that is independent of the parties involved.

This Directive entered into force on 24 April 2002 (Article 29) and had to be implemented into the laws of the Member States by 24 July 2003 (Article 28).

These provisions were amended by Article 1, para. 3 and 4, of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009⁴, which entered into force on 19 December 2009 (Article 6) and which has to be implemented into the Acts of the Member States by 25 May 2011 (Article 5). Accordingly, most of the legislation and case law studied in this project concerns the implementation and application of the 2002 directives. This study will only refer to the new provisions (as they result from amendments made by the 2009 directives) where relevant to the issues addressed.

3.1.1 Belgium

In Belgium, the main NRA in the sector of electronic communications is the *Institut belge des services postaux et des télécommunications / Belgisch Instituut voor postdiensten en telecommunicatie* (“**BIPT**”). This body was created on 27 March

² OJ L 108, 24 April 2002, p. 33–50.

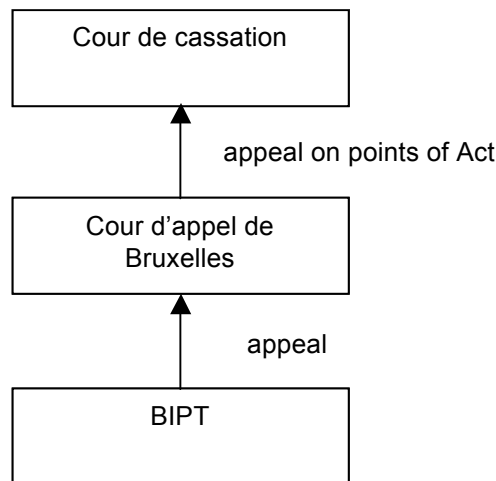
³ The Specific Directives are the Authorisation Directive 2002/20/EC, the Access Directive 2002/19/EC, the Universal Service Directive 2002/22/EC and the Directive 97/66/EC (Article 2 (l) of the Framework Directive).

⁴ Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337, 18/12/2009, p. 37-69.

1991 ⁵, but it only received increased regulatory powers, thanks to the Directives of 2002, as from 23 April 2003 ⁶. This study therefore only investigates the appeal proceedings that have been applicable since April 2003.

The decisions of the BIPT are subject to appeal proceedings before the *Cour d'appel de Bruxelles / Hof van beroep te Brussel* ⁷, which is one of the five ordinary appellate courts in Belgium ("**Cour d'appel de Bruxelles**"). The judgments of the *Cour d'appel de Bruxelles* are subject to further appeals on points of Act ("*pourvoi en cassation / voorziening in cassatie*") before the *Cour de cassation / Hof van cassatie* ⁸, which is the highest ordinary court in Belgium ("**Cour de cassation**").

These appeal proceedings are subject to Articles 2, 2/1 and 3 of the Act of 17 January 2003 ⁹. The provisions of the *Code judiciaire / Gerechtelijk Wetboek* ("**Judicial Code**") – to the extent they have not been superseded by this special act – also apply to these appeal proceedings ¹⁰.



⁵ Articles 71 to 79ter of the Loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques / Wet van 21 maart 1991 betreffende de hervorming van sommige economische overheidsbedrijven, Pasin., 1991, p. 909.

⁶ Articles 13 to 36 of the Loi du 17 janvier 2003 relatif au statut du régulateur des secteurs des postes et des télécommunications belges / Wet van 17 januari 2003 met betrekking tot het statuut van de regulator van de Belgische post- en telecommunicatiesector, M.B., 24 January 2003, p. 2.591.

⁷ Article 2 of the Loi du 17 janvier 2003 concernant les recours et le traitement des litiges à l'occasion de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et télécommunications belges / Wet van 17 januari 2003 betreffende de rechtsmiddelen en de geschillenbehandeling naar aanleiding van de wet van 17 januari 2003 met betrekking tot het statuut van de regulator van de Belgische post- en telecommunicatiesector, M.B., 24 January 2003, p. 2.602 ("**Act of 17 January 2003**").

⁸ Article 608 of the Judicial Code.

⁹ These provisions were amended by a Act of 31 May 2009, which entered into force on 20 July 2009. This study will distinguish between the two versions of the provisions where it is relevant to the issues addressed.

¹⁰ Article 2 of the Judicial Code.

We have reviewed 66 judgments that were rendered by Belgian courts between 18 June 2004 and 15 February 2011 in relation to BIPT's decisions in the sector of electronic communications ¹¹. The contents of the available case law is summarised in the table below.

Court	Area of the appealed decisions	Decision of the judgments
<i>Cour d'appel de Bruxelles</i> (61 judgments)	licenses for use of network and frequencies (3)	1 dismissal of the appeal; 2 quashings
	obligations for interconnection (7)	2 interim judgments on access to NRA file; 2 other interim judgments; 3 quashings
	review of reference offers (25)	1 dismissal of claim for suspension; 7 other interim judgments; 17 quashings
	market analysis and definition of remedies (14)	6 interim judgments on access to NRA file; 2 dismissals of claim for suspension; 1 stay of enforcement; 1 other interim judgment; 4 quashings
	universal service obligations (2)	1 dismissal of the appeal; 1 quashing
	telephone number portability (1)	1 stay of enforcement and referral to the ECJ for

¹¹ All these judgments are available on the website <http://www.ibpt.be> and are listed in the Appendix below.

		preliminary ruling
	provisional measures (3)	2 dismissals of claim for suspension; 1 referral to the ECJ for preliminary ruling
	duty to submit information to NRA (2)	1 dismissal of the appeal; 1 interim judgment
	firms' access to NRA file (2)	2 substitutions of judgment to the decision
	publication of firms' financial reports (1)	1 dismissal of appeal
	appointment of expert by NRA (1)	1 dismissal of appeal
<i>Cour de cassation</i> (5 judgments)	obligations for interconnection (1)	1 dismissal of further appeal
	control of reference offers (2)	1 dismissal of further appeal; 1 quashing of appealed judgment on admissibility of third-party intervention
	market analysis and definition of remedies (1)	1 dismissal of further appeal
	publication of firms' financial reports (1)	1 dismissal of further appeal

3.1.2 France

In France, the main NRA in the sector of electronic communications is the *Autorité de Régulation des Communications électroniques et des Postes* (“**ARCEP**”). This authority has been charged with regulating the industry of electronic communications since 20 May 2005¹². These functions were previously carried out by the *Autorité de Régulation des Télécommunications* (“**ART**”). This study only investigates the appeal and judicial review proceedings that are applicable to the decisions of the ARCEP, leaving aside the cases from the ART era.

When it comes to appeals from ARCEP’s decisions, French Act distinguishes between decisions rendered in the course of disputes between firms providing electronic communications networks and services, on the one hand, and other decisions (including market reviews under the SMP framework). The former are subject to appeal proceedings before the *Cour d’appel de Paris*, which is one of the 35 ordinary appellate courts in France. The judgments of the *Cour d’appel de Paris* are subject to appeals on points of Act (“*pourvoi en cassation*”) before the *Cour de cassation*¹³, which is the highest ordinary court in France (“**Cour de cassation**”).

These appeal proceedings are governed by Articles L36-8, III and IV, and R11-2 to R11-9 of the *Code des postes et des communications électroniques* (“**Code of Posts and Electronic communications**”).

The other decisions of the ARCEP are subject to judicial review before the *Conseil d’Etat*¹⁴, which is the highest administrative court in France¹⁵. This judicial review is

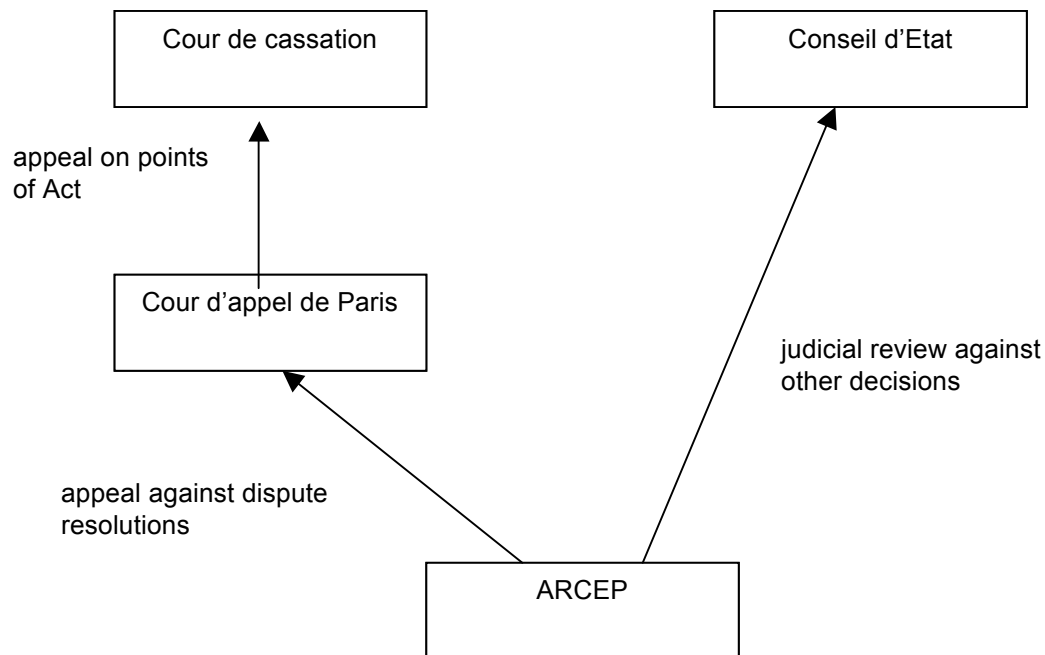
¹² Loi n° 2005-516 du 20 mai 2005 relative à la régulation des activités postales, JORF no. 117, 21 May 2005, p. 8.825.

¹³ Article L36-8, IV, para. 2, of the Code of Posts and Electronic communications; Articles 605 to 607 of the Code of Civil Procedure.

¹⁴ Article R311-1, 4°, of the Code of administrative justice. Article L36-11, 5° and 6°, of the Code of Posts and Electronic communications and article L311-4, 3°, of the Code of administrative justice confirm that the *Conseil d’Etat* has also jurisdiction to rule on appeals against the sanctions ordered by the ARCEP.

¹⁵ Article L111-1 of the Code of administrative justice.

governed by the provisions of the *Code de justice administrative* (“**Code of Administrative Justice**”) ¹⁶.



We have reviewed 33 judgments that were rendered by French courts between 17 March 2006 and 3 February 2011 in relation to ARCEP’s decisions in the sector of electronic communications ¹⁷. The contents of the available case law is summarised in the table below.

¹⁶ The ARCEP may also be party to cases before other French administrative courts, such as the *tribunaux administratifs* and the *cours administratives d’appel*, in relation to its collection of fees and taxes from the firms (see C.A.A. Paris, 3 May 2010, 08PA03759 – 08PA03760; C.A.A. Paris, 22 October 2009, 07PA01797). However, these cases fall out of the scope of this study.

¹⁷ Most of these judgments are available on the website <http://www.arcep.fr> and are listed in the Appendix below.

Court	Area of the appealed decision	Decision of the judgments
<i>Cour d'appel de Paris</i> (8 judgments)	settlement of disputes between firms	1 dismissal of claim for suspension; 5 dismissals of appeals; 2 substitutions of judgment to the decision
<i>Cour de cassation</i> (3 judgments)	settlement of disputes between firms	1 dismissal of further appeal; 2 quashings of appealed judgments
<i>Conseil d'Etat</i> (22 judgments)	universal service obligations (6)	6 dismissals of the appeals
	licenses for use of frequencies and numberings (6)	1 dismissal of claim for suspension; 5 dismissals of the appeals
	market analysis and definition of remedies (5)	3 dismissals of the appeals; 2 quashings
	access and interconnection (2)	2 dismissals of the appeals
	sanctions (3)	1 dismissal of claim for suspension; 2 dismissals of the appeals

3.1.3 Germany

In Germany, the main NRA in the sector of electronic communications is the *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (“**BNetzA**”). This authority has been charged with regulating the industry of electronic communications since 13 July 2005. These functions were previously carried out by the *Regulierungsbehörde für Telekommunikation und Post*. This study only investigates the appeal and judicial review proceedings that are applicable to the decisions of the BNetzA.

The BNetzA’s decisions are regularly subject to judicial review before the *Verwaltungsgericht Köln*¹⁸, which is one of the lowest administrative courts in Germany¹⁹. This judicial review is governed by § 137 of the *Telekommunikationsgesetz*²⁰ (“**TKG**”) and by the provisions of the *Verwaltungsgerichtsordnung*²¹ (“**Code of Administrative Court Procedure**”).

A further appeal to the *Bundesverwaltungsgericht*, which is the highest administrative court in Germany, is only available in exceptional circumstances, such as appeals against decisions concerning the submission of alleged confidential documents by the BNetzA during the court proceedings, appeals against denial of leave to appeal on questions of law, and appeals against decisions on jurisdiction²².

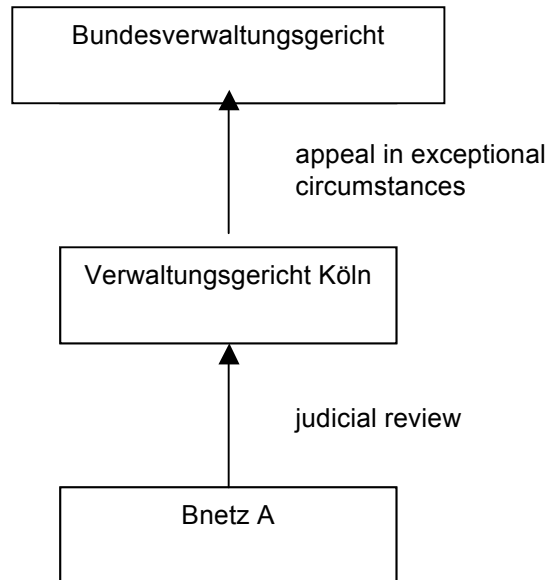
¹⁸ §§ 40 sec. 1, and 52 VwGO ; M. De Visser, *Network-based Governance in EC Act*, Hart Publishing, Oxford, 2009, p. 107.

¹⁹ X., *Les juridictions des Etats membres de l’Union européenne. Structure et organisation*, Cour de justice des Communautés européennes, Luxembourg, 2008, p. 27 and 28.

²⁰ Telekommunikationsgesetz vom 22. Juni 2004 (BGB1. I S. 1190), das zuletzt durch Artikel 2 des Gesetzes vom 17. Februar 2010 (BGB1. I S. 78) geändert worden ist.

²¹ Verwaltungsgerichtsordnung in der Fassung der Bekanntmachung vom 19. März 1991 (BGB1. I S. 686), die zuletzt durch Artikel 9 des Gesetzes vom 22. Dezember 2010 (BGB1. I S. 2248) geändert worden ist (VwGO).

²² M. De Visser, *Network-based Governance in EC Act*, op. cit., p. 107.



3.1.4 The Netherlands

In the Netherlands, the main NRA in the sector of electronic communications is the *Onafhankelijke post- en telecommunicatie autoriteit*²³ (“**OPTA**”). This body was created on 1 August 1997²⁴, but it only received increased regulatory powers, thanks to the Directives of 2002, as from 19 May 2004²⁵. This study therefore only investigates the appeal proceedings that have been applicable since May 2004.

The OPTA’s decisions on interoperability of services, confidentiality of information, obligations of firms with significant market power, dispute resolution between firms and enforcement of the *Telecommunicatiewet* (“**TW**”), excluding fining decisions, are subject to judicial review before the *College van Beroep voor het bedrijfsleven*²⁶

²³ Article 1.3 of the *Wet van 19 oktober 1998, houdende regels inzake de telecommunicatie* (Telecommunicatiewet), Stb. 1998, 610, as modified by a *Wet van 22 april 2004 (“TW”)*.

²⁴ *Wet van 5 juli 1997, houdende regels inzake instelling van een college voor de post- en telecommunicatiemarkt* (Wet Onafhankelijke post- en telecommunicatie autoriteit), Stb. 1997, 320 (“**OPTA wet**”); *Besluit van 19 juli 1997, houdende vaststelling van de datum van inwerkingtreding van de Wet Onafhankelijke post- en telecommunicatieautoriteit*, Stb. 1997, 343.

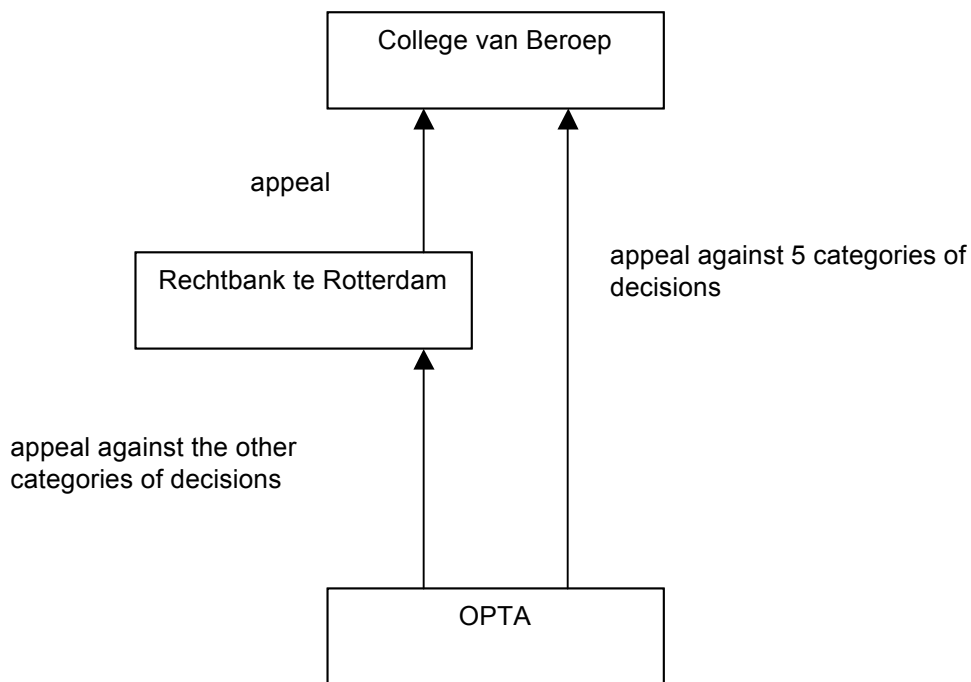
²⁵ *Wet van 22 april 2004 tot wijziging van de Telecommunicatiewet en enkele andere wetten in verband met de implementatie van een nieuw Europees geharmoniseerd regelgevingskader voor elektronische communicatienetwerken en -diensten en de nieuwe dienstenrichtlijn van de Commissie van de Europese Gemeenschappen*, Stb. 2004, 189; *Besluit van 7 mei 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet implementatie Europees regelgevingskader voor de elektronische communicatiesector 2002*, Stb. 2004, 207.

²⁶ Article 17.1, para. 1, of the *Tw*.

(“*College van Beroep*”), which is a specific administrative court of appeal for economic matters ²⁷.

The other decisions of OPTA are subject to judicial review before the *Rechtbank te Rotterdam* ²⁸, which is one of the 19 courts of first instance in the Netherlands ²⁹. The judgments of the *Rechtbank te Rotterdam* are subject to appeals before the *College van Beroep* ³⁰.

Both judicial review proceedings before the *College van Beroep* and the *Rechtbank te Rotterdam* are governed by Article 17.1 of the *Telecommunicatiewet* and by the provisions of the *Algemene wet bestuursrecht* (“*Awb*”).



We have only reviewed the 12 latest judgments that were rendered by Dutch courts between 2 February 2010 and 19 January 2011 in relation to OPTA’s decisions in the

²⁷ <http://www.rechtspraak.nl/Gerechten/CBb>.

²⁸ Article 17.1, para. 2, of the *Tw*.

²⁹ X., *Les juridictions des Etats membres de l'Union européenne*, op. cit., p. 487.

³⁰ Article 20, para. 1, of the *Wet van 16 september 1954 houdende administratieve rechtspraak bedrijfsorganisatie* (“*Wet bestuursrechtspraak bedrijfsorganisatie*”).

sector of electronic communications ³¹. The contents of the available case law is summarised in the table below.

Court	Area of the appealed decision	Decision of the judgment
<i>Rb Rotterdam</i>	license (1)	1 quashing
	fine (1)	1 quashing
<i>College van Beroep</i>	market analysis (5)	1 dismissal of claim for suspension; 1 dismissal of the appeal; 3 quashings
	enforcement (2)	1 dismissal of claim for suspension; 1 stay of enforcement
	fine (2)	1 dismissal of further appeal; 1 allowance of further appeal
	costs of the NRA (1)	1 dismissal of appeal

3.1.5 The United Kingdom

In the United Kingdom, the main NRA in the sector of electronic communications is the Office of Communications (“Ofcom”). This authority has been charged with regulating the industry of electronic communications since 25 July 2003 ³². These

³¹ All these judgments are available on the website <http://zoeken.rechtspraak.nl> and are listed in the Appendix below.

³² Section 1 of the Communications Act 2003; The Communications Act 2003 (Commencement No. 1) Order 2003.

functions were previously carried out by the Office of Telecommunications (“Ofotel”). This study only investigates the appeal and judicial review proceedings that are applicable to the decisions of the Ofcom.

Most decisions of Ofcom are subject to appeal proceedings before the Competition Appeal Tribunal ³³, which is a specialist judicial body whose function is to hear and decide cases involving competition or economic regulatory issues ³⁴. When the appeals relate to specified price control matters, the Competition Appeal Tribunal shall refer these matters to the Competition Commission for determination ³⁵. Specified price control matters implying reference to the Competition Commission are limited to the principles applied, methods used and provisions contained in a condition where a price control has in fact been imposed, and do not include the prior question of whether the imposition of a price control is an appropriate and proportionate response to the finding of significant market power, or whether a remedy short of price control would be sufficient ³⁶. The proceedings before the Competition Appeal Tribunal are governed by Sections 192 to 197 of the Communications Act 2003, the Competition Appeal Tribunal Rules 2003 and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

The judgments of the Competition Appeal Tribunal may, subject to permission ³⁷, be further appealed before the Court of Appeal ³⁸, which is the ordinary appellate court.

The decisions of Ofcom are also subject to judicial review before the Administrative court of the Queen’s Bench Division in the High Court ³⁹, which is the ordinary court entitled with the judicial review of the decisions of administrative bodies ⁴⁰ (“**High Court**”). The proceedings before the High Court are governed by the Civil Procedure Rule 54 and the Practice Directions that supplement it.

³³ Section 192 of the Communications Act 2003.

³⁴ <http://www.catribunal.org.uk>.

³⁵ Section 193 of the Communications Act; The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, S.I. 2004 No. 2068.

³⁶ [2007] CAT 27 (4 October 2007), §§ 36 and 45.

³⁷ Rule 58 (1) of The Competition Appeal Tribunal Rules 2003, S.I. 2003 No. 1372.

³⁸ Section 196 of the Communications Act 2003.

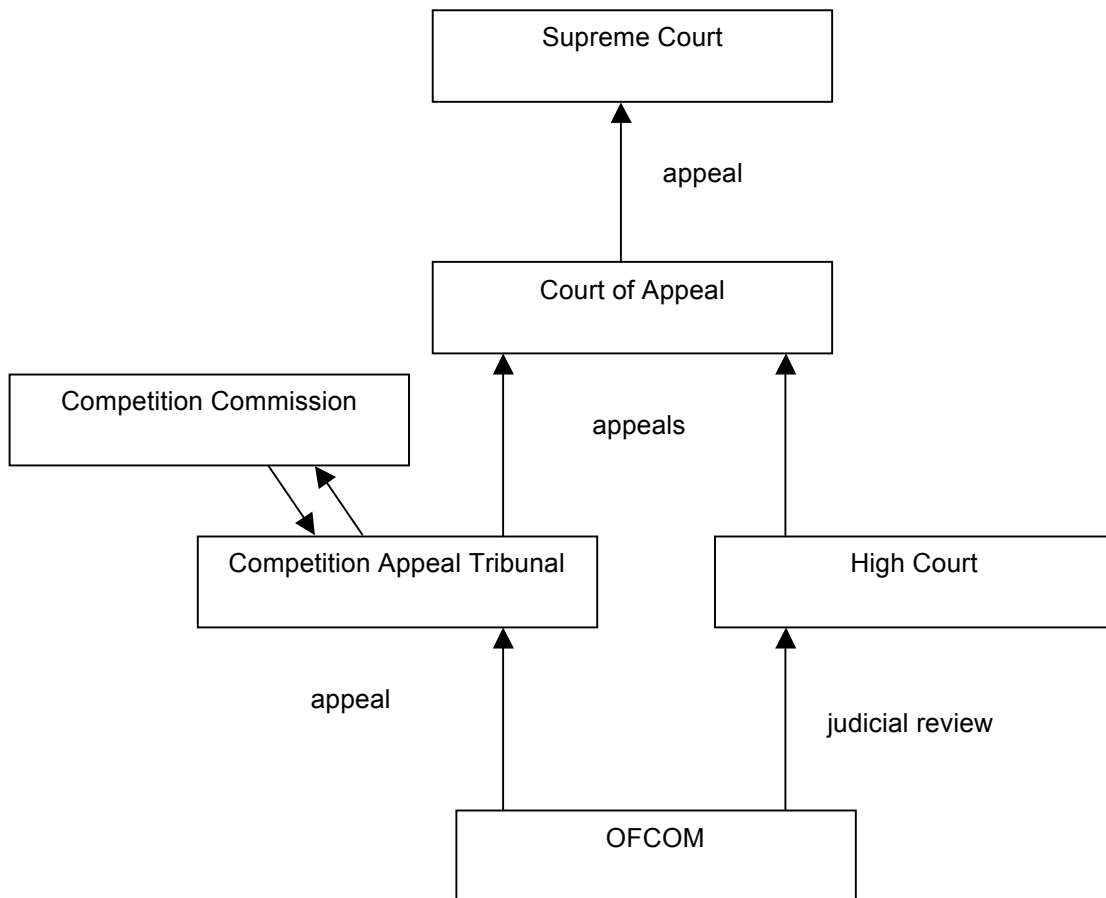
³⁹ Civil Procedure Rule 54.

⁴⁰ X., Les juridictions des Etats membres de l’Union européenne. Structure et organisation, op. cit., p. 605.

The judgments of the High Court may, subject to permission ⁴¹, be further appealed before the Court of Appeal.

The decisions of Ofcom that are listed in Schedule 8 of the Communications Act 2003, such as the legislative powers of Ofcom to make regulations, are not subject to appeal before the Competition Appeal Tribunal. These decisions may only be subject to judicial review before the High Court ⁴².

For the sake of completeness, the judgments of the Court of Appeal are subject to appeals before the UK Supreme Court. However, permission is required for such appeals. We have not found a single judgment of the UK Supreme Court on appeals against NRAs' decisions.



⁴¹ Civil Procedure Rule 52.3.

⁴² [2008] EWCA Civ 1373 (12 December 2008), §§ 45 and 51; [2008] CAT 15 (10 July 2008), § 61.

We have reviewed 67 judgments that were rendered by the Competition Appeal Tribunal and the Court of Appeal between 6 February 2004 and 11 October 2010 in relation to Ofcom's decisions in the sector of electronic communications ⁴³. The judgments relating to the exercise of Ofcom's powers in the broadcasting sector were considered to fall out of the scope of this study. The contents of the available case law is summarised in the table below.

Court	Area of the appealed decision	Decision of the judgment
Competition Appeal Tribunal (58 judgments for 22 cases)	license (3 judgments for 2 cases)	2 dismissals of the appeals; 1 interim judgment
	market analysis (7 judgments for 2 cases)	1 dismissal of the appeal; 1 quashing; 5 interim judgments
	price controls (14 judgments for 4 cases)	1 dismissal of the appeal; 3 quashings with directions to Ofcom; 10 interim judgments
	settlement of dispute between firms (13 judgments for 6 cases)	1 quashing; 1 quashing with directions to Ofcom; 11 interim judgments
	number portability (2 judgments for 2 cases)	1 dismissal of the appeal; 1 quashing
	interconnection (1 judgment)	1 dismissal of the appeal
	general competition law (18 judgments for 5 cases)	2 dismissals of the appeals; 1 quashing ;

⁴³ All these judgments are available on the websites <http://www.bailii.org> and <http://www.catribunal.org.uk> and are listed in the Appendix below.

		1 dismissal of claim for interim relief ; 14 other interim judgments
Competition Commission (4 judgments)	price controls	1 dismissal of grounds of appeal; 3 determinations of errors
Court of Appeal (5 judgments)	license (1)	1 dismissal of appeal
	price control (1)	1 quashing of the appealed judgment
	settlement of dispute between firms (1)	1 reference for preliminary ruling to the ECJ
	general competition law (2)	2 appeals allowed on reasons only

3.2 Electricity and gas

According to Article 23, para. 1, of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity ⁴⁴, and Article 25, para. 1, of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC ⁴⁵, Member States had to designate one or more regulatory authorities, which had to be wholly independent from the interests of the electricity and gas industries.

⁴⁴ OJ L 176, 15 July 2003, p. 37-56.

⁴⁵ OJ L 176, 15 July 2003, p. 57-78.

Article 23, para. 11, of the Electricity Directive and Article 25, para. 11, of the Gas Directive provided that the complaints to the regulatory authorities would be without prejudice to the exercise of rights of appeal under Community and national Act.

These Directives entered into force on 4 August 2003 (Article 31 of the Electricity Directive and Article 34 of the Gas Directive) and had to be implemented into the Acts of the Member States by 1 July 2004 (Article 30 of the Electricity Directive and Article 33 of the Gas Directive).

These Directives were repealed by the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity ⁴⁶, and the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ⁴⁷, which entered into force on 3 September 2009 (Article 50 of the new Electricity Directive and Article 55 of the new Gas Directive) and which had to be implemented into the Acts of the Member States by 3 March 2011 (Article 49 of the new Electricity Directive and Article 54 of the new Gas Directive).

The new Directives maintain the obligation of the Member States to designate independent regulatory authorities (Article 35 of the new Electricity Directive and Article 39 of the new Gas Directive). As far as appeal proceedings are concerned, Article 37, para. 17 of the new Electricity Directive and Article 41, para. 17, of the new Gas Directive now provide that Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government. As was the case for electronic communications, this project takes as a basis the 2003 directives and their implementation and application in the Member States under study. The 2009 directives will be referred to when relevant.

⁴⁶ OJ L 211, 14 August 2009, p. 55–93.

3.2.1 Belgium

In Belgium, the main NRA in the energy sector is the *Commission de Régulation de l'Électricité et du Gaz / Commissie voor de Regulering van de Elektriciteit en het Gas* (“CREG”). This body was created on 2 June 1999⁴⁸, but it received increased regulatory powers, thanks to the Directives of 2003, as from 24 June 2005⁴⁹. This study therefore only investigates the appeal proceedings that have been applicable since June 2005.

The appeal procedure against CREG decisions is complex, since three different avenues are open, depending on the type of decision.

First of all, almost all decisions of the CREG – as enumerated in a list – are subject to appeal proceedings before the *Cour d’appel de Bruxelles*⁵⁰. The judgments of the *Cour d’appel de Bruxelles* are subject to further appeals on points of Act (“*pourvoi en cassation / voorziening in cassatie*”) before the *Cour de cassation*⁵¹. These appeal proceedings are governed by Articles 29*bis* and 29*quater* of the Act of 29 April 1999 and by Articles 15/20 and 15/21 of the Act of 12 April 1965. The provisions of the

⁴⁷ OJ L 211, 14 August 2009, p. 94-136.

⁴⁸ Article 23 of the Loi du 29 avril 1999 relative à l'organisation du marché de l'électricité / Wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt, M.B., 11 May 1999, p. 16.264; Article 15 of the Loi du 29 avril 1999 relative à l'organisation du marché du gaz et au statut fiscal des producteurs d'électricité / Wet van 29 april 1999 betreffende de organisatie van de gasmarkt en het fiscaal statuut van de elektriciteitsproducenten, M.B., 11 May 1999, p. 16.278; Arrêté royal du 3 mai 1999 fixant la date d'entrée en vigueur des dispositions de la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité / Koninklijk besluit van 3 mei 1999 tot vaststelling van de datum van inwerkingtreding van de bepalingen van de wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt, M.B., 2 June 1999, p. 19.960; Arrêté royal du 3 mai 1999 fixant la date d'entrée en vigueur de certaines dispositions de la loi du 29 avril 1999 relative à l'organisation du marché du gaz et au statut fiscal des producteurs d'électricité / Koninklijk besluit van 3 mei 1999 tot vaststelling van de datum van inwerkingtreding van sommige bepalingen van de wet van 29 april 1999 betreffende de organisatie van de gasmarkt en het fiscaal statuut van de elektriciteitsproducenten, M.B., 15 June 1999, p. 22.300.

⁴⁹ Loi du 1er juin 2005 portant modification de la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité / Wet van 1 juni 2005 tot wijziging van de wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt, M.B., 14 June 2005, p. 27.154; Loi du 1er juin 2005 portant modification de la loi du 12 avril 1965 relative au transport de produits gazeux et autres par canalisations / Wet van 1 juni 2005 tot wijziging van de wet van 12 april 1965 betreffende het vervoer van gasachtige producten en andere door middel van leidingen, M.B., 14 June 2005, p. 27.164.

⁵⁰ Article 29*bis* of the Loi du 29 avril 1999 relative à l'organisation du marché de l'électricité / Wet van 29 april 1999 betreffende de organisatie van de elektriciteitsmarkt, M.B., 11 May 1999, p. 16.264, as modified by a Loi du 27 avril 2005 / Wet van 27 april 2005 (“**Act of 29 April 1999**”); Article 15/20 of the Loi du 12 avril 1965 relative au transport de produits gazeux et autres par canalisations / Wet van 12 april 1965 betreffende het vervoer van gasachtige producten en andere door middel van leidingen, M.B., 7 May 1965, as modified by a Loi du 27 avril 2005 / Wet van 27 april 2005 (“**Act of 12 April 1965**”).

⁵¹ Article 608 of the Judicial Code.

Judicial Code – to the extent they have not been superseded by those special acts – also apply to these appeal proceedings⁵².

Secondly, some decisions of the CREG regarding the access to the transport grids and the allocation of cross-border interconnection capacities are subject to appeal proceedings before the *Conseil de la concurrence / Raad voor de Mededinging*⁵³, which is the competition authority in Belgium (“**Conseil de la concurrence**”). The judgments of the *Conseil de la concurrence* are subject to further appeals on points of Act (“*pourvoi en cassation / voorziening in cassatie*”) before the *Cour de cassation*⁵⁴. These appeal proceedings are governed by Articles 29*ter* and 29*quinquies* of the Act of 29 April 1999, by Articles 15/20*bis* and 15/22 of the Act of 12 April 1965 and by Articles 79 to 81 of the Act of 15 September 2006.

Thirdly, decisions of the CREG that would not be subject to the appeal proceedings before the *Cour d’appel de Bruxelles* or the *Conseil de la concurrence*, if any, would be subject to judicial review before the *Conseil d’Etat / Raad van State*⁵⁵, which is the highest administrative court in Belgium (“**Conseil d’Etat**”). These judicial review proceedings are governed by the Act of 12 January 1973, the Royal Decree of 23 August 1948⁵⁶ and the Royal Decree of 5 December 1991⁵⁷.

On the basis of the case law of the *Conseil d’Etat* since June 2005, it is doubtful whether there are still decisions of the CREG that can be subject to judicial review before this administrative court today. Most of the available judgments acknowledged withdrawals of appeals⁵⁸ or ruled that the appeals were inadmissible⁵⁹. In 3 judgments, the *Conseil d’Etat* ruled that it had no jurisdiction on the appeals because

⁵² Article 2 of the Judicial Code.

⁵³ Article 29*ter* of the Act of 29 April 1999; Article 15/20*bis* of the Act of 12 April 1965.

⁵⁴ Article 81 of the Loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006 / Wet tot bescherming van de economische mededinging, gecoördineerd op 15 september 2006, M.B., 29 September 2006, p. 50.613 (“**Act of 15 September 2006**”).

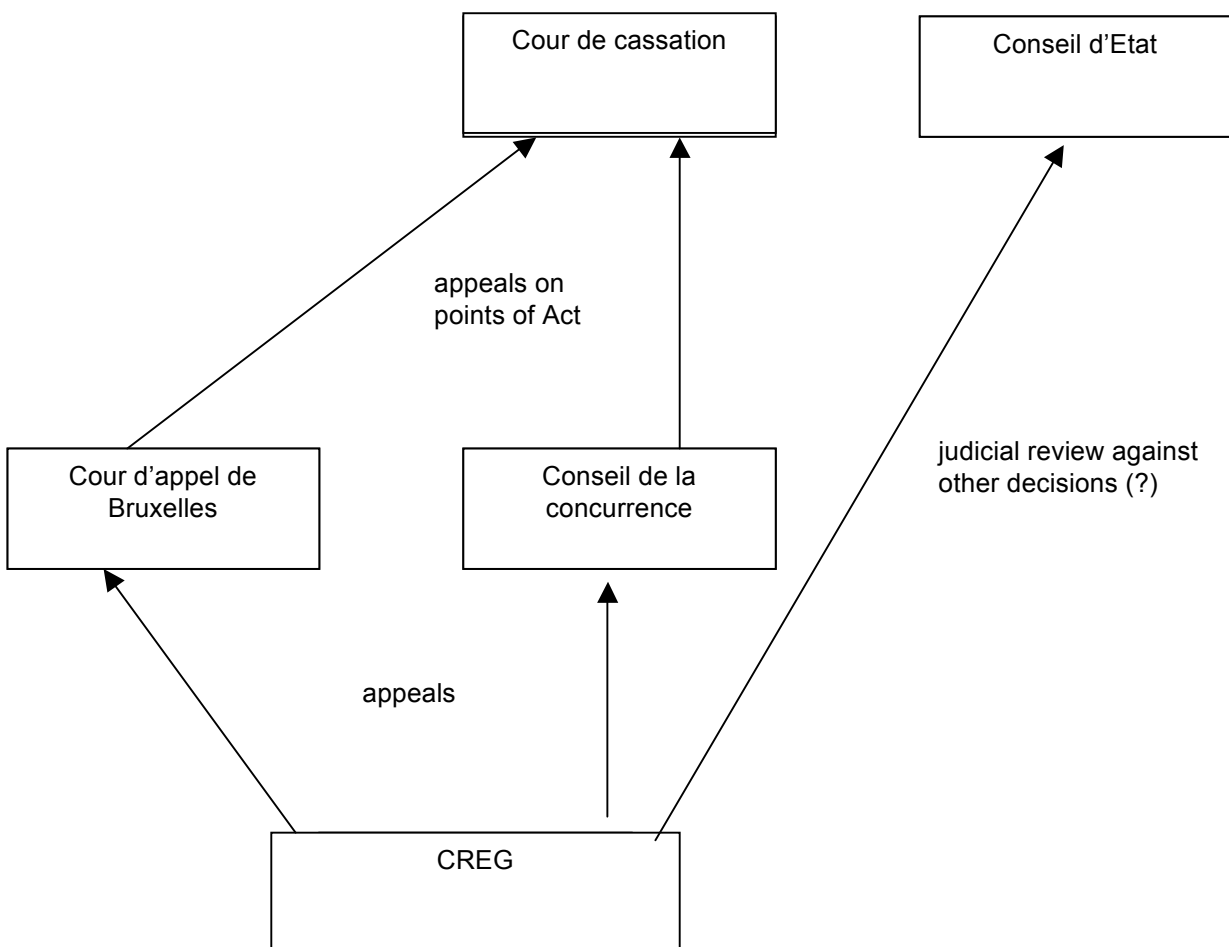
⁵⁵ Article 14 of the Lois coordonnées du 12 janvier 1973 sur le Conseil d’Etat / Gecoördineerde wetten van 12 januari 1973 op de Raad van State, M.B., 21 March 1973, p. 3.641 (“**Act of 12 January 1973**”).

⁵⁶ Arrêté du Régent du 23 août 1948 déterminant la procédure devant la section du contentieux administratif du Conseil d’Etat / Besluit van de Regent van 23 augustus 1948 tot regeling van de rechtspleging voor de afdeling bestuursrechtspraak van de Raad van State, M.B., 23 and 24 August 1948, p. 6.821, err. M.B., 8 October 1948, p. 8.144, err. M.B., 21 November 1948, p. 9.300 (as modified eventually) (“**Royal Decree of 23 August 1948**”).

⁵⁷ Arrêté royal du 5 décembre 1991 déterminant la procédure en référé devant le Conseil d’Etat / Koninklijk besluit van 5 december 1991 tot bepaling van de rechtspleging in kort geding voor de Raad van State, M.B., 14 January 1992, p. 564 (as modified eventually) (“**Royal Decree of 5 December 1991**”).

⁵⁸ C.E., 7 February 2008, no. 179.406; C.E., 22 November 2007, no. 177.002.

of the jurisdiction of the *Cour d'appel de Bruxelles*⁶⁰. The only judgments according to which the application is to be investigated by the *Conseil d'Etat*, relate to a single fining decision that was rendered by the CREG in 2004⁶¹, i.e. before the Acts of 2005 that transferred jurisdiction on appeals against fining decisions to the *Cour d'appel de Bruxelles*.



We have reviewed 44 judgments that were rendered by Belgian courts between 27 October 2006 and 22 September 2010 in relation to the CREG's decisions in the

⁵⁹ See C.E., 16 September 2005, no. 149.004.

⁶⁰ See C.E., 23 June 2009, no. 194.578; C.E., 9 March 2009, no. 191.166; C.E., 5 March 2007, no. 168.474.

⁶¹ See C.E., 30 November 2009, no. 198.369; C.E., 31 January 2006, no. 154.304.

energy sector ⁶². The contents of the available case law is summarised in the table below.

Court	Area	Decision
<i>Cour d'appel de Bruxelles</i> (37 judgments)	access to the transport grid (1)	1 dismissal of the appeal
	tariffs of TSO (3)	1 dismissal of the appeal; 1 stay of enforcement; 1 quashing
	tariffs of DSO (29)	2 dismissals of appeal; 1 dismissal of claim for suspension; 1 stay of enforcement; 22 quashings; 3 substitutions of judgment to the decision
	allocation of cross-border interconnection capacity (1)	1 interim judgment on jurisdiction
	public service obligations (2)	1 quashing; 1 substitution of judgment to the decision
	fine (1)	1 quashing
<i>Cour de cassation</i> (4 judgments)	access to the transport grid (1)	1 dismissal of further appeal
	tariffs of DSO (3)	2 dismissals of further appeal; 1 quashing on the costs

⁶² All these judgments were provided by the CREG and are listed in the Appendix below.

		of the proceedings
<i>Conseil de la concurrence</i> (1 judgment)	allocation of cross-border interconnection capacity (1)	1 judgment on jurisdiction
<i>Conseil d'Etat</i> (2 judgments)	fine (1 case)	1 reopening of the debates; 1 referral for preliminary ruling to the Belgian Constitutional Court ⁶³

3.2.2 France

In France, the main NRA in the energy sector is the *Commission de régulation de l'énergie* (“**CRE**”). This body was created on 24 March 2000.

Appeals against CRE decisions can take one of two avenues, depending on the type of decision. CRE decisions on disputes between firms are subject to appeal proceedings before the *Cour d'appel de Paris* ⁶⁴. The judgments of the *Cour d'appel de Paris* are subject to appeals on points of Act (“*pourvoi en cassation*”) before the *Cour de cassation* ⁶⁵.

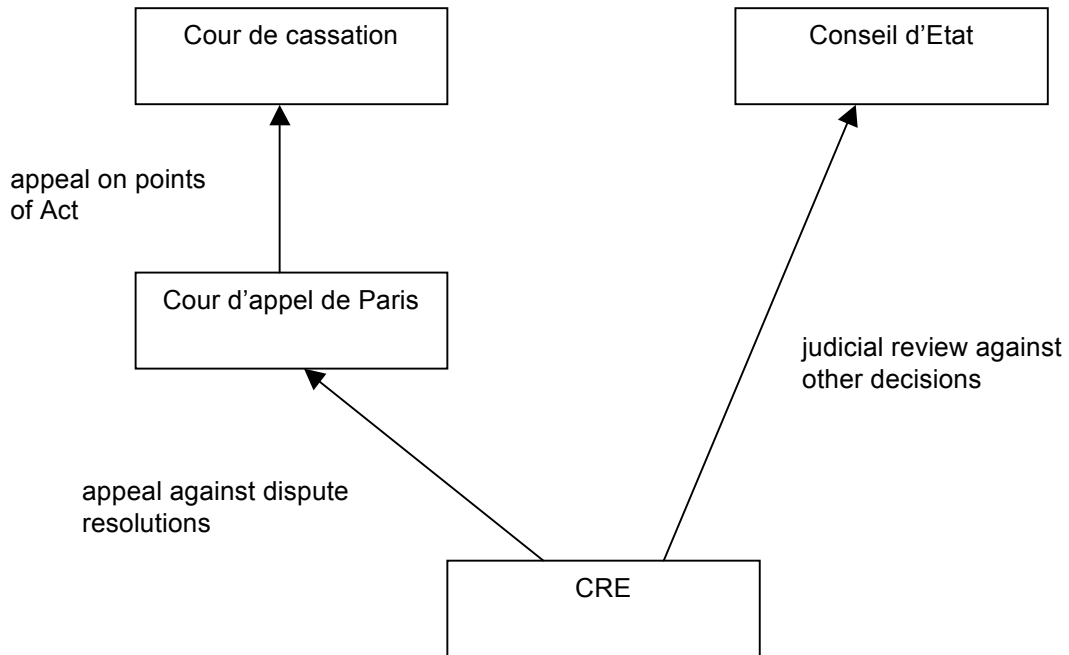
These appeal proceedings are governed by Article 38, II of the Act no. 2000-108 of 10 February 2000 and by Articles 8 to 15 of the Decree no. 2000-894 of 11 September 2000.

⁶³ The Constitutional Court rendered its judgment on 18 November 2010 (C.C., 18 November 2010, no. 130/2010).

⁶⁴ Article 38, II, of the Loi n° 2000-108 du 10 février 2000 relative à la modernisation et au développement du service public de l'électricité, JORF no. 35, 11 February 2000, p. 2.143 (“**Act no. 2000-108 of 10 February 2000**”).

⁶⁵ Article L38, II, para. 5, of the Act no. 2000-108 of 10 February 2000; Articles 605 to 607 of the Code of Civil Procedure.

The other decisions of the CRE are subject to judicial review before the *Conseil d'Etat* ⁶⁶. This judicial review is governed by the provisions of the Code of Administrative Justice.



We have reviewed 24 judgments that were rendered by French courts between 10 December 2002 and 7 September 2010 in relation to CRE's decisions in the energy sector ⁶⁷. The contents of the available case law is summarised in the table below.

Court	Area of the appealed decision	Decision of the judgments
<i>Cour d'appel de Paris</i> (14 judgments)	settlement of disputes between firms	10 dismissals of appeals; 3 substitutions of judgment to the decision; 1 quashing
<i>Cour de cassation</i>	settlement of disputes	2 dismissals of further

⁶⁶ Article R311-1, 4°, of the Code of administrative justice. Article 40, 7°, of the Act no. 2000-108 of 10 February 2000 and article L311-4, 9°, of the Code of administrative justice confirm that the *Conseil d'Etat* has also jurisdiction to rule on appeals against the sanctions ordered by the CRE.

⁶⁷ All these judgments are available on the websites <http://www.cre.fr/fr/documents/jurisprudence> and <http://www.conseil-etat.fr/cde/fr/base-de-jurisprudence>, and are listed in the Appendix below.

(3 judgments)	between firms	appeal; quashing of appealed judgment	1
<i>Conseil d'Etat</i> (7 judgments)	contribution to the public service of electricity (4)	1 dismissal of the appeal; 2 substitutions of judgment to the decision; 1 quashing	
	building of new production capacity (1)	1 dismissal of claim for suspension	
	tariffs of DSO (1)	1 dismissal of claim for suspension	
	allocation of cross-border interconnection capacity (1)	1 dismissal of the appeal	

3.2.3 Germany

In Germany, the BNetzA is also the main NRA in the energy sector. The Directives of 2003 were implemented by the *Gesetz über die Elektrizitäts- und Gasversorgung* of 7 July 2005 ⁶⁸ (“*EnWG*”). The BNetzA’s decisions in the energy sector are subject to appeal before the *Oberlandesgericht Düsseldorf* ⁶⁹, which is one of the higher regional courts in the German civil court structure ⁷⁰. A further appeal on points of law can be made to the *Bundesgerichtshof* ⁷¹, which is the federal supreme court in the German civil court structure ⁷², but leave is required ⁷³.

⁶⁸ Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) vom 7. Juli 2005 (BGB1. I S. 1970 (3621)), das zuletzt durch Artikel 2 des Gesetzes vom 21. August 2009 (BGB1. I S. 2870) geändert worden ist.

⁶⁹ § 75, sec. 4, of the *EnWG*.

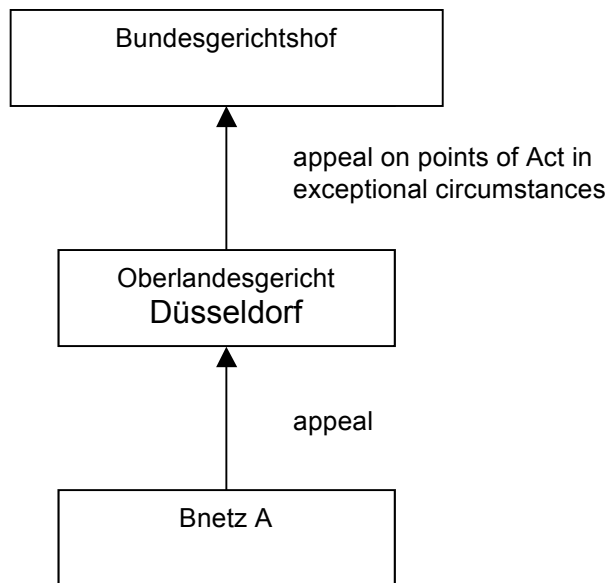
⁷⁰ X., Les juridictions des Etats membres de l'Union européenne. Structure et organisation, op. cit., p. 24.

⁷¹ § 86(1) of the *EnWG*.

⁷² X., Les juridictions des Etats membres de l'Union européenne. Structure et organisation, op. cit., p. 24.

⁷³ Leave is granted if a legal issue of fundamental importance is to be decided or if a decision by the *Bundesgerichtshof* is necessary to develop the Act or ensure uniform court practice (§ 86[2] of the *EnWG*). The *Oberlandesgericht Köln* decides on the admissibility of the appeal, subject to the potential challenge of a decision of non-admission before the *Bundesgerichtshof* (§ 86 [3] and § 87 of the *EnWG*).

These appeal proceedings are governed by §§ 75 to 87 of the *EnWG*. §§ 169 through 197 of the *Gerichtsverfassungsgesetzes* (“**Courts Constitution Act**”) and the provisions of the *Zivilprozessordnung* (“**Civil Procedure Code**”) from which it has not been derogated, also apply to these appeal proceedings.



3.2.4 The Netherlands

In the Netherlands, the competition authority, the *Nederlandse Mededingingsautoriteit* (“**NMa**”), has also been designated as the main NRA in the sector of energy⁷⁴. Within the NMa, a special chamber (*Energiekamer*) is in charge of all matters of energy regulation.⁷⁵

The NMa’s decisions on fines, on penalties for late performance of the *Elektriciteitswet*, and on discharge of obligations for the gas transmission system operators, are subject to judicial review before the *Rechtbank te Rotterdam*⁷⁶. The

⁷⁴ Article 5 of the Wet van 2 juli 1998, houdende regels met betrekking tot de productie, het transport en de levering van elektriciteit (Elektriciteitswet 1998) (“**Elektriciteitswet**”).

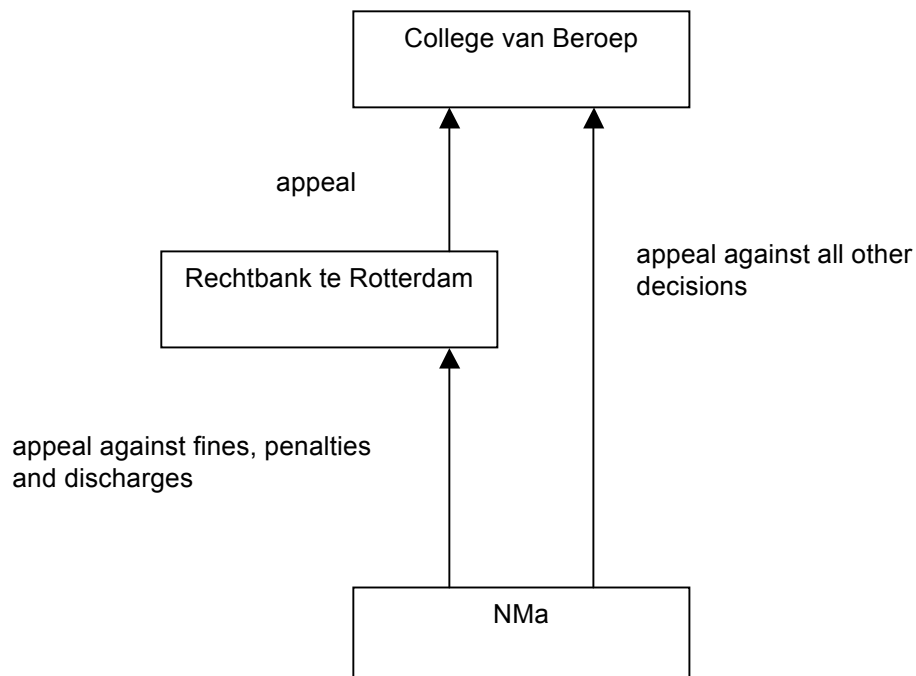
⁷⁵ The *Energiekamer* is part of the Direction on Energy and Transport Regulation (DREV, *Directie Regulering Energie en Vervoer*).

⁷⁶ Article 82, para. 2, of the Elektriciteitswet; Article 61, para. 2 of the Wet van 22 juni 2000, houdende regels omtrent het transport en de levering van gas (“**Gaswet**”).

judgments of the *Rechtbank te Rotterdam* are subject to appeals before the *College van Beroep* ⁷⁷.

The other decisions of NMA are subject to judicial review directly before the *College van Beroep* ⁷⁸.

These judicial review proceedings are governed by Article 82 of the *Elektriciteitswet*, Article 61 of the *Gaswet* and by the provisions of the *Awb*.



We have only reviewed the 8 latest judgments that were rendered by the *College van Beroep* between 11 February 2010 and 10 November 2010 in relation to NMA's decisions in the energy sector ⁷⁹.

⁷⁷ Article 20, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

⁷⁸ Article 82, para. 1, of the *Elektriciteitswet*; Article 61, para. 1 of the *Gaswet*.

⁷⁹ All these judgments are available on the website <http://zoeken.rechtspraak.nl> and are listed in the Appendix below.

Court	Area of the appealed decision	Decision of the judgments
<i>College van Beroep</i>	tariffs (5)	2 dismissals of the appeals; 3 quashings
	public service obligations (1)	1 quashing
	management of transmission system (1)	1 dismissal of the appeal
	other (1)	1 substitution of the judgment to the decision

3.2.5 The United Kingdom

In the United Kingdom, the main NRA in the energy sector is the Office of the Gas and Electricity Markets (“**Ofgem**”), which is governed by the Gas and Electricity Markets Authority. This authority has been charged with regulating the energy industry by the Utilities Act 2000 ⁸⁰. These functions were previously carried out by the Office of Electricity Regulation (“**Offer**”) and the Office of Gas Supply (“**Ofgas**”). This study only investigates the appeal and judicial review proceedings that are applicable to the decisions of the Ofgem.

The appeal procedure against Ofgem decisions is complex, since three different avenues are open, depending on the type of decision.

Some decisions of Ofgem relating to offshore electricity transmission and property schemes are subject to application before the Competition Appeal Tribunal for a review of the determination ⁸¹. Moreover, the decisions of Ofgem made under the Competition Act 1998 (relating to the prohibition of agreements restricting

⁸⁰ Section 1 of the Utilities Act 2000.

⁸¹ Paragraph 23 of Schedule 2 of the Energy Act 2008.

competition and to the prohibition of abuses of dominant position) are subject to appeal proceedings before the Competition Appeal Tribunal ⁸². The Energy Act 2010 provides an additional ground of appeal before the Competition Appeal Tribunal in relation to orders which relate to a condition of a license that has been modified ⁸³. However, this new Act has not entered into force yet ⁸⁴. The judgments of the Competition Appeal Tribunal are subject to further appeal before the Court of Appeal ⁸⁵ and, for the sake of completeness, ultimately before the Supreme Court.

The decisions of Ofgem to modify certain energy codes under the Energy Act 2004 are subject to appeal proceedings to the Competition Commission ⁸⁶.

The decisions of Ofgem that impose penalties on licence holders are subject to a statutory appeal before the High Court ⁸⁷. The other decisions of Ofgem are subject to judicial review before the High Court ⁸⁸. The judgments of the High Court may be further appealed before the Court of Appeal.

⁸² Sections 46 to 48 of the Competition Act 1998.

⁸³ Sections 20 and 21 of the Energy Act 2010.

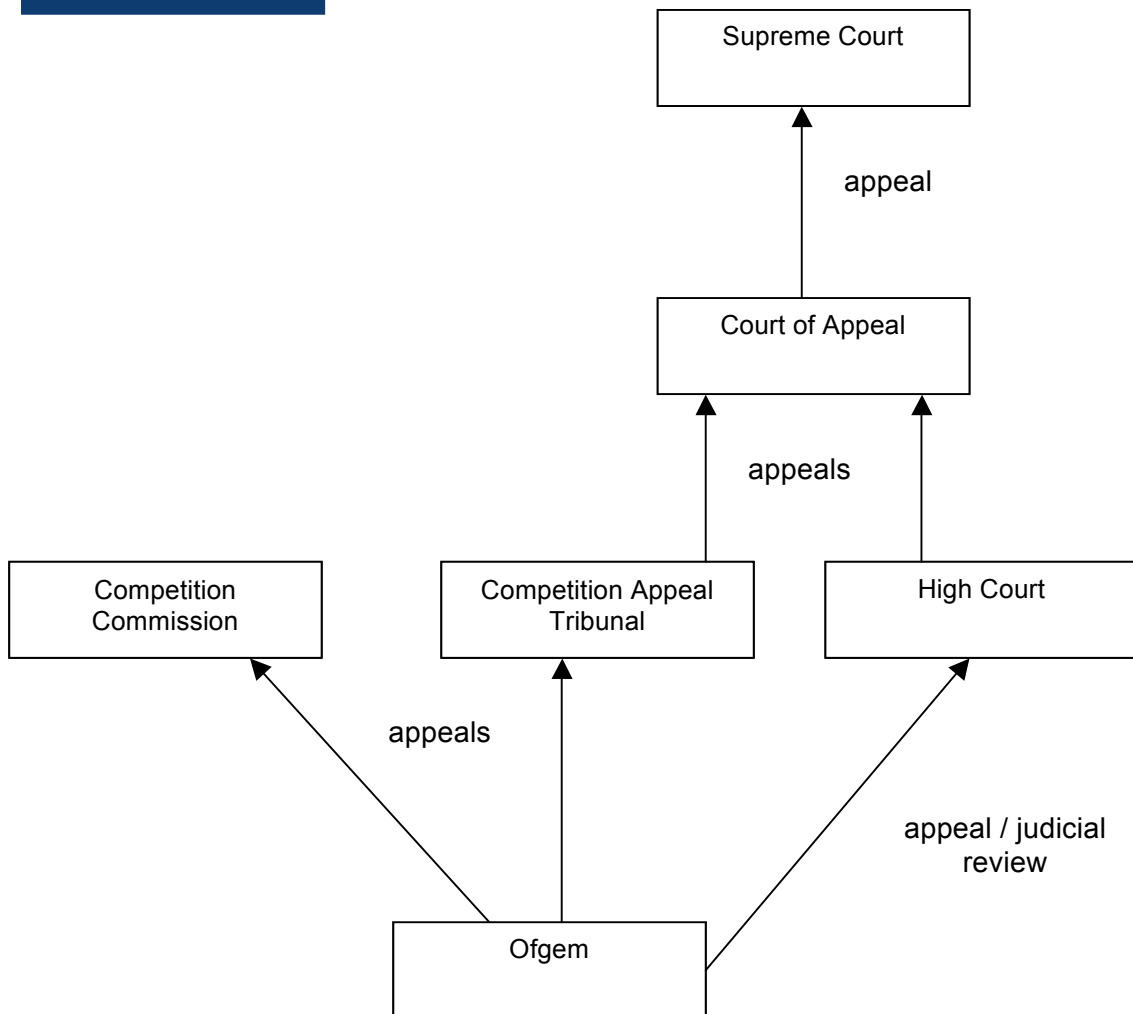
⁸⁴ Section 38 of the Energy Act 2010.

⁸⁵ Paragraph 33 of Schedule 2 of the Energy Act 2008; Section 49 of the Competition Act 1998.

⁸⁶ Section 173 of the Energy Act 2004.

⁸⁷ Section 27E of the Electricity Act 1989; Section 30E of the Gas Act 1986.

⁸⁸ Civil Procedure Rule 54.



We have reviewed the 6 judgments that were rendered by the Competition Appeal Tribunal and the Court of Appeal between 8 October 2008 and 23 February 2010 in relation to Ofgem’s decisions in the energy sector ⁸⁹. All these judgments relate to a single case where Ofgem found that the transmission system operator committed an abuse of dominant position. The Competition Appeal Tribunal dismissed the appeal and the Court of Appeal allowed a reduction of the fine.

⁸⁹ All these judgments are available on the websites <http://www.bailii.org> and <http://www.catribunal.org.uk> and are listed in the Appendix below. Ofgem confirmed that there has not been any other case regarding its decisions.

3.3 Railway transport

According to Article 30, para. 1, of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure⁹⁰, Member States shall establish an independent regulatory body, which can be the Ministry responsible for transport matters or any other body.

Article 30, para. 6, of the same Directive provides that Member States shall take the measures necessary to ensure that decisions taken by this regulatory body are subject to judicial review. No other provision deals with the judicial review of the decisions of the NRAs in the sector of railway transport.

This Directive entered into force on 15 March 2001 (Article 39) and had to be implemented into the Acts of the Member States by 15 March 2003 (Article 38).

3.3.1 Belgium

In Belgium, the main NRA in the sector of railway transport is the *Service de Régulation du transport ferroviaire et de l'exploitation de l'aéroport de Bruxelles-National / Dienst Regulering van het Spoorwegvervoer en van de Exploitatie van de Luchthaven Brussel-Nationaal*⁹¹ ("**Service de Régulation**"). This body was created on 5 November 2004⁹².

Until February 2010, the decisions of the *Service de Régulation* were subject to judicial review before the *Conseil d'Etat*⁹³. Two Acts of 26 January 2010, which entered into force on 19 February 2010, provide that the decisions of the *Service de*

⁹⁰ OJ L 75, 15 March 2001, p. 29-46 (as modified by Directives 2004/49/EC and 2007/58/EC).

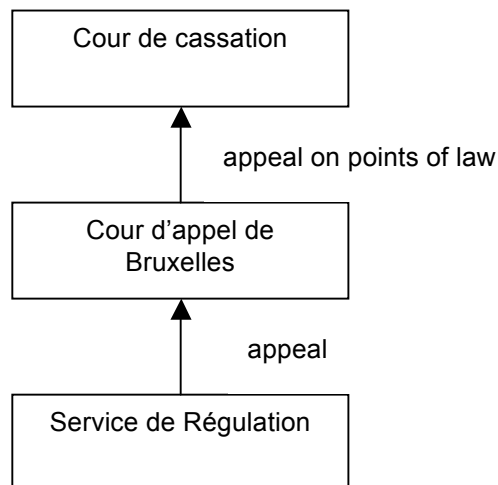
⁹¹ Article 61 of the Loi du 4 décembre 2006 relative à l'utilisation de l'infrastructure ferroviaire / Wet van 4 december 2006 betreffende het gebruik van de spoorweginfrastructuur, M.B., 23 January 2007, p. 2.837 ("**Act of 4 December 2006**"); Article 2bis of the Arrêté royal du 25 octobre 2004 créant le Service de Régulation du transport ferroviaire et de l'exploitation de l'aéroport de Bruxelles-National, fixant sa composition ainsi que les statuts administratif et pécuniaire applicables à ses membres / Koninklijk besluit van 25 oktober tot oprichting van de Dienst Regulering van het Spoorwegvervoer en van de exploitatie van de luchthaven Brussel-Nationaal, tot vaststelling van zijn samenstelling en het administratief en geldelijk statuut dat van toepassing is op zijn leden, M.B., 5 November 2004, p. 75.092 ("**Royal Decree of 25 October 2004**").

⁹² Article 3 of the Royal Decree of 25 October 2004.

⁹³ Article 14 of the Act of 12 January 1973.

Régulation are no longer subject to judicial review before the *Conseil d'Etat*, but to appeal proceedings before the *Cour d'appel de Bruxelles*⁹⁴. This study only investigates the appeal proceedings that are currently applicable before the *Cour d'appel de Bruxelles*.

These appeal proceedings are subject to Articles 66/1 and 66/2 of the *Loi du 4 décembre 2006 relative à l'utilisation de l'infrastructure ferroviaire / Wet van 4 december 2006 betreffende het gebruik van de spoorweginfrastructuur* ("**Act of 4 December 2006**"), which were inserted by the two Acts of 26 January 2010 mentioned above. The provisions of the Judicial Code from which it has not been derogated, also apply to these appeal proceedings.



According to the websites of the *Service de Régulation* and of the Judicial Order, no case law is available for these appeal proceedings in the railway sector.

⁹⁴ Loi du 26 janvier 2010 modifiant la loi du 4 décembre 2006 relative à l'utilisation de l'infrastructure ferroviaire et la loi du 19 décembre 2006 relative à la sécurité d'exploitation ferroviaire, en ce qui concerne principalement la certification de personnel de sécurité et la maintenance des véhicules / Wet van 26 januari 2010 tot wijziging van de wet van 4 december 2006 betreffende het gebruik van de spoorweginfrastructuur en van de wet van 19 december 2006 betreffende de exploitatieveiligheid van de spoorwegen, voornamelijk wat de certificering van het veiligheidspersoneel en het onderhoud van de voertuigen betreft, M.B., 9 February 2010, p. 7.851.
Loi du 26 janvier 2010 modifiant la loi du 4 décembre 2006 relative à l'utilisation de l'infrastructure ferroviaire, la loi du 19 décembre 2006 relative à la sécurité d'exploitation ferroviaire et le Code judiciaire en ce qui concerne le recours contre certaines décisions de l'organe de contrôle et de l'autorité de sécurité / Wet van 26 januari 2010 tot wijziging van de wet van 4 december 2006 betreffende het gebruik van de spoorweginfrastructuur, de wet van 19 december 2006 betreffende de exploitatieveiligheid van de spoorwegen en het *Gerechtelijk Wetboek* wat de rechtsmiddelen tegen bepaalde beslissingen van het toezichthoudend orgaan en de veiligheidsinstantie betreft, M.B., 9 February 2010, p. 7.908.

3.3.2 France

In France, the main NRA in the sector of railway transport is the *Autorité de régulation des activités ferroviaires* (“**ARAF**”). This authority has just been created in December 2010⁹⁵. Before the creation of the ARAF, the Ministry responsible for transport matters was entrusted with the regulatory duties provided by the EU directives on the liberalisation of railway transport. This study only aims at investigating the appeal and judicial review proceedings that are currently applicable to the decisions of the ARAF.

The ARAF’s decisions on complaints relating to access to the railway grid are subject to appeal proceedings before the *Cour d’appel de Paris*. These proceedings are governed by Article 16.III of the Act no. 2009-1503 of 8 December 2009, Article L2143-3 of the *Code des transports* (“**Code of Transports**”), and Articles 10 to 17 of the Decree no. 2010-1023 of 1 September 2010⁹⁶.

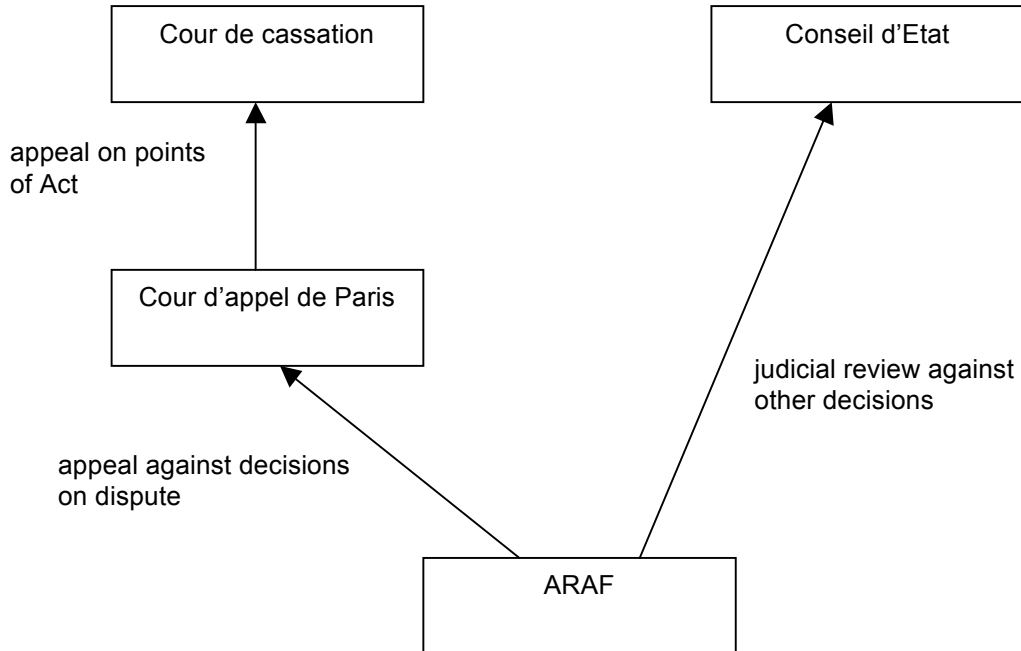
The other decisions of the ARAF are subject to judicial review before the *Conseil d’Etat*⁹⁷, which is the highest administrative court in France⁹⁸. This judicial review is governed by the Code of Administrative Justice.

⁹⁵ Loi n° 2009-1503 du 8 décembre 2009 relative à l’organisation et à la régulation des transports ferroviaires et portant diverses dispositions relatives aux transports, JORF no. 285 of 9 December 2009, p. 21.226 (“**Act no. 2009-1503 of 8 December 2009**”); Ordonnance n° 2010-1307 du 28 octobre 2010 relative à la partie législative du code des transports, JORF no. 255 of 3 November 2010, p. 3.

⁹⁶ Décret n° 2010-1023 du 1er septembre 2010 relatif à l’organisation et au fonctionnement de l’Autorité de régulation des activités ferroviaires et portant diverses dispositions relatives au secteur ferroviaire, JORF no. 203 of 2 September 2010, p. 15.995 (“**Decree no. 2010-1023 of 1 September 2010**”).

⁹⁷ Article R311-1, 4°, of the Code of administrative justice. Article L2135-8, para. 6, of the Code of Transports and article L311-4, 10°, of the Code of administrative justice confirm that the *Conseil d’Etat* has also jurisdiction to rule on appeals against the sanctions ordered by the ARAF.

⁹⁸ Article L111-1 of the Code of administrative justice.



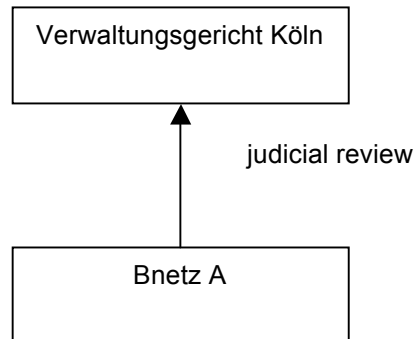
Because of the recent creation of the ARAF, there is no case law available in relation to the enforcement of its decisions and to the appeal proceedings in the railway sector.

3.3.3 Germany

In Germany, the BNetzA is also the main NRA in the railway sector. This authority has been charged with regulating the industry of electronic communications since 1 January 2006.

The BNetzA's decisions are subject to judicial review before the *Verwaltungsgericht Köln*⁹⁹. This judicial review is governed by the provisions of the Code of Administrative Court Procedure.

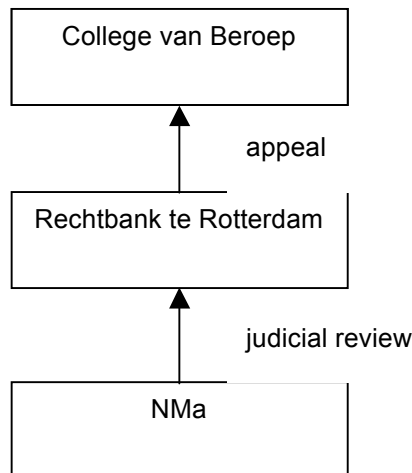
⁹⁹ § 52 (2) of the Code of Administrative Court Procedure.



3.3.4 The Netherlands

In the Netherlands, the NMa has also been designated as the main NRA in the sector of railway transport since 1 January 2005 ¹⁰⁰. Much like in the energy sector, a special chamber of the NMa (*Vervoerkamer*) is specifically in charge of transport regulation.

The NMa's decisions in the railway sector are subject to judicial review before the *Rechtbank te Rotterdam* ¹⁰¹. The judgments of the *Rechtbank te Rotterdam* are subject to appeals before the College van Beroep ¹⁰².



¹⁰⁰ Article 70, para. 1, of the Wet van 23 april 2003, houdende nieuwe algemene regels over de aanleg, het beheer, de toegankelijkheid en het gebruik van spoorwegen alsmede over het verkeer over spoorwegen (Spoorwegwet), Stb. 2003, 264 ("Sw"); Besluit van 20 december 2004, houdende vaststelling van het tijdstip van inwerkingtreding van bepalingen van de Spoorwegwet (Stb. 2003, 264) en van daarmee samenhangende regelgeving, alsmede houdende intrekking van een aantal wettelijke voorschriften, Stb. 2003, 264.

¹⁰¹ Article 90 of the Sw.

¹⁰² Article 20, para. 1, of the Wet bestuursrechtspraak bedrijfsorganisatie.

We have reviewed 6 judgments that were rendered by Dutch courts between 27 April 2009 and 3 May 2010 in relation to NMa's decisions in the railway sector ¹⁰³.

2 judgments were rendered by the *College van Beroep* ¹⁰⁴ and the 4 other judgments by the *Rechtbank te Rotterdam*. 3 cases relate to complaints that were filed by railway enterprises against other railway enterprises with the NMa on the basis of Article 71 of the *Sw*. The 3 other cases relate to fining decisions of the NMa for infringements on the basis of Article 76 of the same Act.

The appeals were dismissed in 3 cases, led to a reduction of the fines in 2 cases and to the quashing of the appealed decision in 1 case.

3.3.5 The United Kingdom

In the United Kingdom, the main NRA in the railway sector is the Office of Rail Regulation (“**ORR**”). This authority has been entrusted with regulating the railway industry since 5 July 2004 ¹⁰⁵. These functions were previously carried out by the Rail Regulator. This study only investigates the appeal and judicial review proceedings that are applicable to the decisions of the ORR.

The appeal procedure against ORR decisions is complex, since three different avenues are open, depending on the type of decision.

The decisions of ORR made under the Competition Act 1998 (relating to the prohibition of agreements restricting competition and to the prohibition of abuses of dominant position) are subject to appeal proceedings before the Competition Appeal Tribunal ¹⁰⁶. The judgments of the Competition Appeal Tribunal are subject to further

¹⁰³ All these judgments are available on the website <http://zoeken.rechtspraak.nl> and are listed in the Appendix below.

¹⁰⁴ The *College van Beroep* rendered these judgments on appeals against judgments of the *Rechtbank te Rotterdam* of 8 June 2007 (MEDED 06/3460 VRLK) and 26 September 2007 (MEDED 06/3416 VRLK). The review of the appealed judgments of 2007 did not appear necessary for the purpose of this study.

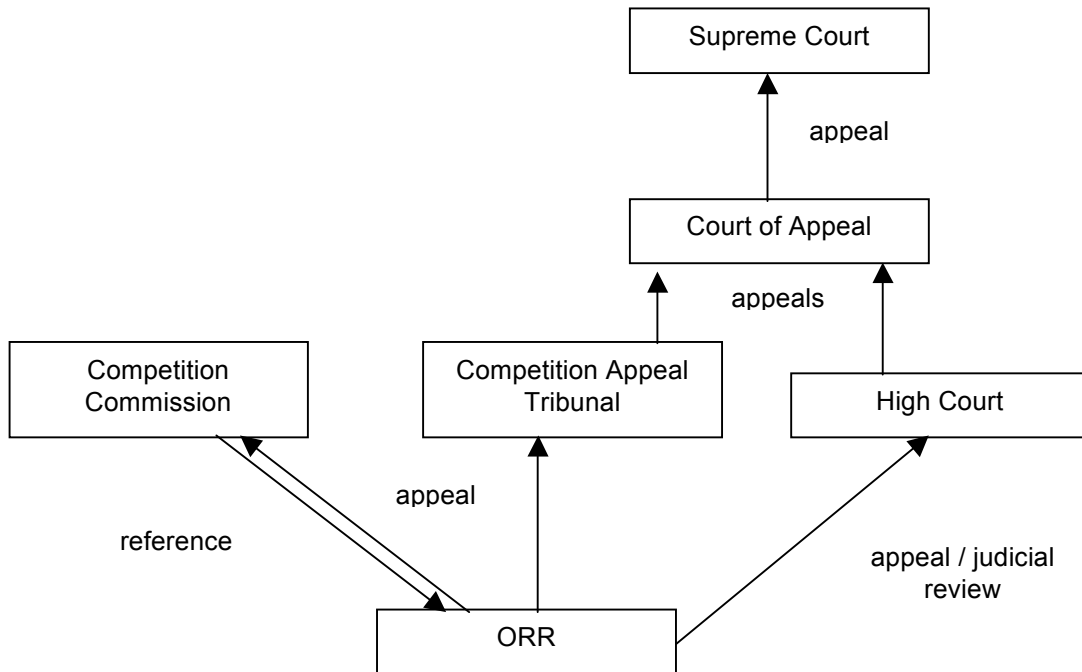
¹⁰⁵ Section 16 of the Railways and Transport Safety Act 2003.

¹⁰⁶ Sections 46 to 48 of the Competition Act 1998.

appeal before the Court of Appeal and, for the sake of completeness, ultimately before the Supreme Court.

If objections are made against licences and access charge reviews, ORR must give a new review notice or make a reference to the Competition Commission ¹⁰⁷.

The decisions of ORR that impose orders or penalties on operators are subject to a statutory appeal before the High Court ¹⁰⁸. The other decisions of ORR are subject to judicial review before the High Court ¹⁰⁹. The judgments of the High Court may be further appealed before the Court of Appeal.



We have reviewed the single judgment that was rendered by the High Court on an application for judicial review against an ORR’s decision granting track access rights. The Court dismissed the application ¹¹⁰.

¹⁰⁷ Paragraph 8 of Schedule 4A of the Railways Act 1993.

¹⁰⁸ Sections 57 and 57F of the Railways Act 1993.

¹⁰⁹ Civil Procedure Rule 54.

¹¹⁰ This judgment is available on the website <http://www.bailii.org> and is included in the Appendix below. ORR confirmed that there has not been any other application for judicial review of its decisions.



CENTRE ON REGULATION IN EUROPE



CENTRE ON REGULATION IN EUROPE

4 Cross-jurisdiction review of the available case law

After this review of the available case law in the sectors of electronic communications, energy and railway transport, we can state that the subject matters of the appeals and the percentage of judgments allowing these appeals may be very different from one jurisdiction to another.

In the end, as will be apparent in the discussion of the specific questions in this project, the available case law concerning the review of NRA decisions across the jurisdictions and the sectors under study here is not such as to constitute a large and valid enough sample for the purpose of quantitative analysis. Accordingly, we have refrained from generating more than the most basic quantitative information (average length of proceedings, etc.). Nevertheless, the case law reviewed for this project contains a wealth of information which can be used in a more qualitative analysis.

4.1 Subject matters of appeals in the sector electronic communications

Courts	Number of judgments							
	licenses	market analysis	ref. offers & price controls	access & interc.	universal service	settlement disputes	sanc-tions	other
<i>C.A. Bruxelles</i>	3	14	25	7	2	-	-	10
<i>Cour cassation (be)</i>	-	1	2	1	-	-	-	1
<i>C.A. Paris</i>	-	-	-	-	-	8	-	-
<i>Cour cassation (fr)</i>	-	-	-	-	-	3	-	-
<i>Conseil d'Etat</i>	6	5	-	2	6	-	3	-
<i>Rb Rotterdam (2010 - 2011)</i>	1	-	-	-	-	-	1	-
<i>College van Beroep (2010 – 2011)</i>	-	5	-	-	-	-	2	3

CAT	3	7	14	1	-	13	-	20
Competition Comm.	-	-	4	-	-	-	-	-
Court of Appeal	1	-	1	-	-	1	-	2

4.2 Subject matters of appeals in the energy sector

Courts	Number of judgments							
	licenses	access	tariffs	cross-border interconnect.	public service	settlement disputes	sanctions	other
<i>C.A. Bruxelles</i>	-	1	32	1	2	-	1	-
<i>Cour cassation (be)</i>	-	1	4	1	-	-	-	1
<i>C. concurrence</i>	-	-	-	1	-	-	-	-
<i>Conseil d'Etat (be)</i>	-	-	-	-	-	-	2	-
<i>C.A. Paris</i>	-	-	-	-	-	14	-	-
<i>Cour cassation (fr)</i>	-	-	-	-	-	3	-	-
<i>Conseil d'Etat (fr)</i>	1	-	1	1	-	-	-	4
<i>College van Beroep (2010 – 2011)</i>	-	-	5	-	1	-	-	2
CAT	-	-	-	-	-	-	-	5
Court of Appeal	-	-	-	-	-	-	-	1

4.3 Subject matters of appeals in the railway sector

Courts	Number of judgments			
	access	settlement of disputes	sanctions	other
<i>Belgium</i>	-	-	-	-

<i>France</i>	-	-	-	-
<i>Rb Rotterdam</i>	-	1	3	-
<i>College van Beroep</i>	-	2	-	-
High Court	1	-	-	-

4.4 Percentage of judgments allowing the appeals

Courts	Percentage of judgments allowing appeals on the merits		
	electronic communications	energy	railways
<i>C.A. Bruxelles</i>	87% (29 / 33)	87% (29 / 33)	-
<i>Cour cassation (be)</i>	20% (1/5)	25% (1 / 4)	-
<i>C. concurrence</i>	N.A.	-	N.A.
<i>Conseil d'Etat (be)</i>	N.A.	-	N.A.
<i>C.A. Paris</i>	28% (2 / 7)	28% (4 / 14)	-
<i>Cour cassation (fr)</i>	66% (2 / 3)	33% (1 / 3)	-
<i>Conseil d'Etat (fr)</i>	10% (2 / 20)	60% (3 / 5)	-
<i>Rb Rotterdam</i> (2010 – 2011)	100% (2 / 2)	-	75% (3 / 4)
<i>College van Beroep</i> (2010 – 2011)	62% (5 / 8)	62% (5 / 8)	0% (0 / 2)
CAT	50% (8 / 16)	0% (0 / 1)	N.A.
Competition Comm.	75% (3 / 4)	N.A.	N.A.
High Court		N.A.	0% (0 / 1)
Court of Appeal	25% (1 / 4)	100% (1 / 1)	-



CENTRE ON REGULATION IN EUROPE

Question 1: Once the NRA decision stands, which recourses are available to the NRA and to aggrieved parties to ensure that firms comply with their regulatory obligations?

Until recently the EU Directives did not contain any provision dealing with the compliance with NRA decision. Article 37, para. 4, of the new Electricity Directive 2009/72/EC and Article 41, para. 4, of the new Gas Directive 2009/73/EC now state that Member States shall ensure that regulatory authorities are granted the powers enabling them to carry out its duties in an efficient and expeditious manner. For this purpose, the regulatory authority shall have at least the powers to issue binding decisions on electricity and natural gas firms, and to impose effective, proportionate and dissuasive penalties on the firms not complying with their obligations under the Directives or any relevant legally binding decisions of the regulatory authority, or to propose that a competent court impose such penalties.

In terms of enforcement by the NRA, two different systems are present in the legislations under review. In a first system, penalties may be imposed by the NRAs on firms for breach of the applicable legal provisions. In the other system, penalties may be imposed by the NRAs directly for breach of the NRA orders themselves. Some NRAs benefit from both systems, meaning that they are entitled to impose penalties for breach of the legal provisions as well as some of their own decisions.

Penalties for breach of the legal provisions

In the Belgian energy sector, the CREG may summon any person or any legal entity to respect provisions of the Electricity Act, the Gas Act and the Royal Decrees that enforce these Acts before a given deadline. If the person or the legal entity is still defaulting after this deadline, the CREG may impose administrative fines for breach of these provisions ¹¹¹. The scope of this sanction is narrowly interpreted by the *Cour d'appel de Bruxelles*. In a 11 February 2010 judgment, the Court indeed ruled that this sanction is not applicable for breach of the Royal Decree of 11 July 2002 on

¹¹¹ Article 31 of the Act of 29 April 1999; Article 20/2 of the Act of 12 April 1965.

electricity tariffs because this decree was validated by another Act than the Electricity Act of 29 April 1999 ¹¹².

In the Belgian sector of electronic communications, the BIPT could also only impose administrative fines for breach of the legal provisions until 14 June 2009.

Penalties for breach of (some) NRA decisions

In Germany, decisions, orders and other measures by German administrative authorities such as the BNetzA regularly constitute administrative acts. Under German law, an administrative act is any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. Such acts constitute enforceable titles themselves ¹¹³. In case persons or entities do not comply with an administrative act, the administrative authority or aggrieved parties can enforce the compliance.

According to § 94 of the *EnWG*, the BNetzA can enforce its orders according to the law on administrative enforcement (*Verwaltungs-Vollstreckungsgesetz*, “VwVG”). Under these rules, the possible measures of enforcement incorporate the execution by substitution (“*Ersatzvornahme*”, § 10 VwVG), legal compulsion (“*unmittelbarer Zwang*”, § 12 VwVG) and penalty payments (“*Zwangsgeld*”, § 11 VwVG).

According to § 31 *EnWG*, aggrieved parties are able to initiate abuse proceedings in front of the BNetzA to ensure that firms comply with their regulatory obligations. § 32 *EnWG* furthermore entitles all market operators to the elimination of damnification, an injunctive relief or to damages, if firms do not comply with the provisions of the *EnWG* or decisions of the BNetzA based thereon.

According to § 126 *TKG*, the BNetzA can request firms to comply with their legal and regulatory duties within a stipulated period. If firms do not comply with the request within the fixed period, the BNetzA can order the necessary measures. In case firms do neither comply with such orders, the BNetzA can order penalty payments or

¹¹² Bruxelles, 11 February 2010, 2008/AR/1152, §§ 29 and 30.

¹¹³ Art. 35 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, “VwVfG”).

enjoin firms from operating telecommunication networks or offer telecommunication services.

According to § 133 TKG, the BNetzA can furthermore settle disputes between firms in the telecommunication sector relating to or arising out of their legal duties under the TKG.

In the British railway sector, where a duty is owed by a final or provisional NRA order to any person, any breach of the duty which causes that person to sustain loss or damage shall be actionable at the suit or instance of that person ¹¹⁴. Compliance with any such order shall also be enforceable by civil proceedings by the appropriate authority for an injunction or for interdict or for any other appropriate relief or remedy

¹¹⁵.

Penalties for breach of the legal provisions as well as (some) NRA decisions

Since 14 June 2009, the BIPT has been entrusted with both regimes of enforcement in the Belgian sector of electronic communications.

First, Article 21 of the Act of 17 January 2003 provides that the BIPT may impose administrative fines for breach of the regulatory framework under its control. In case of serious and repeated offences that do not end after the order of fines, the BIPT has been recently entitled, since 31 December 2010, to order the suspension of all or part of the operation of the network or of the supply of the service.

Second, Article 21/1 of the Act of 17 January 2003 provides that the BIPT may order administrative fines for breach of the duties that it imposed on the basis of various provisions of the Act of 13 June 2005 on electronic communications (including the provisions on duties of firms with significant market power). In case of serious and repeated offences that do not end after the order of fines, the BIPT has also been entitled, since 14 June 2009, to order the suspension of all or part of the operation of the network or of the supply of the service. In a judgment of 7 May 2009, the *Cour*

¹¹⁴ Section 57 (5) of the Railways Act 1993.

¹¹⁵ Section 57 (7) of the Railways Act 1993.

d'appel de Bruxelles ruled that the BIPT could Actfully render a framework decision on remedies, but could not impose sanctions as long as the requested behaviour of the operator with significant market power is not precisely determined ¹¹⁶.

In the Belgian railway sector, Article 63, § 3, of the Act of 4 December 2006 entitles the *Service de Régulation* to take all necessary measures, including conservatory measures and administrative fines, to put an end to offences relating to the network statement, the allocation of capacity, the charging of infrastructure and the provisions on access to the network.

Conclusions and recommendations

There are strong efficiency arguments in favour of the system where penalties are directly available for breach of NRA decision.

Under the other system where penalties are only available for breach of the legal provisions, the NRA sanctions the breach of its orders on the basis that such orders are compatible with the legal framework. It is therefore vulnerable, in the course of the enforcement proceedings, to objections by regulated firms that the NRA orders are not legally valid or that they do not implement the legal provisions the breach of which is sanctioned by penalties. Such a system implies an additional layer of complexity that may be an obstacle to an efficient enforcement of NRA decision.

Moreover, the system of direct enforcement of NRA decisions appears to be in line with accepted domestic law principles, according to which administrative acts constitute enforceable titles by themselves. One could therefore raise an EU law argument, relying on the principle of equivalence (within the doctrine of national procedural autonomy), according to which the procedural rules governing actions for safeguarding rights which individuals derive from EU law must not be less favourable than those governing similar domestic actions.

¹¹⁶ Bruxelles, 7 May 2009, 2008/AR/787, § 266.

However, a system of direct enforcement of NRA decision by the NRA itself may, under some circumstances, raise concerns about the principles of independence, impartiality and proportionality, which condition the validity of the penalties ordered. When it imposes penalties for breach of its own decisions, the NRA must therefore always pay attention to these principles, the breach of which might invalidate its sanctioning orders.



CENTRE ON REGULATION IN EUROPE

Question 2: Do the appeals stay or may cause to stay the enforcement of the decisions of the regulators until the final judgments of the courts? What is the impact of such stay of enforcement on the regulatory process in the various jurisdictions? For instance, in comparison to the number of NRA decisions and to the number of appeals, how many NRA decisions remain unenforceable, and during which average amount of time, until a judgment is rendered that dismisses the appeals?

The EU Directives in the sectors of electronic communications and energy exclude a system whereby the appeals would automatically stay the enforcement of NRA decisions. Indeed, Article 4, para. 1, of the Framework Directive 2002/21/EC on electronic communications provides that pending the outcome of the appeal, the decision of the NRA stands, “unless the appeal body decides otherwise”¹¹⁷. Nevertheless, as will be seen below, Article 4 was implemented in various ways in the Member States, and the fate of NRA decisions pending appeals remained controversial in the subsequent review of the 2002 directives. Directive 2009/140/EC amended Article 4 of the Framework Directive to specify that the NRA decision stands, “unless interim measures are granted in accordance with national Act”¹¹⁸. Article 23, para. 5, of the Electricity Directive 2003/54/EC and Article 25, para. 5, of the Gas Directive 2003/55/EC also provide that the decisions of the NRA that settle a complaint against a transmission or distribution system operator shall have binding effect unless and until overruled on appeal¹¹⁹. There is no such provision in Directive 2001/14/EC in the railway sector.

The rules against stay of enforcement found in the EU directives are in line with the general rule found in the TFEU as regards appeals against decisions of EU

¹¹⁷ Under the amendment by the new Directive 2009/140/EC, the NRA’s decision “shall stand unless interim measures are granted in accordance with national Act”.

¹¹⁸ See also Directive 2009/141, Recitals 14 and 15.

¹¹⁹ The same rule is now provided by Article 37, para. 11, of the new Electricity Directive 2009/72/EC and Article 41, para. 11, of the new Gas Directive 2009/73/EC. These new Directives also provide that the complaints for review concerning decisions on tariffs or methodologies shall not have suspensive effect (Article 37, para. 12, of the new Electricity Directive 2009/72/EC and Article 41, para. 12, of the new Gas Directive 2009/73/EC).

institutions (Article 278 TFEU) and with the general principle that EU law must be implemented such as to be effective (*effet utile*).

At national level, various regimes exist as to the suspensive effect of appeal proceedings against NRA decisions.

No automatic stay of enforcement but right to claim suspension

This regime has been chosen in France in the sector of electronic communications. The appeal proceedings before the *Cour d'appel de Paris* and the judicial review proceedings before the *Conseil d'Etat* have no suspensive effect on the appealed decisions, but the stay of enforcement can be ordered according to the circumstances of the case. The *Cour d'appel de Paris* orders the suspension if the enforcement of the appealed decision could imply manifestly excessive consequences, or if new facts of exceptional seriousness arose after the notification of the appealed decision ¹²⁰. The *Conseil d'Etat* orders the suspension when the urgency justifies it, and when the claimant invokes a ground of appeal that creates a serious doubt on the Actfulness of the appealed decision ¹²¹.

Appeals against decisions of the BNetzA in the sector of electronic communications do not have any suspensive effect in principle. This derives from § 137 sec. 1 TKG. Exemptions from this principle are possible when the BNetzA itself orders a stay of the enforcement after weighing up the interests ¹²² and when the *Verwaltungsgericht Köln* re-establishes the suspensive effect ¹²³. If a stay of enforcement is considered, the BNetzA or the competent court will generally weigh up several circumstances, which mainly contain the prospects of the appeal, the balance between the negative impact a suspensive effect might have on the regulation on the one hand, and the (irreparable) negative consequences the enforcement might have for the affected party on the other hand. The stay of enforcement may also depend on a security deposit.

¹²⁰ Article L36-8, III, para. 2, of the Code of Posts and Electronic communications.

¹²¹ Article L36-11, 5°, of the Code of Posts and Electronic communications; Article L521-1 of the Code of Administrative Justice.

¹²² §§ 80 sec. 4, 80 a sec. 1 no. 2 Rules of the Administrative Courts (Verwaltungs-gerichtsordnung, "VwGO").

¹²³ § 80 sec. 5 VwGO.

A similar regime is applicable by the Competition Appeal Tribunal in the sector of electronic communications in the United Kingdom. The Tribunal may make an order on an interim basis, suspending in whole or part the effect of any decision which is the subject matter of proceedings before it ¹²⁴. The Tribunal will give such direction if it considers that it is necessary as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of person, or protecting the public interest ¹²⁵. The Tribunal shall take into account all the relevant circumstances, including the urgency of the matter, the effect on the party making the request if the relief sought is not granted, and the effect on competition if the relief is granted ¹²⁶.

In the Netherlands, the *voorzieningenrechter* of the *Rechtbank te Rotterdam* or of the *College van Beroep* may order provisional measures upon application ¹²⁷. This judge may, also *ex officio*, suppress or modify its provisional measures ¹²⁸.

Since 20 July 2009, the same regime has been applicable to the appeals against the BIPT's decisions before the *Cour d'appel de Bruxelles* in the sector of electronic communications ¹²⁹.

Provisional stay of enforcement of fines and right to claim suspension

In the sectors of energy and rail transport, French Act provides a regime that is slightly different. In these sectors, the claim for suspension before the *Conseil d'Etat* stays the enforcement of the monetary sanctions ¹³⁰. If the claim for suspension is ultimately dismissed, the enforcement of the fine will only be stayed until the *Conseil d'Etat* rules on the claim for suspension. The claims for suspension are subject to the same criteria as in the sector of electronic communications.

¹²⁴ Rule 61 (1) (a) of the Competition Appeal Tribunal Rules 2003.

¹²⁵ Rule 61 (2) of the Competition Appeal Tribunal Rules 2003.

¹²⁶ Rule 61 (3) of the Competition Appeal Tribunal Rules 2003. The Competition Appeal Tribunal may also grant interim relief on the basis of *prima facie* evidence and urgency of the matter ([2007] CAT 12 (28 February 2007)).

¹²⁷ Article 8:81 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

¹²⁸ Article 8:87, para. 1, 81 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

¹²⁹ Article 2, § 4, of the Act of 17 January 2003, as modified by a Act of 31 May 2009.

¹³⁰ Article 40, 7°, of the Act no. 2000-108 of 10 February 2000; Article L2135-8, para. 6, of the Code of Transports.

Stay of enforcement of fines and right to claim suspension of other decisions

In Belgium, most appeal proceedings before the *Cour d'appel de Bruxelles* apply this regime, where the enforcement of fines is automatically stayed, while the claimant may request the suspension of the other kinds of NRA decisions. This is the case of the appeal proceedings before the *Cour d'appel de Bruxelles* in the sectors of energy¹³¹ and rail transport¹³². This was also the case in the sector of electronic communications until 20 July 2009¹³³. The *Conseil d'Etat* has no jurisdiction on fining decisions in the sectors under review, and may also be seized by a claim for suspension of the appealed decision¹³⁴.

The *Cour d'appel de Bruxelles* and the *Conseil d'Etat* order the suspension when the claimant invokes serious grounds that could justify the overruling of the appealed decision, and when the immediate enforcement of the appealed decision could cause serious damage to the claimant¹³⁵. When it has a substantial impact on the budget of a distribution system operator, a provisional decision on tariffs may cause serious damage since it will be renewed in further provisional decisions and the loss will be very difficult to recover. When the enforcement of a provisional tariff is stayed, the NRA may not renew this provisional decision for a further period¹³⁶.

English law provides a similar regime as far as the energy sector is concerned. If an application is made to the High Court in relation to a penalty, the penalty is not required to be paid until the application has been determined¹³⁷.

¹³¹ Article 29*quater*, para. 1, of the Act of 29 April 1999; Article 15/21, para. 1, of the Act of 12 April 1965.

¹³² Article 66/2, para. 3 and 4, of the Act of 4 December 2006.

¹³³ Article 2, para. 2, of the Act of 17 January 2003, before it was modified by the Act of 31 May 2009. There is no automatic stay of enforcement anymore in relation to fining decisions.

¹³⁴ Article 17, para. 2, of the Act of 12 January 1973.

¹³⁵ Article 29*quater*, para. 1, of the Act of 29 April 1999; Article 15/21, para. 1, of the Act of 12 April 1965; Article 121, para. 6, of the Act of 2 August 2002. Before the *Conseil d'Etat*, the damage that could be suffered by the claimant, must also be hard to compensate in case of overruling (Article 17, para. 2, of the Act of 12 January 1973). In the railway sector, Article 66/2 of the Act of 4 December 2006 does not mention the criteria that must be fulfilled for the suspension to be ordered.

¹³⁶ Brussel, 2 July 2007, 2007/AR/1239, §§ 22 to 27.

¹³⁷ Section 27E (5) of the Electricity Act 1989; Section 30E (5) of the Gas Act 1986.

Stay of enforcement of decisions relating to unbundling unless decided otherwise, and right to claim suspension of other decisions

In Germany, §§ 76 and 77 of the *EnWG* provide a more sophisticated regime as to the potential suspensive effect of the appeals before the *Oberlandesgericht Düsseldorf* in the energy sector. The regime distinguishes between the appeals against decisions on the implementation of unbundling duties, against provisional orders and against the other decisions of the BNetzA.

If the decision challenged concerns the implementation of unbundling duties, the appeal has suspensive effect ¹³⁸, unless the BNetzA orders the immediate execution of its decision, which it may only do if this is in the public interest or otherwise overwhelmingly in the interest of another participant in the proceedings before the BNetzA ¹³⁹. In this event, the *Oberlandesgericht Düsseldorf* may restore the suspensive effect in whole or in part if such prerequisites for the order of immediate execution were not fulfilled or are no longer fulfilled ¹⁴⁰.

If the decision challenged is a provisional order, the *Oberlandesgericht Düsseldorf* may order that it shall first take effect in whole or in part only upon conclusion of the appeal proceedings ¹⁴¹.

If the decision challenged is another decision, the appeal has no automatic suspensive effect ¹⁴². Upon application, the *Oberlandesgericht Düsseldorf* may restore the suspensive effect in whole or in part, if there is serious doubt about the legality of the decree challenged, or execution would result in undue hardship for the interested party that is not overwhelmingly in the public interest ¹⁴³.

If a stay of enforcement is considered upon request, the *Oberlandesgericht Düsseldorf* will generally weigh up several circumstances, such as the prospects of the appeal, the balance between the negative impact a suspensive effect might have

¹³⁸ § 76 (1) of the *EnWG*.

¹³⁹ § 77 (1) of the *EnWG*. This order may be issued by the BNetzA prior to the filing of the appeal (§ 77 [2]).

¹⁴⁰ § 77 (3) of the *EnWG*.

¹⁴¹ § 76 (2) of the *EnWG*.

¹⁴² § 76 (1) of the *EnWG*.

¹⁴³ § 77 (3) of the *EnWG*. The application is admissible even prior to the filing of the appeal (§ 77 [4]).

on the regulation on the one hand, and the (irreparable) negative consequences the enforcement might have for the affected party on the other hand. All judgments of the *Oberlandesgericht Düsseldorf* as to the suspension of the challenged decisions may be revoked or amended at any time ¹⁴⁴.

Stay of enforcement except if the court decides otherwise

In Germany, § 80 of the Code of Administrative Court Procedure provides that the application for judicial review before the *Verwaltungsgericht Köln* may have suspensive effect towards the BNetzA's decisions in the railway sector, except if this court decides otherwise. The court will rule on the suspensive effect taking into account the personal interest of the plaintiff in a suspension and the public interest in an immediate effect ¹⁴⁵. Suspensive effect will be granted when the summary examination of the decision of the BNetzA shows that it is likely to be unlawful ¹⁴⁶.

Implementation, conclusions and recommendations

A 2004 study on the effectiveness of the regulatory system in the sector of electronic communications stated, on the basis of an examination of the situation in Germany at the time, that where the regulatory decision is suspended over a long time, pending the outcome of the main proceedings, it generates legal and economic uncertainty for all actors involved and has substantive impacts on the market. It was argued that the incumbent generally benefits from this situation and that it was widely known that Deutsche Telekom systematically made use of its right to appeal and to apply for interim measures ¹⁴⁷. This study and others led the Commission to propose amending Article 4 of Directive 2002/21 in 2007, in order to make it clear that NRA decisions concerning electronic communications were not meant to be suspended when they are appealed from. ¹⁴⁸

¹⁴⁴ § 77 (5) of the *EnWG*.

¹⁴⁵ *VG Köln*, 9 January 2008, 18 L 1874/07.

¹⁴⁶ *VG Köln*, 21 August 2009, 18 K 2722/07.

¹⁴⁷ M. Andenas and S. Zleptnig, "Telecommunications Dispute Resolution: Procedure and Effectiveness", [2004] EBLR, pp. 547, 568 and 569.

¹⁴⁸ See the Proposal for a Directive amending Directives 2002/21, 2002/19 and 2002/20, COM(2007) 697 final (13 November 2007) at 10.

On the basis of our review of the various legal regimes relating to the stay of enforcement of NRA decision that are subject to appeal, one can state that there is no longer any regime where the enforcement of NRA decision would be automatically stayed pending the appeal proceedings. The possible stay of enforcement and its potential impact will be considered by the courts for each individual case.

According to the case law under review, the various regimes that are currently applicable have a very small impact on the regulatory process. The number of suspensions is very low and there are almost no cases where the enforcement of the appealed decision is stayed before the appeal is ultimately dismissed on the merits.

In Belgium, the single fine in the energy sector whose payment was stayed has ultimately been quashed ¹⁴⁹. In tariff cases, one claim for suspension was dismissed because it was filed before any appeal was lodged on the merits against the CREG's decision ¹⁵⁰. There has been one case where the enforcement of the appealed decision was stayed ¹⁵¹ before the decision was quashed ¹⁵². In the last case, the enforcement of the appealed decision was stayed and there is no judgment available on the merits of the appeal ¹⁵³. In the sector of electronic communications, 5 claims for suspension were dismissed. There has been one case where the enforcement of the appealed decision was stayed before the decision was quashed. In the last case, the enforcement of the appealed decision was stayed and there is no judgment available on the merits of the appeal. Until today, there has been no case where the enforcement of the appealed decision was stayed until a judgment that dismissed the appeal.

In France, all claims for suspension were dismissed. In the same way, there was no stay of enforcement of the English NRA decisions that were subject to appeal.

¹⁴⁹ Bruxelles, 11 February 2010, 2008/AR/1152.

¹⁵⁰ Brussel, 22 May 2007, 2007/AR/61.

¹⁵¹ Brussel, 2 July 2007, 2007/AR/1239.

¹⁵² Brussel, 30 September 2008, 2007/AR/216 - 2007/AR/1239 - 2007/AR/2000 - 2007/AR/2825.

¹⁵³ Bruxelles, 10 November 2008, 2008/AR/1616 – 2008/AR/1617 – 2008/AR/1670 – 2008/AR/1671.

While we do not have statistical data available, it is our opinion that German courts are very reluctant to grant a stay of enforcement. The number of decisions of the BNetzA that are suspended – and therefore unenforceable – is extremely low.

This situation is broadly in line with the objectives of the EU legislation. Given that the various legislative regimes under review appear to lead to case laws that have relatively similar and limited impacts in practice on the efficiency of the regulatory process, there do not seem to be arguments available to opt for one system to the detriment of the others. The discussion above shows that, either as a result of the 2009 package or of the discussion which arose after the 2002 package, the strictest rules against stay of enforcement are found in electronic communications regulation, while energy and rail regulation are more permissive.

As a matter of principle, we would recommend a strong rule against a systematic stay of enforcement of NRA decisions. Indeed, what must be avoided is a system where the markets would in practice not be regulated, because all NRA decisions would become unenforceable pending appeals and would therefore be prevented from impacting the behaviours of the market participants. While the parties should still have the right to request a stay of enforcement of the appealed decisions as a provisional measure, these requests should be carefully considered by the courts for each individual case and should only be granted in exceptional cases, in order to prevent serious and irreparable damage. At the same time, we would recommend to make an exception to this rule for fines; after all, while fines impose a burden on their addressee and are meant to influence its behaviour, they do not have such a direct impact on the market as access or price regulation. Furthermore, incentives to appeal for the sake of winning time can be countered by letting interest run on unpaid fines until such time as the matter is finally settled.

In practice, the limited number of judgments granting a stay of enforcement of NRA decisions increases the impact of other aspects of the appeal proceedings. It indeed implies that NRA decision remain enforceable and influence the behaviours of market participants pending the appeal proceedings, so that the issues relating to the length

of the proceedings and to the powers of the appellate courts to quash appealed decisions with retroactive effect become crucial.



CENTRE ON REGULATION IN EUROPE

Question 3: Which courts or bodies have jurisdiction to rule on the appeals against the decisions of the regulators? Are these appeals considered as public law litigation or private law litigation? Are these appeals lodged with ordinary or specialised courts or bodies? Is there a correlation between the kind of appellate courts having jurisdiction, and the percentage of judgments quashing appealed decisions?

In accordance with the principle of procedural autonomy of the Member States, EU Directives do not contain precise rules as to the legal nature of the appeal proceedings and the appeal bodies in the Acts of the Member States.

Article 4, para. 1, of the Framework Directive 2002/21/EC provide only that there shall be an effective appeal mechanism, that the appeal body, which may be a court, shall be independent of the parties involved and that it shall have the appropriate expertise available to it to enable it to carry out its function effectively¹⁵⁴. Article 37, para. 17, of the new Electricity Directive and Article 41, para. 17, of the new Gas Directive also provide that the appeal body shall be independent of the parties involved and of any government. There is no such provision in the Directive 2001/14/EC in the railway sector.

The nature of the appellate courts

In all the jurisdictions under review, the appeals against NRA decisions are lodged with courts. The proceedings are brought before various kinds of courts: (i) civil courts such as the *Cour d'appel de Bruxelles*, the *Cour d'appel de Paris* and the *Oberlandesgericht Düsseldorf*, (ii) administrative courts such as the *Conseil d'Etat* in Belgium and France, the *Verwaltungsgericht Köln* in Germany, the *Rechtbank te Rotterdam* and the *College van Beroep* in the Netherlands, and the Administrative court of the Queen's Bench Division in the High Court of England and Wales, and (iii) specialised courts such as the *Conseil de la concurrence* in Belgium and the Competition Appeal Tribunal in the United Kingdom.

¹⁵⁴ The word "effectively" was added by the Directive 2009/140/EC.

The specialised courts have a composition that is different from the composition of the other courts. The background required from their members puts more emphasis on the need for expertise that is not purely legal.

The *Conseil de la concurrence* is composed of auditors and counsellors¹⁵⁵, which are not required to be holders of a master in law. The auditors must pass an exam to assess their knowledge of competition law and economics¹⁵⁶. The counsellors must pass an exam to assess their knowledge of procedural law, competition law, accountancy law and economics¹⁵⁷.

Cases before the Competition Appeal Tribunal are heard by a panel consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields¹⁵⁸.

The number of judges

Another important institutional feature is the number of judges that may sit in appellate courts and render judgments on appeals against NRA decisions. It can be argued that a smaller number of competent judges leads to a higher degree of specialisation of the appellate court but also to a higher concentration of decisional power on the regulation of network industries.

¹⁵⁵ Article 11, § 2, of the Act of 15 September 2006.

¹⁵⁶ Article 1 of the Arrêté royal du 21 mai 2008 relatif aux modalités et au programme du concours d'aptitude professionnelle pour la nomination d'auditeurs adjoints auprès du Conseil de la concurrence / Koninklijk besluit van 21 mei 2008 betreffende de modaliteiten en het programma van het vergelijkende examen betreffende de beroepsbekwaamheid voor de benoeming van adjunct-auditeurs bij de Raad voor de Mededinging, M.B., 29 May 2008, p. 27.410.

¹⁵⁷ Article 1 of the Arrêté royal du 31 octobre 2006 fixant le programme de l'examen d'aptitude professionnelle en vue d'une nomination de président, vice-président ou conseiller au Conseil de la concurrence créé par la loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006 / Koninklijk besluit van 31 oktober 2006 tot vaststelling van het programma van het examen inzake beroepsbekwaamheid met het oog op de benoeming tot voorzitter, ondervoorzitter of raadslid van de Raad voor de Mededinging, opgericht bij de wet tot bescherming van de economische mededinging, gecoördineerd op 15 september 2006, M.B., 22 November 2006, p. 64.630.

¹⁵⁸ <http://www.catribunal.org.uk/246/Personnel.html>.

The judgments of the *Cour d'appel de Bruxelles* on appeals against NRA decisions are rendered by chambers of 3 judges competent on civil matters ¹⁵⁹. Until September 2007, these appeals could be brought before 3 different chambers of the court (8th, 9th, 9bis). Since September 2007, it has been provided that a new single chamber (18th) would have jurisdiction to rule on all appeals against NRA decisions ¹⁶⁰.

If one looks at the judgments in the energy sector, one can state that the 11 judgments between October 2006 and November 2007 were rendered by 7 judges ¹⁶¹, each judge taken part to the deliberation of 3 to 6 judgments. The judgments between December 2007 and November 2008 were all rendered by the same 3 judges ¹⁶². Because of incidents in another case that is not related to any NRA decision, the composition of the 18th chamber had to be modified. The judgments between May and November 2009 were all issued by the same 2 judges ¹⁶³ and by a third one who changed from case to case. Since January 2010, all the judgments have again been rendered by the same 3 judges ¹⁶⁴.

There is no such concentration of decisional power within the hands of so few judges in the other jurisdictions.

Private law or public law litigation?

The proceedings before the administrative courts are considered as public law cases. In this way, the *Rechtbank te Rotterdam* considers that even when they rule on disputes between firms, NMa's decisions are public law decisions of an administrative body within the meaning of Article 1:3, para. 1, of the *Awb* ¹⁶⁵. Private law relations are excluded from the jurisdiction of the *Rechtbank te Rotterdam* ¹⁶⁶ and

¹⁵⁹ Article 109bis, §3, of the Judicial Code.

¹⁶⁰ Orders of service of the first president of the *Cour d'appel de Bruxelles* of 29 June 2007, 8 July 2008, 30 July 2009 and 9 August 2010.

¹⁶¹ Mr Blondeel, Mr Demanche, Mrs Herregodts, Mr Lybeer, Mr Macklebert, Mrs Regout and Mrs Van Santvliet.

¹⁶² Mr Blondeel, Mr Moens and Mrs Schurmans.

¹⁶³ Mr Blondeel and Mr Bodson.

¹⁶⁴ Mr Blondeel, Mr Bodson and Mrs Gadeyne.

¹⁶⁵ College van Beroep, 27 April 2009, AWB 07/872 – AWB 07/873, § 5.2.

¹⁶⁶ Article 8:3 of the *Awb*.

the *College van Beroep*¹⁶⁷. Private law relations are also excluded from the jurisdiction of the *Conseil de la concurrence* and the *Conseil d'Etat* in Belgium¹⁶⁸.

If appeals are lodged before civil courts, that does not imply that such appeals are considered as private law cases. The *Cour d'appel de Bruxelles* indeed considers appeals against NRA decisions as public law cases. The *Cour d'appel de Bruxelles* rules that the appealed decisions of the BIPT¹⁶⁹ and the CREG¹⁷⁰ are administrative decisions which are subject to public law appeals ("*recours objectifs / objectieve verhalen*"). However, since this court belongs to the civil court structure, claimants may invoke private law relations, such as contractual rights, to support their appeals¹⁷¹. The proceedings before the *Oberlandesgericht Düsseldorf* are also governed by administrative law, so that the appeals are to be considered as public law cases.

The situation is different before the *Cour d'appel de Paris*. As mentioned above, this court has jurisdiction to rule only on appeals against decisions of the French NRAs that settle disputes between firms. In France, the NRA is not a party to the appeal proceedings in this context, but merely attends the proceedings in order to provide its observations to the Court. The appeal before the *Cour d'appel de Paris* is thus rather considered as a private law litigation¹⁷².

Conclusions and recommendations

Except for specialised courts (the *Conseil de la concurrence* and the Competition Appeal Tribunal) all the courts that are subject to this study are to be considered as "ordinary" courts, as they regularly deal with different generic (non sector-specific) cases. Nevertheless, they also hold the exclusive competence for appeals against NRA decisions based on the regulatory framework for one or several sectors. These courts have therefore gathered significant expertise regarding regulatory issues.

¹⁶⁷ Article 18, para. 1, of the Wet bestuursrechtspraak bedrijfsorganisatie.

¹⁶⁸ Article 144 of the Belgian Constitution. See *Conseil de la concurrence*, 12 December 2006, no. 2006-R/B-25, § 7.

¹⁶⁹ Bruxelles, 18 June 2004, 2003/AR/2249, § 35.

¹⁷⁰ Brussel, 30 September 2008, 2007/AR/213-2007//AR/1237-2007/AR/2001-2007/AR/2823, § 54; Bruxelles, 16 November 2006, 2006/AR/402, § 12.

¹⁷¹ Brussel, 12 June 2007, 2006/AR/618, § 17.

¹⁷² C.A. Paris, 8 March 2005, 04/12606.

One can also state that several Member States have implemented similar rules for appeal proceedings in the three sectors under review. This cross-fertilisation is obvious in France, where the *Cour d'appel de Paris* and the *Conseil d'Etat* have exactly the same scope of jurisdiction, and in the Netherlands, where the *Rechtbank te Rotterdam* and the *College van Beroep* act as first-stage and second-stage review courts. In the Dutch system, there are some differences between the sectors in relation to the scope of the jurisdiction of the *College van Beroep* as first-stage review court.

The cross-sector approach is less complete in Germany, where the *Verwaltungsgericht Köln* has jurisdiction in the telecom and railway sectors while the *Oberlandesgericht Düsseldorf* is the exclusive appellate court in the energy sector. That is also the case in the United Kingdom, where there is no statutory appeal before the Competition Appeal Tribunal in the railway sector.

In Belgium, the structure of the appeal proceedings in the energy sector is very complex and shows a lack of coherence, which gives rise to procedural debates as to which court has jurisdiction to rule on an appeal against some given decisions. The jurisdiction of the *Conseil d'Etat* is unclear in scope. Granting jurisdiction to the national competition authority to review some decisions of the CREG is also questionable. There are strong arguments to plead in favour of a change of the Electricity Act of 29 April 1999 and the Gas Act of 12 April 1965 that would provide the *Cour d'appel de Bruxelles* with an exclusive jurisdiction on appeals against all decisions of the CREG, in line with the situation in the sectors of electronic communications and railway transport ¹⁷³.

¹⁷³ On this point, we agree with the recent proposals of the CREG (see CREG, Etude (F)101105-CDC-986 du 5 novembre 2010 relative aux modifications à apporter à la loi du 29 avril 1999 relative à l'organisation du marché de l'électricité en vue d'améliorer le fonctionnement et le suivi du marché de l'électricité et conformément à la directive 2009/72/CE du Parlement européen et du Conseil du 13 juillet 2009 concernant des règles communes pour le marché intérieur de l'électricité et abrogeant la directive 2003/54/CE, pp. 124 and 125; CREG, Etude (F)101105-CDC-984 du 5 novembre 2010 relative aux modifications à apporter à la loi du 12 avril 1965 relative au transport de produits gazeux et autres par canalisations en vue d'améliorer le fonctionnement et le suivi du marché du gaz naturel et conformément à la directive 2009/73/CE du Parlement européen et du Conseil du 13 juillet 2009 concernant des règles communes pour le marché intérieur du gaz naturel et abrogeant la directive 2003/55/CE, p. 92).

On the basis of the case law under review, there does not appear to be a correlation between the nature of the appellate courts on the one hand, and their powers or the percentage of quashing judgments on the other hand. If one compares the rules and the case law available for two courts from the civil court structure such as the *Cour d'appel de Bruxelles* and the *Cour d'appel de Paris*, or two courts from the administrative court structure such as the *Conseil d'Etat* in Belgium or France and the *College van Beroep* in the Netherlands, one cannot show that the civil or administrative nature of the courts would imply similarities in terms of decisional powers or percentage of quashing judgments.

It can be argued that this absence of correlation between the institutional qualification of the review courts and the practical contents of their case laws, is encouraged by two converging factors: (i) the exclusive competence of many of these courts, according to which several courts gathered significant expertise regarding substantive law issues in regulatory matters, and (ii) the complexity of the regulatory issues and the impact of EU law, pursuant to which non-harmonised rules of procedure at national level may converge under the impact of the harmonised rules of substantive law.



CENTRE ON REGULATION IN EUROPE



CENTRE ON REGULATION IN EUROPE

Question 4: Who can lodge an appeal against the decisions of the regulators? Do the regulators appear before the courts? Which are the parties that may be involved in the appeal proceedings? What is the impact of these appeal proceedings on the number of litigation between competitors? For instance, what is the average number of competitors involved in appeal proceedings against NRA decisions?

The claimant

The EU Directives on electronic communications and energy define the parties that have the right of appeal against NRA decisions. Article 4, para. 1, of the Framework Directive 2002/21/EC provides that any user or firm providing electronic communications networks and/or services who is affected by a NRA's decision has the right of appeal ¹⁷⁴. Article 37, para. 17, of the new Electricity Directive and Article 41, para. 17, of the new Gas Directive now provide that a party affected by a NRA's decision has the right of appeal ¹⁷⁵. There is no such provision in Directive 2001/14/EC in the railway sector.

On the basis of Article 4, para. 1, of the Framework Directive 2002/21/EC, the European Court of Justice rendered two judgments on this issue. The first judgment, on 21 February 2008, ruled that the terms user "affected" or firm "affected" must be interpreted as being applicable not only to an firm (formerly) having significant power on the relevant market which is subject to a NRA's decision taken in the context of a market analysis procedure and which is the addressee of that decision, but also to users and firms in competition with such an firm which are not themselves addressees of that decision but the rights of which are adversely affected by it ¹⁷⁶. The second judgment of 24 April 2008 ruled, in line with the first one, that the national courts must interpret and apply the domestic rules of procedure governing the bringing of appeals in such a way that an NRA decision concerning the authorisation

¹⁷⁴ This provision has not been modified by the Directive 2009/140/EC.

¹⁷⁵ There was no such provision in the Directives 2003/54/EC and 2003/55/EC.

¹⁷⁶ ECJ, 21 February 2008, C-426/05.

of rates for unbundled access to the local loop may be challenged before the courts, not only by the firm to which such a decision is addressed but also by beneficiaries within the meaning of that regulation whose rights are potentially affected by it ¹⁷⁷.

The Directive provisions quoted above only aim at a minimal harmonisation of the rules of the Member States on *locus standi*. The Member States are still competent to implement rules that are more 'favourable', in the sense that they would extend standing to lodge an appeal to a wider range of parties. The laws of the Member States show therefore some divergences as to the parties that have the right to appeal NRA's decisions.

In Belgium, any person having a personal interest ¹⁷⁸ to appeal against an NRA decision is admissible to appear before the *Cour d'appel de Bruxelles* ¹⁷⁹, the *Conseil d'Etat* ¹⁸⁰ or the *Conseil de la concurrence* ¹⁸¹. In the sector of electronic communications, the Ministry in charge of telecommunications has also the right to appeal the BIPT's decisions ¹⁸². The requirement of personal interest for legal entities is subject to various implementations by the *Cour d'appel de Bruxelles* and the *Conseil d'Etat*. The collective interests that legal entities promote are not enough to render their claim admissible before the *Cour d'appel de Bruxelles* ¹⁸³, while this may be the case before the *Conseil d'Etat* under certain conditions.

In the Netherlands, the regime is similar, since NRA decisions are subject to appeals by any person whose interest is directly affected by the appealed decision ¹⁸⁴. The interests of legal entities may also consist in the general and collective interests that they specifically promote in accordance to their objectives and factual activities ¹⁸⁵. A

¹⁷⁷ ECJ, 24 April 2008, C-55/06.

¹⁷⁸ Appellants are only admissible if they are in the concrete situation that is dealt with by the appealed decision (Bruxelles, 16 November 2006, 2006/AR/402, §§ 14 and 15).

¹⁷⁹ Article 2, § 1, para. 2, of the Act of 17 January 2003; Article 29*bis*, §1, of the Act of 29 April 1999; Article 15/20, §1, of the Act of 12 April 1965; Article 66/1, para. 1, of the Act of 4 December 2006.

¹⁸⁰ Article 19 of the Act of 12 January 1973.

¹⁸¹ Article 29*ter* of the Act of 29 April 1999; Article 15/20*bis* of the Act of 12 April 1965.

¹⁸² Article 2, § 1, para. 3, of the Act of 17 January 2003.

¹⁸³ Bruxelles, 16 November 2006, 2006/AR/402, § 13. Only legal entities that are actually subject to the NRA decision are admissible to lodge an appeal against such decision (*ibid.*, §§ 14 and 15).

¹⁸⁴ Articles 1:2, para. 1, and 8:1, para. 1 of the *Awb*.

¹⁸⁵ Article 1:2, para. 3, of the *Awb*.

company is however inadmissible to request the judicial review of an NMA decision that has only an influence on the interests of its (fully-owned) subsidiary ¹⁸⁶.

In France, only the parties to the dispute before the NRA may lodge an appeal against the settlement decision with the *Cour d'appel de Paris*. The other decisions of the NRA are subject to judicial review before the *Conseil d'Etat* on the application of any interested person.

In Germany, only the participants to the proceedings in front of the BNetzA may appeal before the *Verwaltungsgericht Köln* in the sectors of electronic communications and railways ¹⁸⁷, and before the *Oberlandesgericht Düsseldorf* in the energy sector ¹⁸⁸.

In the United Kingdom, the regimes diverge according to the sectors and the appeals concerned. In the sector of electronic communications, any person affected by an Ofcom decision may appeal against it to the Competition Appeal Tribunal ¹⁸⁹. On the contrary, in the sectors of energy and railway transport, only the licence holder or the relevant operator to whom an order relates or upon whom a penalty is imposed, may lodge the statutory appeal against such order or penalty ¹⁹⁰.

The NRA

In all sectors and jurisdictions under review, the NRAs appear before their appellate courts. In most cases, the NRAs appear as defendants entitled to defend the lawfulness of the appealed decisions. This can be related to recent case concerning national competition authorities, where the ECJ has ruled that the national authority must be entitled to appear before national courts to defend its decisions in the course of appeal proceedings, or otherwise the effectiveness of EU law (Articles 101 and 102 TFEU in that case) would be undermined ¹⁹¹.

¹⁸⁶ College van Beroep, 27 April 2009, AWB 07/525, § 5.3.

¹⁸⁷ § 63 of the *VwGO*.

¹⁸⁸ § 75, sec. 2, of the *EnWG*.

¹⁸⁹ Section 192 (2) of the Communications Act.

¹⁹⁰ Section 27E (1) of the Electricity Act 1989; Section 30E (1) of the Gas Act 1986; Sections 57 (1) and 57F (1) of the Railways Act 1993.

¹⁹¹ ECJ, 7 December 2010, Case C-439/08, *VEBIC*, not yet reported.

However, the French NRAs have a different position in case of appeals against their decisions on disputes between firms. In France, the ARCEP and the CRE are not parties to the appeal proceedings, but are merely attending it in view of providing their observations to the *Cour d'appel de Paris* ¹⁹². In the other jurisdictions, the NRAs are defendants on appeal even when the appealed decisions settle a dispute between firms ¹⁹³.

The intervention of third parties

Third parties are entitled to take part to all appeal proceedings under review. This is the case before the *Cour d'appel de Bruxelles* ¹⁹⁴, the *Conseil d'Etat* in Belgium ¹⁹⁵ and in France ¹⁹⁶, the *Verwaltungsgericht Köln* ¹⁹⁷, the *Oberlandesgericht Düsseldorf* ¹⁹⁸, the Dutch courts ¹⁹⁹, the Competition Appeal Tribunal ²⁰⁰ and the High Court ²⁰¹.

In France, the presence of several competitors before the *Cour d'appel de Paris* is organised by the legal provisions on appeals against NRA decisions that settle disputes between firms. In that context, the appeal proceedings are organised in the

¹⁹² See Article R11-8 of the Code of Posts and Electronic communications; Article 12 of the Decree no. 2000-894 of 11 September 2000; C.A. Paris, 30 June 2009, 2008/22440; C.A. Paris, 26 June 2007, 2006/19689.

¹⁹³ See Rb Rotterdam, 30 September 2009, AWB 08/3831 – AWB 08/3832.

¹⁹⁴ Article 813 of the Judicial Code.

¹⁹⁵ Article 52 of the Royal Decree of 23 August 1948.

¹⁹⁶ Article R632-1 of the Code of Administrative Justice.

¹⁹⁷ §§ 63 and 65 of the *VwGO*.

¹⁹⁸ § 79 (1) no. 3 of the *EnWG*.

¹⁹⁹ The Dutch courts may *ex officio*, or on request of a (third) party, authorise interested parties to take part to the proceedings. If the court is of the opinion that there are unknown interested third parties, it may publish the existence of the proceedings (Article 8:26 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspreek bedrijfsorganisatie*).

²⁰⁰ According to Rule 15 of the Competition Appeal Tribunal rules 2003, the Registrar shall publish a notice about the appeal on the Tribunal website and in any other manner the President may direct. Any person who considers he has sufficient interest in the outcome may then make a request to the Tribunal for permission to intervene in the proceedings within a three-week time limit (Rule 16 [1]). If the Tribunal is satisfied that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit (Rule 16 [6]). In case of tardy applications to intervene, the Tribunal may refuse to extend the time limit and dismiss the application ([2007] CAT 31 (20 November 2007)).

²⁰¹ In its claim form, the claimant must state the name and address of any person he considers to be an interested party (Civil Procedure Rule 54.6 [1] [a]). The claim form must be served on the defendant, and unless the court otherwise directs, any person the claimant considers to be an interested party, within 7 days after the date of issue (Rule 54.7). Any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice not more than 21 days after service of the claim form (Rule 54.8 [1]).

same way as private law litigations, so that both litigating parties are automatically parties to the proceedings before the *Cour d'appel de Paris*.

Some courts are also entitled to bring third parties *ex officio* to the appeal proceedings.

The *Cour d'appel de Bruxelles* has such power in the energy sector ²⁰².

The *Verwaltungsgericht Köln* may also subpoena on request or *ex officio* third parties whose legal interests are affected by the ruling. If third parties are involved in the contentious legal relationship in such a way that the ruling can only be imposed on them uniformly, they shall be subpoenaed by the *Verwaltungsgericht* (necessary subpoena). However, the court has shown a restrictive approach towards the summoning of third parties in the sector of electronic communications. The court has indeed negated a necessary subpoena of Deutsche Telekom (regularly being the regulated company requested to grant third-party access to competitors) in many cases.

Several competitors may be party to the same appeal proceedings against a NRA decision in another procedural situations, i.e. where several firms lodge different appeals against the same NRA decision and their appeals are joined as related cases.

The available case law shows that several market operators are party to many appeal proceedings before the courts under review. There can be party to the proceedings through intervention or through the joinder of related appeals that are lodged against the same NRA decisions.

Conclusion and recommendations

With some exceptions, proceedings in the sectors and countries under review generally lead to several competitors being party to appeal proceedings.

The presence of several competitors in front of the review courts may lead to diverging consequences.

On the one hand, the review courts may receive additional information and knowledge about the regulated sectors through the arguments and evidence of several market participants. The courts may then have a broader and more balanced view of the consequences of the disputed issues.

On the other hand, this additional layer of arguments and exhibits may slow down the appeal proceedings because of the increased workload imposed on the courts. The presence of several competitors in the same proceedings also gives rise to issues regarding the protection of business secrets and commercially sensitive information.

Finally, there is a risk that the presence of several competitors turns the “public law” appeal proceedings against a NRA decision into a “private law” adversarial dispute between market players, so that the nature of the judicial review would be deviated from its role of ensuring that the rights of the market players have not been infringed by NRA decision that are subject to the appeals.

However, on the basis of the case law available, there does not seem to be any correlation between the number of firms that are party to the appeal proceedings and the way the appellate courts exercise the judicial review of the appealed decisions. The only consequences of the presence of several competitors in the appeal proceedings seems to be a potentially more comprehensive information of the court on the impact of the regulatory issues on the market, as well as an increased risk of lengthy proceedings and of arguments on access to the NRA file and protection of confidential information. It is our opinion that a thorough information of the review courts more than balances these potential adverse consequences of third-party interventions.

²⁰² Article 29*quater*, §4, of the Act of 29 April 1999; Article 15/21, §4, of the Act of 12 April 1965. The *Cour d'appel de Bruxelles* made use of this power in one case only, in order to bring the transmission system operator to the appeal proceedings that were lodged in relation to the conditions of access to the transmission grid (Bruxelles, 16 November 2006, 2006/AR/402).



CENTRE ON REGULATION IN EUROPE

Question 5: How do the appeals move forward from the day they are lodged till the day they are judged by the courts? What is the average length of the proceedings?

Considered as the period between the day of the appealed decision and the day of the judgment of the appellate court, the length of the court proceedings depends on (i) whether a preliminary objection must be lodged or a permission must be granted before the claimant may move forward with its appeal, (ii) how long is the deadline to appeal an NRA decision, (iii) how the filing of the written submissions, the production of evidence and the oral pleadings are organised, and (iv) how long the court takes to render its judgment. These four steps are discussed below.

Preliminary objections and permission requirement

Preliminary objections with the NRA are required in the Netherlands and in Germany.

In Dutch law, Article 7:1 of the *Awb* provides that the claimant must file an objection (*bezwaarschrift*) to the decision with the administrative body, before it may lodge a request for judicial review with an administrative court in case its objection is dismissed by the administrative body. However, article 7:1a allows the administrative body to allow that the appeal be immediately filed with the court if this suits the case. As an example, all judgments relating to fining decisions in the railway sector mention that the NMa allowed the appeal to be immediately filed before the *Rechtbank te Rotterdam* ²⁰³.

The objection procedure provided by Article 7:1 does not apply to the decisions of OPTA, which are subject to direct appeal before the *College van Beroep* ²⁰⁴.

To legally challenge a decision of the BNetzA regarding the sector of electronic communications, an action for rescission can be lodged before the *Verwaltungsgericht Köln*. Depending on the type of the decision of the BNetzA, an

²⁰³ Rb Rotterdam, 3 May 2010, AWB 08/5252, § 1; Rb Rotterdam, 3 May 2010, AWB 08/5253, § 1; Rb Rotterdam, 3 May 2010, AWB 08/5255, § 1.

²⁰⁴ Article 17.1, para. 3, of the *Tw*.

objection against the administrative act and following preliminary proceedings may be required before an appeal is filed. According to § 68 sec. 1 of the *VwGO*, prior to lodging an action for rescission, the lawfulness and expedience of the administrative act shall be reviewed within preliminary proceedings. The objection shall be lodged in writing or for the record of the authority which has carried out the administrative act. The *BNetzA* will therefore review the administrative act upon objection. In case the objection is unsuccessful, the action for rescission is possible.

However, according to §§ 132 and 137 sec. 2 of the *TKG*, preliminary proceedings are not required if the decision is rendered by a decision making body ("*Beschlusskammer*") of the *BNetzA*. In this case an appeal can be filed without preliminary proceedings.

In the UK, the court's leave is only required for judicial review claims before the High Court ²⁰⁵. The Court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates ²⁰⁶. This leave requirement does not necessarily delay the case when an urgent judgment is needed. In its single judgment in the railway sector, the High Court ordered that there should be a single hearing for both the application for leave and the substantive application for judicial review ²⁰⁷.

Deadline to appeal

In Belgium, the appeal period amounts to 30 days before the *Cour d'appel de Bruxelles* and the *Conseil de la concurrence* in the energy sector ²⁰⁸, 1 month in the railway sector ²⁰⁹ and 60 days in the sector of electronic communications ²¹⁰. The petition of appeal shall contain the subject matter of the appeal as well as a summary of the grounds of appeal.

²⁰⁵ Civil Procedure Rule 54.4.

²⁰⁶ Section 31 (3) of the Supreme Court Act 1981.

²⁰⁷ *Great North Eastern Railway Ltd v Office of Rail Regulation & Ors* [2006] EWHC 1942 (Admin) (27 July 2006).

²⁰⁸ Articles 29*quater*, § 2, and 29*quinquies*, § 2, of the Act of 29 April 1999; Articles 15/21, § 2, and 15/22, § 1, of the Act of 12 April 1965.

²⁰⁹ Article 66/2, para. 1, of the Act of 4 December 2006.

²¹⁰ Article 2, § 1, para. 1, of the Act of 17 January 2003.

The appeal period amounts to 60 days before the Conseil d'Etat ²¹¹. The application for judicial review shall contain the grounds of appeal.

In France, the appeal deadline before the Cour d'appel de Paris is 1 month as from the notification of the NRA decision ²¹². The declaration of appeal shall contain the subject matter of the appeal as well as a summary of the grounds of appeal ²¹³.

The application for judicial review before the Conseil d'Etat must be filed within the 2 months following the notification or the publication of the appealed decision ²¹⁴.

The appeal before the Oberlandesgericht Düsseldorf in the energy sector must be filed in writing within a deadline of 1 month upon service of the challenged decision ²¹⁵. The grounds of appeal must be provided within a one-month period beginning upon the filing of the appeal ²¹⁶.

An appeal to the Competition Appeal Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within 2 months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier ²¹⁷. The notice of appeal shall contain a concise statement of the facts, a summary of the grounds for contesting the decision, a succinct presentation of the arguments supporting each of the grounds of appeal, and the relief sought by the appellant ²¹⁸. The appellant may eventually amend its notice of appeal only with the permission of the Competition Appeal Tribunal ²¹⁹.

In the railway sector, the appeal deadline before the High Court is 42 days ²²⁰. It amounts to 3 months in the sector of electronic communications ²²¹.

²¹¹ Article 4, para. 3, of the Royal Decree of 23 August 1948.

²¹² Article L36-8, III, para. 1 of the Code of Posts and Electronic communications; Article 38, II, para. 1, of the Act no. 2000-108 of 10 February 2000; Article 16.III, para. 2, of the Act no. 2009-1503 of 8 December 2009.

²¹³ Article R11-3 of the Code of Posts and Electronic communications; Article 9 of the Decree no. 2000-894 of 11 September 2000; Article 11 of the Decree no. 2010-1023 of 1 September 2010.

²¹⁴ Article R421-1 of the Code of Administrative Justice.

²¹⁵ § 78 (1) of the *EnWG*.

²¹⁶ § 78 (3) of the *EnWG*.

²¹⁷ Rule 8 (1) of the Competition Appeal Tribunal Rules 2003, S.I. 2003 No. 1372. The Competition Appeal Tribunal may not extend this time limit unless the circumstances are exceptional (Rule 8[2]).

²¹⁸ Rule 8 (4) of the Competition Appeal Tribunal Rules 2003.

²¹⁹ Rule 11 (1) of the Competition Appeal Tribunal Rules 2003.

²²⁰ Sections 57 (1) and 57F (2) of the Railways Act 1993.

²²¹ Civil Procedure Rule 54.5.

Written submissions, evidence and oral pleadings

Before the *Cour d'appel de Bruxelles*, the lodging of the petition of appeal will summon the claimant and the NRA to appear at a first hearing, which will take place after a waiting period of at least 2 to 8 days. After this hearing, the court will order the deadlines for the filing of the written submissions and schedule the hearing for the oral pleadings ²²².

Before the *Conseil de la concurrence*, the proceedings will begin with a period of investigation by an auditor ²²³. After the filing of an investigation report by the auditor, the chairman of the *Conseil de la concurrence* will order the deadlines for the filing of the written submissions and schedule the hearing for the oral pleadings ²²⁴.

Before the *Conseil d'Etat* in Belgium, there are two 60-day deadlines for the filing of the written submission of the NRA and the filing of the claimant's reply brief. After the expiry of these deadlines, the auditor investigates the case and submits a report. Each party has a last 30-day deadline to submit its final submission. The president schedules then the hearing for the oral pleadings ²²⁵.

Before the *Cour d'appel de Paris*, the claimant must file a detailed explanation of its grounds of appeal within the month following the filing of its declaration of appeal ²²⁶. The first chairman of the court will then order the deadlines for the filing of the written observations of the parties and the NRA and schedule the hearing for the oral pleadings ²²⁷.

The *Conseil d'Etat* of France may rule that there is no need for submission of writings and evidence when the solution of the case already appears to be certain in view of

²²² Article 2, § 2, para. 6, of the Act of 17 January 2003; Article 29*quater*, § 6, para. 1, of the Act of 29 April 1999; Article 15/21, § 6, para. 1, of the Act of 12 April 1965; Articles 707, 747 and 1035 of the Judicial Code.

²²³ Article 29*quinquies*, § 1, of the Act of 29 April 1999; Article 15/22, § 1, of the Act of 12 April 1965; Articles 44 to 47 of the Act of 15 September 2006; *Conseil de la concurrence*, 12 December 2006, no. 2006-R/B-25, case MEDE-R/B-06/0011.

²²⁴ Article 80, § 2, para. 3, of the Act of 15 September 2006.

²²⁵ Articles 6 to 14 of the Royal Decree of 23 August 1948.

²²⁶ Article R11-3 of the Code of Posts and Electronic communications; Article 9 of the Decree no. 2000-894 of 11 September 2000; Article 11 of the Decree no. 2010-1023 of 1 September 2010.

²²⁷ Article R11-5, para. 2, of the Code of Posts and Electronic communications; Article 11, para. 2, of the Decree no. 2000-894 of 11 September 2000; Article 13, para. 2, of the Decree no. 2010-1023 of 1 September 2010.

the application ²²⁸. Apart from this situation, if the application for judicial review mentions the willingness of the applicant to file an additional submission (“*mémoire complémentaire*”), this submission must be filed within a three-month period as from the filing of the application ²²⁹. The *Conseil d’Etat* will then order the schedule for the filing of the other submissions ²³⁰.

In the German energy sector, after the appellant has filed the statement of claim, the defendant will file his statement of defence with the *Oberlandesgericht Düsseldorf*. Regularly the parties will exchange further written statements after the initial correspondence. In many cases the parties will request access to the records, which has to be granted by the regulatory authority under the premises of § 84 of the *EnWG*. The court will request the parties to complement relevant information (e.g. to complement insufficient statements, to bring forward the relevant evidence and to elaborate on issues in need of clarification etc.) according to § 82 of the *EnWG*.

According to § 81 sec. 1 of the *EnWG*, the case will be decided after oral pleadings. In accordance with the agreement of the involved parties, the case can be decided without oral pleadings.

In German electronic communications regulation, after the appellant has filed the statement of claim, the defendant will file his statement of defence with the *Verwaltungsgericht Köln*. Regularly the parties will exchange further written statements after the initial correspondence.

According to § 101 sec. 1 of the *VwGO*, the case will be decided after oral pleadings. In accordance with the agreement of the involved parties, the case can be decided without oral pleadings.

Before the Dutch courts, the defendant NRA must file its trial brief and send the relevant exhibits to the court within a four-week period after the lodging of the appeal

²²⁸ Article R611-8 of the Code of Administrative Justice.

²²⁹ Article R611-22 of the Code of Administrative Justice. This deadline may be shortened in case of urgency (Article R611-24).

²³⁰ Article R611-26 of the Code of Administrative Justice.

²³¹. If the court authorises the claimant to file a reply brief, it will order the deadlines for the filing of the written submissions for both parties ²³². The court also authorises the other parties (e.g. intervening third parties) to file one trial brief at least, and it orders the deadline for them to do so ²³³.

The court may then authorise the defendant NRA to amend a defect in the disputed decision within a certain period ²³⁴. If the authority amends its decision, the claimant must provide its opinion on the amendment within a four-week period ²³⁵.

The court informs the parties about the next stages of the proceedings within a new four-week period as from the expiry of the previous deadlines on amendment and opinion thereon ²³⁶.

In case of appeal before the Competition Appeal Tribunal, the Registrar of this Tribunal shall send a copy of the notice of appeal to the respondent who made the disputed decision ²³⁷. The respondent shall send to the Registrar a defence brief that shall be received within six weeks of the date on which the respondent received a copy of the notice of appeal from the Registrar ²³⁸. The request for leave to intervene must be sent by a third party to the Registrar within a period of three weeks after the publication of the notice about the appeal ²³⁹.

The Competition Appeal Tribunal may at any time, at a case management conference, pre-hearing review or otherwise, give such directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings, including as to the manner in which the proceedings are to be conducted and as to any time limits to be observed ²⁴⁰.

²³¹ Article 8:42 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²³² Article 8:43, para. 1, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²³³ Article 8:43, para. 2, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²³⁴ Article 8:51a, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²³⁵ Article 8:51a, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²³⁶ Article 8:51c, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²³⁷ Rule 13 of the Competition Appeal Tribunal Rules 2003.

²³⁸ Rule 14 (1) of the Competition Appeal Tribunal Rules 2003.

²³⁹ Rules 15 (2) (f) and 16 (2) of the Competition Appeal Tribunal Rules 2003.

²⁴⁰ Rule 19 (1) and (2) of the Competition Appeal Tribunal Rules 2003.

The Competition Appeal Tribunal may reject an appeal in whole or in part at any stage in the proceedings if it considers that the notice of appeal discloses no valid ground of appeal, that the appellant does not have a sufficient interest, that the appellant has habitually and persistently instituted vexatious proceedings, or that the appellant fails to comply with any rule, direction, practice direction or order of the Tribunal ²⁴¹.

When the appeals relate to specified price control matters, the Competition Appeal Tribunal shall refer these matters to the Competition Commission for determination of this matter. Subject to any directions given by the Competition Appeal Tribunal, the Competition Commission shall determine every price control matter within four months of receipt by them of the reference ²⁴². If a party challenges the determination of the Competition Commission, the Competition Appeal Tribunal will review this determination on the basis of the judicial review principles ²⁴³. There is no ground for such judicial review if there is no challenge from any party ²⁴⁴ or if such challenge is withdrawn ²⁴⁵.

In case of judicial review before the High Court, any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form not more than 21 days after service of the claim form ²⁴⁶. The High Court must then decide on whether permission to proceed is given to the claimant. The defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve detailed grounds and any written evidence within 35 days after service of the order giving permission ²⁴⁷.

²⁴¹ Rule 10 (1) of the Competition Appeal Tribunal Rules 2003.

²⁴² Rule 5 (1) of the Competition Appeal Tribunal Rules 2004.

²⁴³ [2009] CAT 11 (2 April 2009), §§ 21 and 22.

²⁴⁴ [2010] CAT 26 (20 September 2010), §§ 9 and 10.

²⁴⁵ [2010] CAT 23 (20 September 2010), §§ 6 to 8.

²⁴⁶ Civil Procedure Rule 54.8 (1) and (2) (a).

²⁴⁷ Civil Procedure Rule 54.14 (1).

Length of the proceedings

In Belgium, Article 770 of the Judicial Code provides that the *Cour d'appel de Bruxelles* shall render its judgment within the month following the oral pleadings. Although the breach of this provision may lead to disciplinary sanctions towards the judges in some circumstances, it is not often respected in practice.

Court	Sector	Average length
Belgium		
<i>Cour d'appel de Bruxelles</i>	electronic communications (28)	50 days on claims for suspension (5) ; 72 days for other interim judgments (11) ; 136 days on the merits (12)
	energy (30)	62 days on claims for suspension (3) ; 91 days for another interim judgment (1) ; 113 days on the merits (26)
<i>Conseil d'Etat</i>	energy (2 interim judgments)	33 days
<i>Conseil de la concurrence</i>	energy (1 interim judgment)	5 days
France		
<i>Cour d'appel de Paris</i>	electronic communications (8)	14 days on claims for suspension (1) 51 days on the merits (7)
	energy (14)	62 days on the merits
<i>Cour de cassation</i>	electronic communications (3)	30 days
<i>Conseil d'Etat</i>	energy (2)	10 days on claims for suspension
The Netherlands		
<i>College van Beroep</i>	electronic communications 2010 – 2011 (10)	11 days on claims for suspension (3); 197 days on the merits (7)
	energy 2010-2011 (8)	94 days
	railway transport (2)	84 days
<i>Rechtbank Rotterdam</i>	electronic communications	113 days

	2010 - 2011 (2)	
	railway transport (4)	136 days
Court	Sector	Average length
The United Kingdom		
Competition Appeal Tribunal	electronic communications (23)	27 days for interim judgments (14) 109 days on the merits (9)
	energy (1)	91 days
High Court	railway transport (1)	17 days
Court of Appeal	electronic communications (4)	109 days
	energy (1)	95 days

Average length of the proceedings

In the energy sector, it is provided that the *Cour d'appel de Bruxelles* shall render its judgment within the 60-day period following the filing of the petition of appeal²⁴⁸. This provision is not sanctioned, and it is not respected in practice.

The table below shows the average length of the proceedings that can be assessed on the basis of the judgments under review. It must be noted that these calculations have only been made on the basis of the judgments that ruled on the merits of the appeals, on applications for interim measures or on other disputed issues. It therefore does not take into account withdrawn cases and currently pending cases. This is therefore an incomplete assessment of the actual average length of the appeal proceedings, which do not take all appeals into account.

²⁴⁸ Article 29*quater*, § 6, para. 2, of the Act of 29 April 1999; Article 15/21, § 6, para. 2, of the Act of 12 April 1965.

Court	Sector	Average length
Belgium		
<i>Cour d'appel de Bruxelles</i>	electronic communications (62)	139 days on claims for suspension (7) 1 year 258 days for other interim judgments (20) 1 year 345 days on the merits (34) a further 1 year 272 days for preliminary ruling of the ECJ (1)
	energy (36)	143 days on claims for suspension (3) 1 year 193 days for another interim judgment (1) 1 year 64 days on the merits (32)
<i>Cour de cassation</i>	electronic communications (5)	2 years 220 days
	energy (4)	1 year 127 days
<i>Conseil d'Etat</i>	energy (1 case with interim judgments only)	6 years and 196 days until the preliminary ruling of the Constitutional Court
<i>Conseil de la concurrence</i>	energy (1 interim judgment)	1 year 11 days
France		
<i>Cour d'appel de Paris</i>	electronic communications (8)	91 days on claims for suspension (1) 224 days on the merits (7)
	energy (14)	264 days on the merits
<i>Cour de cassation</i>	electronic communications (3)	1 year 125 days
	energy (3)	1 year 18 days
<i>Conseil d'Etat</i>	electronic communications (22)	49 days on claims for suspension (2) 1 year 217 days on the merits (20)
	energy (7)	109 days on claims for suspension (2) 2 years 116 days on the merits (5)
Germany		
<i>Verwaltungsgericht Köln</i>	2009 average for all proceedings	282 days

<i>OBG Düsseldorf</i>	energy approx. average	248 days to 1 year 62 days
The Netherlands		
<i>College van Beroep</i>	electronic communications 2010 – 2011 (10)	211 days on claims for suspension (3); 1 year 348 days on the merits (7)
	energy 2010 – 2011 (8)	1 year 351 days
<i>Rechtbank Rotterdam</i>	electronic communications 2010 – 2011 (2)	1 year 344 days
Court	Sector	Average length
<i>Rechtbank Rotterdam</i>	railway transport (6)	1 year and 189 days 2 years and 352 days including further appeal to the <i>College van Beroep</i>
The United Kingdom		
Competition Appeal Tribunal	electronic communications (51)	334 days for interim judgments (35) 1 year 145 days on the merits in specified price control matters (including a 243-day referral to the Competition Commission) (4) 1 year 80 days on the merits in other matters (12)
	energy (3)	235 days for interim judgments (2) 433 days on the merits (1)
High Court	railway transport (1)	126 days
Court of Appeal	electronic communications (5)	1 year 83 days

Conclusion and recommendations

The appeal proceedings against NRA decisions do take some time (one year and a half on average for a judgment on the merits of the appeal, across the sectors and the jurisdictions under review). Such length can be explained and is probably unavoidable in view of the legal, technical and economic complexity of the subject matters of these appeals. There can therefore be no realistic hope to see the length

of the appeal proceedings be substantially reduced in all jurisdictions in the future. Of course, jurisdictions could be incentivized to search for measures to reduce the length of these proceedings if the maximum length was fixed in the relevant EU directives; such a measure, however, might be hard to defend from the point of view of subsidiarity.²⁴⁹

In view of the length of the appeal proceedings in all Member States, it is hopeful that only a few appealed decisions are suspended until the final determination of the appeal. However, this length puts increased focus on the retrospective and/or prospective effects of judgments that quash the appealed decisions.

When comparing the jurisdictions under review, Belgian courts do stand out for a significantly longer length of the proceedings, both the *Conseil d'Etat* (6 years and 196 days until a preliminary ruling of the Constitutional Court) and the *Cour d'appel de Bruxelles*. The situation is due to a huge backlog of pending cases before the *Conseil d'Etat* and to a poor number of judges of the *Cour d'appel de Bruxelles* that are assigned to such appeals.

The situation of the *Conseil d'Etat* is not a great source of concern in the sectors under review, since this court has almost lost all its jurisdiction in these sectors.

One must however worry about the fact that the proceedings before the *Cour d'appel de Bruxelles* are much more lengthy than the average. It amounts to one year and 209 days on average for the 66 judgments on the merits that have been reviewed, but this result does not take into account the fact that it took the same time (1 year and 255 days) for interim judgments to be rendered in 21 other cases. It also does not reflect the fact that a significant number of cases had to be argued again before a partially renewed panel of the *Cour d'appel de Bruxelles* because incidents in

²⁴⁹ It is worth noting that while EU law imposes strict deadlines for Commission decisions under the Merger Control Regulation and somewhat less strict deadlines for State aid review, it contains no deadlines for review proceedings before European courts. Most observers think that proceedings before European courts last too long to provide effective judicial protection in competition and regulatory cases.

another case that is not related to any NRA decision, led the composition of the 18th chamber of this court to be modified unexpectedly.²⁵⁰

These facts lead us to the statement that the small number of judges of the *Cour d'appel de Bruxelles* may be a weakness of this jurisdiction as review court of NRA decision. This limited allocation of human resources to the appeal proceedings against NRA decisions in Belgium contributes to additional delays of the proceedings. The situation could turn to be even more serious in the case where the *Cour de cassation* would quash a judgment of the 18th chamber of the *Cour d'appel de Bruxelles*. In such case, the review of NRA decision would have to be remitted to another chamber of the same *Cour d'appel*, which would be composed of judges that could be deprived of any experience on regulatory matters because of the exclusive first-stage jurisdiction provided to the 18th chamber. This too high concentration of decisional power gives thus rise to organisational problems, which cause substantial delays to the proceedings. We would therefore argue in favour of a regime where at least 2 chambers of the *Cour d'appel de Bruxelles* have competency to rule on appeals against NRA decisions, and potentially on other non sector-specific appeals if this is necessary for the management of the workload of the court.

²⁵⁰ See in the sector of electronic communications: Bruxelles, 31 March 2009, R.G. 2006/AR/45; Bruxelles, 31 March 2009, R.G. 2006/AR/186; Bruxelles, 31 March 2009, R.G. 2007/AR/3165; Bruxelles, 31 March 2009, R.G. 2007/AR/3166; Bruxelles, 2 April 2009, R.G. 2008/AR/213; Bruxelles, 7 April 2009, R.G. 2007/AR/2258. See in the energy sector: Brussel, 25 February 2009, R.G. 2008/AR/1115; Brussel, 16 March 2009, R.G. 2008/AR/1614; Bruxelles, 23 March 2009, R.G. 2008/AR/934; Brussel, 24 March 2009, R.G. 2007/AR/1445; Bruxelles, 2 April 2009, R.G. 2008/AR/1152.



CENTRE ON REGULATION IN EUROPE



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Question 6: Do the business secrets, professional secrets and other confidential information remain protected within the framework of the appeal proceedings? What is the impact of these appeal proceedings on the flow of information between the competitors in the market? For instance, in comparison to the number of appeals involving competitors, how many appeals lead to a competitor gaining additional information thanks to the appeal?

The EU Directives on electronic communications and energy provide that NRAs must protect confidential information and business secrets that firms provide them. Article 5, para. 3 and 4 of the Framework Directive 2002/21/EC provides that where information is considered confidential by a NRA in accordance with Community and national rules on business confidentiality, the NRA shall ensure such confidentiality, including when the NRA publishes information that would contribute to an open and competitive market. Article 37, para. 16, of the new Electricity Directive and Article 41, para. 16, of the new Gas Directive now provide that NRA decision shall be available to the public while preserving the confidentiality of commercially sensitive information. There is no such provision in the Directive 2001/14/EC in the railway sector.

In judgment of 13 July 2006 concerning electronic communications, the ECJ decided that the courts having jurisdiction to rule on appeals against NRA decisions also have the duty to preserve confidentiality. Indeed, this judgment stated that the body responsible for hearing an appeal against a NRA decision must have at its disposal all the information necessary in order to decide on the merits of the appeal, including, if necessary, confidential information which the NRA has taken into account in reaching the decision which is the subject of the appeal. However, that body must guarantee the confidentiality of the information in question whilst complying with the requirements of effective legal protection and ensuring protection of the rights of defence of the parties to the dispute ²⁵¹.

²⁵¹ ECJ, 13 July 2006, C-438/04.

In Belgium, the case law of the *Cour d'appel de Bruxelles* provides the rules on the preservation of confidential information in case of appeal proceedings in the sector of electronic communications. It is first the duty of the BIPT to decide which information is commercially sensitive and which information may be disclosed to all parties to the appeal proceedings²⁵². The BIPT shall then provide a confidential version and a non-confidential version of its whole file to the *Cour d'appel de Bruxelles*, as well as an inventory of this file to all parties to the proceedings²⁵³. In case of objection against the confidential nature of some documents, the court shall check whether the confidentiality of these documents must be preserved or not²⁵⁴. There is no case law of the *Cour d'appel de Bruxelles* on the preservation of confidential information in the energy sector, but it is likely due to the fact that only one firm is party to almost all appeal proceedings against the CREG's decision.

No issue of protection of commercially sensitive information appears to have been raised before the French courts.

German law provides for the protection of business and industrial secrets in case of appeals in the sectors of energy and electronic communications.

In the energy sector, while parties can generally request access to the records of the NRA according to § 84 sec. 1 of the *EnWG*, § 84 sec. 2 of the *EnWG* restrains this right if business or industrial secrets are concerned. Access to preliminary or supplementary files, opinions and disclosures is only to be granted in accordance with the agreement of the competent authority, which owns the requested files or which has requested the relevant information. As far as business or industrial secrets are concerned, the regulatory authority has to reject the request for access to the records. In this case, the decision of the *Oberlandesgericht Düsseldorf* can only be based on the concerned documents as far as their content has been brought forward.

However, the court can demand the disclosure of the concerned information if the party concerned by the disclosure has been heard, the judgment depends on the

²⁵² The BIPT implements the guidelines that are provided by its Communication of 24 March 2010 on the confidential treatment of secret information.

²⁵³ Bruxelles, 10 May 2007, 2004/AR/2962, § 3.

concerned information or documents, a clarification of facts is impossible without the concerned information, and the significance of the information outweighs the interest in confidentiality of the concerned party after a consideration of the relevant circumstances.

In the electronic communications sector, §§ 138 sec. 1 of the *TKG*, and 99 sec. 1 of the *VwGO* provide that administrative authorities shall be obliged to submit certificates or files, to transmit electronic documents and provide information. If the knowledge of the content of these certificates, files, electronic documents or this information would prove disadvantageous to the interests of the German Federation or of a *Land* (federal state), or if the events must be kept strictly secret in accordance with a statute or due to their essence, the *BNetzA* may refuse the submission of certificates or files, the transmission of the electronic documents and the provision of information.

According to § 138 sec. 2 of the *TKG*, on request by a party concerned, the *Verwaltungsgericht Köln* shall find by order whether the documents have to be submitted or whether they have to be kept confidential. As far as business or industrial secrets are concerned, the court can demand the disclosure of the concerned information if the judgment depends on the concerned information or documents, a clarification of facts is impossible without the concerned information, and the significance of the information outweighs the interest in confidentiality of the concerned party after a consideration of the relevant circumstances.

According to § 138 sec. 3 sentence 3 of the *TKG*, the members of the court are obliged to keep the concerned information confidential. The reasoning of the court shall not reveal the confidential information.

The examination by the *College van Beroep* of the exhibits that the *NMa* is required to communicate, may be restricted. If not all parties to the appeal allow the *College*

²⁵⁴ Bruxelles, 15 February 2008, 2006/AR/2756; Bruxelles, 21 September 2006, 2004/AR/2962.

van Beroep to found its judgment on such exhibits, the *College van Beroep* will not take knowledge of such documents ²⁵⁵.

Before the Competition Appeal Tribunal, a request for the confidential treatment of any document or part of a document filed in connection with proceedings may be made in writing by the person who submitted the document at the latest within 14 days after filing the document ²⁵⁶. In the event of a dispute as to whether confidential treatment should be accorded, the Competition Appeal Tribunal shall decide the matter, taking into account the need for excluding, so far as practicable, information the disclosure of which would be contrary to the public interest, commercial information the disclosure of which would or might significantly harm the legitimate business interests of the firm to which it relates, and information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests ²⁵⁷.

Ultimately, it is for the Competition Appeal Tribunal to balance the appellant's need to be able properly to conduct its appeal against the need to protect confidential information of other parties in the particular context of these proceedings. Since these proceedings are not *inter partes* litigation, the issue is not a matter of ensuring that parties are placed on an equal footing before the court. The usual practice of the Competition Appeal Tribunal is to ensure that confidential information is restricted to the circle of parties' external advisers ²⁵⁸. The Competition Commission adopts the Competition Appeal Tribunal's confidentiality circle as part of its procedure ²⁵⁹.

The Competition Appeal Tribunal publishes non-confidential versions of its determinations in which commercially confidential information is excised.

Where Ofcom is only in possession of redacted versions of some documents, the Competition Appeal Tribunal may request that the Competition Commission reviews

²⁵⁵ College van Beroep, 27 April 2009, AWB 07/525, § 1; College van Beroep, 27 April 2009, AWB 07/872 – AWB 07/873, § 1.

²⁵⁶ Rule 53 (1) of the Competition Appeal Tribunal Rules 2003.

²⁵⁷ Paragraph 1(2) of Schedule 4 to the Enterprise Act 2002; Rule 53 (3) of the Competition Appeal Tribunal Rules 2003.

²⁵⁸ [2009] CAT 37 (29 December 2009), §§ 3, 14 and 16.

²⁵⁹ CC, Case 1149/3/3/09 (31 August 2010), § 1.77.

the unredacted versions of these documents to determine their relevance and determine whether those documents should be disclosed to the parties ²⁶⁰.

The Competition Commission publishes non-confidential versions of its determinations in which commercially confidential information is excised.

Conclusion and recommendations

The laws of all the Member States that fall under the scope of this study provide rules protecting the confidentiality of business secrets and commercially-sensitive information as between competitors. A case law review suggests that the mechanisms in place are efficient enough to prevent the lodging of appeals that would be solely motivated by the wish to obtain secret information about a competitor and/or its business.

Whilst the laws of all Member States deliver on the protection of business secrets during appeal proceedings against NRA decisions, various regimes are in place to reach this goal. These regimes do not have the same impact in terms of scope of review by the court and infringement to the principle of adversarial proceedings. The available regimes can be divided into the three following categories.

In the first category, review courts are prevented from gaining knowledge of commercially-sensitive information (unless concerned parties allow it). This regime is applied in France, Germany and the Netherlands. The major disadvantage of this regime is that the confidentiality of business secrets may be an obstacle to the completeness of judicial review. On the other hand, the principle of adversarial proceedings appears to be safeguarded.

In the second category, the regime of protection does not prevent the review court from gaining knowledge of commercially-sensitive information, but prevents one or several parties to the proceedings from receiving this information. This regime is applied in Belgium, before the *Cour d'appel de Bruxelles*, the *Conseil de la concurrence* and the *Conseil d'Etat*. It has the major advantage of providing all

²⁶⁰ See CC, Case 1111/3/3/09 (31 August 2010), § 1.82.

relevant information to the review court, but it leads to technical difficulties, such as the need to provide non-confidential versions of confidential documents. More fundamentally, it gives priority to the scope of judicial review at the expense of full adversarial proceedings.

In the last category, the regime of protection does not prevent the review courts from gaining knowledge of commercially-sensitive information, and in addition it safeguards the rights of concerned parties by allowing their counsel (but not the parties themselves) access to the information in question. This regime is applied in the United Kingdom before the Competition Appeal Tribunal. It seems to reach a better balance between the protection of business secrets, the scope of the judicial review and the principle of adversarial proceedings. At the same time, such a regime places a great trust in the counsel of all parties involved, since they are entrusted with both the duty to protect confidential information coming from other parties and the task to protect and defend their clients' interests. While the UK regime would be the benchmark as regards the protection of confidential information and business secrets, it remains to be seen whether it can be transplanted in other Member States, where legal and other concerned professions might not be organized in the same fashion as in the UK.



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Question 7: Which issues are subject to review from the courts in appeal proceedings (facts, proceedings, substantive law and/or regulatory policies)? Are the claimants in appeal entitled to define the scope of the judicial review and to what extent? Is there a correlation between the scope of review and the percentage of judgments quashing appealed decisions?

In the sector of electronic communications, Article 4, §1, of the Framework Directive 2002/21/EC provides that Member States shall ensure that the merits of the case are duly taken into account by the appeal body. This provision can have many meanings:²⁶¹ on the one hand, it can mean that the appeal body cannot limit itself to a formal analysis and must examine the substance of the case (see also Question 10). This interpretation would be the natural one in a continental public law system on the French model. On the other hand, it can also be read to mean that the appeal body must consider the case in detail and should not limit itself to marginal review (see Question 8). This interpretation would fit in the context of English public law.

In Belgium, the relevant legal provisions state that appeals with “full review” (*pleine juridiction / volle rechtsmacht*) may be lodged against NRA decisions before the *Cour d’appel de Bruxelles*²⁶². This means that the court is entitled to review all factual, legal and policy issues relating to the appealed decisions²⁶³.

However, the appellants may limit the scope of the judicial review by leaving parts of the appealed decisions unattacked²⁶⁴. The court only reviews the grounds of appeal that are put forward by the appellant. Moreover, the grounds of appeal are inadmissible if they do not relate to the reasons given for the decision under appeal, or if they do not affect the appellant²⁶⁵. The court only reviews one ground of appeal when it is enough to quash the appealed decision. On appeals against tariffs

²⁶¹ Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM/2000/393 final - COD 2000/184, O.J. C 365 E , 19 December 2000, pp. 198 to 211.

²⁶² Article 2, § 1, of the Act of 17 January 2003; article 29*bis*, §2, of the Act of 29 April 1999; Article 15/20, §2, of the Act of 12 April 1965; Article 66/1, para. 2, of the Act of 4 December 2006.

²⁶³ Bruxelles, 27 October 2006, 2006/AR/543-2006/AR/1056, § 33.

²⁶⁴ Bruxelles, 27 June 2008, 2006/AR/468, § 54.

²⁶⁵ Bruxelles, 27 October 2006, 2006/AR/543-2006/AR/1056, §§ 51 and 52.

decisions, for instance, a successful ground of appeal relating to some part of the tariff calculation will suffice to lead to quashing the tariff decision of the NRA.²⁶⁶

The *Cour d'appel de Bruxelles* accepts to substitute its own reasoning to the reasoning of the NRA when it allows the dismissal of the appeal²⁶⁷.

There is no provision and no case law of the *Conseil de la concurrence* on the scope of its judicial review. It has however been claimed by legal scholars that the jurisdiction of the *Conseil de la concurrence* would be subject to the same rules as the one of the *Cour d'appel de Bruxelles*²⁶⁸.

The two *Conseils d'Etat*, in Belgium and in France, only review the lawfulness of the disputed decision. They quash decisions for lack of competence of the authority, formal failures, illegality or misuse of its legal powers by the authority. The *Conseil d'Etat* is entitled to review the facts the case, but it will only sanction the disputed decisions when the factual motivations do not exist, have been wrongly qualified or have been obviously misassessed by the authority.

The German courts review whether the administrative act is unlawful and if the plaintiff's rights have been violated²⁶⁹. The review of the lawfulness of the administrative act includes a review of the competence of the BNetzA for enacting the administrative act and the adherence to procedural standards (procedural legality), as well as a review of the substantive lawfulness and whether the administration has exercised its discretion without failure (substantive legality). Within this review, the court examines if there is any violation of higher-ranking provisions.

The courts will review the facts of the case comprehensively and conclusively regarding all relevant circumstances. This includes the facts, the proceedings, the substantive law as well as the regulatory policies. Nonetheless, the review courts are

²⁶⁶ Bruxelles, 14 September 2007, 2006/AR/3321-2007/AR/187, § 53.

²⁶⁷ Brussel, 10 November 2008, 2007/AR/214-2007/AR/1238-2007/AR/2113-2007/AR/2821, §§ 34 to 50.

²⁶⁸ P. Boucquey and P-O. de Broux, "Les recours juridictionnels contre les décisions des autorités de régulation", in X., *La protection juridictionnelle du citoyen face à l'administration*, Brussels, la charte, 2006, pp. 284 and 285, no. 80.

²⁶⁹ § 113 sec. 1 of the *VwGO*.

not compelled to investigate and validate each fact, unless there is sufficient reason to do so.

The parties are not supposed to be able to define the scope of the judicial review on their own motion. However, judicial inquiry is limited to a certain degree by the claim of the applicant²⁷⁰ and the pleadings of the parties to the proceedings.

Before Dutch courts, the scope of the judicial review is defined by the applicant. The applicant may limit its appeal with the *Rechtbank te Rotterdam* to a part of the appealed decision of the NMa²⁷¹. If the applicant fails on its claim, the *Rechtbank te Rotterdam* concludes that the Nma decision stands²⁷². The claimant may also limit its appeal with the *College van Beroep* to a part of the appealed judgment of the *Rechtbank te Rotterdam*²⁷³. However, the courts check *ex officio* the admissibility of the appeal²⁷⁴.

Within the limits of the appeal, the Dutch courts review the grounds of appeal and the evidence. They may *ex officio* raise additional legal grounds and complete the facts submitted by the parties²⁷⁵.

The Dutch courts also review the proportionality of the sanctions that were ordered by the NRAs²⁷⁶.

In the sector of electronic communications, the Competition Appeal Tribunal decides the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal²⁷⁷.

²⁷⁰ § 88 of the *VwGO*.

²⁷¹ Rb Rotterdam, 30 September 2009, AWB 08/3831 – AWB 08/3832, § 2.2 and 2.3 (complaint); Rb Rotterdam, 3 May 2010, AWB 08/5252, § 2 (penalty for late payment and fine).

²⁷² Rb Rotterdam, 3 May 2010, AWB 08/5252, § 3.1; Rb Rotterdam, 3 May 2010, AWB 08/5253, § 2.1; Rb Rotterdam, 3 May 2010, AWB 08/5255, § 9.1.

²⁷³ See *College van Beroep*, 27 April 2009, AWB 07/872 – AWB 07/873, § 5.3.15, which checks whether grounds of appeal are alleged against the decision of the appealed judgment based on Article 7 of the Directive 2001/14/EC.

²⁷⁴ *College van Beroep*, 27 April 2009, AWB 07/872 – AWB 07/873, § 5.2; Rb Rotterdam, 30 September 2009, AWB 08/3831 – AWB 08/3832, § 2.5.1.

²⁷⁵ Article 8:69 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²⁷⁶ Article 3:4, para. 2, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

²⁷⁷ Section 195 (2) of the Communications Act 2003.

Since this is an appeal on the merits, the Competition Appeal Tribunal is not concerned solely with whether the decision of Ofcom is adequately reasoned but also whether those reasons are correct ²⁷⁸.

However, the Competition Appeal Tribunal only examines the grounds of appeal that are set out in the notice of appeal. It would not be enough for the appellant to invite the Tribunal to consider the matter afresh as though the appealed decision had never been made. No one may expect the Tribunal to start *de novo* or to be in effect a duplicate of the regulator waiting to hear appeals ²⁷⁹. Where no errors are pleaded, the appealed decision will not be the subject of specific review ²⁸⁰.

The Competition Commission is required to determine questions relating to specified price control matters that have been identified by the referral order of the Competition Appeal Tribunal. In its determination, the Competition Commission sets out the main arguments and evidence put to it by the parties and determines whether Ofcom has erred for any of the reasons put to it. The role of the Competition Commission is not to conduct a completely fresh investigation into all aspects of the price control set by Ofcom. Rather it is to consider the specified price control issues raised by the appellants and determine those issues ²⁸¹. The Competition Commission does not extend its investigation beyond the scope of the referral order of the Competition Appeal Tribunal.

If the Competition Commission finds that Ofcom set the regulated tariff correctly notwithstanding a flaw in the methodology adopted, the Commission will answer to the Competition Appeal Tribunal that no error was disclosed. It will nonetheless be apparent from the reasons given by the Competition Commission that the Commission considers that Ofcom has adopted an incorrect approach or methodology ²⁸².

²⁷⁸ [2008] CAT 11 (20 May 2008), § 164.

²⁷⁹ [2008] EWCA Civ 1373 (12 December 2008), §§ 30 and 34.

²⁸⁰ [2010] CAT 17 (8 July 2010), §§ 73 and 76.

²⁸¹ [2008] CAT 23 (23 September 2008), § 2; [2008] CAT 10 (20 May 2008), § 55.

²⁸² CC, Case 1111/3/3/09 (31 August 2010), §§ 1.30 and 1.31.

The *High Court* only examines the grounds of appeal that are raised by the claimant

²⁸³

Conclusion and recommendations

There seems to be some converging and recurrent pattern in the appeal proceedings against NRA decisions across sectors and jurisdictions under review. Appellate courts are usually entitled to review all legal, factual and policy issues within the scope of the grounds of appeal that are put to them.

The regime applicable before the *Conseils d'Etat* in Belgium and in France, which only review the facts of the case through the prism of a limitative list of grounds of appeal such as the judicial review of legal qualifications and due reasoning, appears to be an exception to the more common pattern.²⁸⁴

It is open to question whether the duty of the review courts to examine the merits of the case, in European electronic communications regulation (Article 4 of the Framework Directive), has had the practical impact that was contemplated by the European legislature. This provision originally aimed at avoiding that NRA decisions be quashed on the sole basis of procedural failures while they were valid on their merits. Some judgments of the *Cour d'appel de Bruxelles* go in that direction, holding that the NRA decision cannot be quashed on a procedural ground (breach of the rights of defence) while the merits of the case still have to be examined by the review court. However, in view of the high percentage of quashing judgments from this court, the judgments mentioned here have had a limited impact.

In practice, the major consequence of a provision such as Article 4 of the Framework Directive seems to be to broaden the scope of judicial review. Since the new Directive 2009/140/EC maintains the same wording, it would seem that the EU institutions are satisfied with how Article 4 worked out in practice. Nevertheless, in the light of the developments in the previous paragraphs, there is still scope to make

²⁸³ [2006] EWHC 1942 (Admin) (27 July 2006), §§ 12 to 14.

²⁸⁴ At the same time, to the extent that such formal grounds include the illegality of the NRA decision, in practice any argument that the applicant might want to raise can be reframed in terms of legality.

Article 4 more precise, for instance by stating without ambiguity that that provision does not affect the standard of review (marginal or not), but rather only its scope (substance of the case and not merely formal issues). With such clarification, a provision such as Article 4 could be useful in other sectors as well; given the observed tendency to align the procedural regimes across sectors in each jurisdiction, however, Article 4 could produce effects in other sectors by analogy.

Finally, in the interest of effective enforcement and efficient review proceedings, it seems that it would be preferable to restrict the scope of review to those issues which have been brought before the review courts by the parties.



CENTRE ON REGULATION IN EUROPE



CENTRE ON REGULATION IN EUROPE

Question 8: Which means are available to the courts in view of investigating the market conditions and the regulatory issues? Do the courts only rely on the file of the NRA and on the arguments and/or exhibits of the parties? Or do the courts also rely on own powers of investigation, economic staff and/or experts? Is there a correlation between the extent of the court powers of investigation and the percentage of judgments quashing appealed decisions?

The EU Directives do not contain specific provisions about the powers of investigation of the review courts. Article 4 of the Framework Directive in the sector of electronic communications only provides that the review courts shall have the appropriate expertise to carry out their functions effectively ²⁸⁵.

All the appellate courts under review appear to have investigating powers available.

The *Cour d'appel de Bruxelles* may appoint experts, hear witnesses and parties and require the parties or third people to produce relevant documents ²⁸⁶. These powers of investigation may be used at the request of a party or *ex officio* ²⁸⁷. In the energy sector, the *Cour d'appel de Bruxelles* has never made use of its powers of investigation, and only relied on the file of the CREG and the exhibits of the parties.

The German courts investigate the facts *ex officio* ²⁸⁸. Therefore, they are not bound to the submissions and to the motions for the taking of evidence of those concerned. The principle of judicial investigation does not oblige the appellate courts to investigate the facts of the case instead of the BNetzA. In general, it is therefore up to the BNetzA to investigate the facts.²⁸⁹ Nevertheless, the appellate courts can decide independently whether the facts brought forward by the BNetzA suffice. In case the appellate courts consider further investigations appropriate, they can fully investigate on their own and hear authorised experts or economic staff during the process.

²⁸⁵ The word "effectively" is added by the Directive 2009/140/EC.

²⁸⁶ Articles 877 to 882 and 915 to 1004 of the Judicial Code.

²⁸⁷ Article 871 of the Judicial Code.

The Dutch courts may hear witnesses, appoint experts and require the parties to file information, declarations and/or documents ²⁹⁰.

The Competition Appeal Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give directions requiring persons to attend and give evidence or to produce documents. It may also give directions as to the evidence which may be required or admitted in proceedings, as to the submission in advance of a hearing of any witness statements or expert reports, as to the examination or cross-examination of witnesses, as to the disclosure between, or the production by, the parties of documents or classes of documents, as to the appointment and instruction of experts, whether by the Tribunal or by the parties, and as to the manner in which expert evidence is to be given ²⁹¹. The Tribunal may, in particular, of its own initiative put questions to the parties, invite the parties to make written or oral submissions on certain aspects of the proceedings, ask the parties or third parties for information or particulars, ask for documents or any papers relating to the case to be produced, summon the parties' representatives or the parties in person to meetings ²⁹².

The Tribunal Rules impose no restriction on the evidence that can be adduced in support of a notice of appeal, but they entitle the Competition Appeal Tribunal to exclude evidence ²⁹³ where (for example) evidence is unrelated to the notice of appeal, proves to be unnecessary or duplicative, or relates to a point or argument that was deliberately declined by the appellant during the course of the dispute resolution process before the regulator ²⁹⁴.

The Competition Commission receives the financial models that were used by Ofcom in setting the price control, as well as written arguments and evidence from the parties, including witness evidence given at hearings. The Commission issues

²⁸⁸ § 82 of the *EnWG* ; § 86 of the *VwGO*.

²⁸⁹ § 68 sec. 1 of the *EnWG* ; § 128 of the *TKG*.

²⁹⁰ Articles 8:27 to 8:34, 8:46 and 8:47 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*. If the disputed decision is a fine, the claimant may not be required to provide declarations (Article 8:28° of the *Awb*).

²⁹¹ Rule 21 (2) of the Competition Appeal Tribunal Rules 2003.

²⁹² Rule 21 (3) of the Competition Appeal Tribunal Rules 2003.

²⁹³ Rule 22 (2) of the Competition Appeal Tribunal Rules 2003.

²⁹⁴ [2010] CAT 17 (8 July 2010), §§ 61 and 88.

requests where it considers it needs further information. Before rendering its final determinations, the Commission issues provisional determinations and holds remedies hearings in order to receive views and comments from the parties ²⁹⁵. According to the Competition Appeal Tribunal, the Competition Commission is much more proactive than itself in identifying the issues it considers most relevant and in seeking information it needs from the parties ²⁹⁶.

Despite its proactive behaviour, the Competition Commission still rules that it is for a party asserting that the appealed decision is wrong to bear the burden of establishing its case ²⁹⁷.

Before the High Court, any person may apply for permission to file evidence, or to make representations at the hearing of the judicial review ²⁹⁸.

Conclusion and recommendations

All the proceedings under review allow investigating measures, which can be ordered at the request of the parties or *ex officio* by the courts.

However, the available case law suggests that these investigating measures are scarcely used in practice (except by the Competition Commission in the UK sector of electronic communications) and that the courts often rely only on the evidence that is put to them by the NRA and the parties. This might find its explanation in the fact that the NRA file should be the result of extensive investigation of the market conditions, and that the market players that are party to the appeal proceedings provide a great deal of additional information to the appellate courts. In case of insufficient investigation of the market conditions, most review courts also have the opportunity to quash the appealed decision and to remit the matter with the NRA for a new determination.

It is therefore suggested that there is no actual need to increase the investigation powers of the review courts.

²⁹⁵ CC, Case 1111/3/3/09 (31 August 2010), §§ 1.77 and 5.7.

²⁹⁶ [2009] CAT 37 (29 December 2009), § 15.

²⁹⁷ CC, Case 1111/3/3/09 (31 August 2010), § 1.72.

²⁹⁸ Civil Procedure Rule 54.17 (1).



CENTRE ON REGULATION IN EUROPE

Question 9: What are the standards of review by the courts in relation to the merits of the appealed decisions of the regulators (full review or marginal review)? Do the courts (have to) leave some discretionary power to the regulators? Is there a correlation between the standards of review and the percentage of judgments quashing appealed decisions?

The ECJ rendered one judgment related to the standards of review that must be implemented by the national appeal bodies in the sector of electronic communications. On 24 April 2008, the ECJ stated that EU law does not lay down any rule requiring the Member States to enforce a specific standard of judicial review with respect to NRA decisions.²⁹⁹ There is no such case law in the energy and railway sectors.

The *Cour d'appel de Bruxelles* exercises full review on all issues where the NRA has no margin of assessment³⁰⁰. All issues for which the NRA benefits from a margin of assessment are only subject to a marginal review of the court³⁰¹. More precisely, the court reviews the compliance with the rules governing procedure and the statement of reasons, as well as the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers. The judicial review of factual issues verifies not only whether the evidence put forward is factually accurate, reliable and consistent but also determines whether that evidence contains all the relevant data that must be taken into consideration in appraising the situation and whether it is capable of substantiating the conclusions drawn from it³⁰².

The German courts have the capacity to fully review all facts of the case and decide on the lawfulness of the administrative act. However, this principle is limited where

²⁹⁹ ECJ, 24 April 2008, *Arcor AG & Co. KG v Bundesrepublik Deutschland*, Case C-55/06, European Court reports 2008, page I-2931. The ECJ mentions other aspects as well where Member States were said to enjoy procedural autonomy, but this autonomy has been curtailed through Directive 2002/21, which was enacted after the facts which underpinned the *Arcor* case.

³⁰⁰ See on network losses of a distribution system operator: Brussel, 12 November 2007, 2007/AR/191, §§ 24 to 35.

³⁰¹ See the same judgment of 12 November 2007 on equitable margin of a distribution system operator: §§ 36 to 42. See also Bruxelles, 14 September 2007, 2006/AR/3321-2007/AR/187, §§ 29 to 32.

³⁰² Bruxelles, 30 June 2009, 2006/AR/2332-2006/AR/2628-2006/AR/2629-2007/AR/3394-2008/AR/425-2008/AR/427, § 41; Brussel, 30 September 2008, 2007/AR/213-2007/AR/1237-2007/AR/2001-2007/AR/2823, § 25; Bruxelles, 9 May 2008, 2005/AR/1028, §§ 50 et 51.

the administrative authority is granted discretion. While courts are able to consider all facts of the case and interpret indefinite legal terms, the administrative authority has the final authority to adjudicate in these certain cases. It has to be noticed though, that the limits of the scope for discretion are disputed. As a bottom-line it can be held, that indefinite legal terms shall not be sufficient to grant the administrative authority the final authority to adjudicate. Rather, the interpretation of the provisions in question has to lead to the assumption that the law provides for an independent final judgment of the administrative authority. If this is the case, the court does not have the power to interfere with the decision. However, according to § 114 of the *VwGO*, the court shall examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment. The *Verwaltungsgericht Köln* tends to assign a rather wide discretion to the BNetzA.

In case of appeal against fining decisions, the *Rechtbank te Rotterdam* reassesses whether the infringement is established by the evidence available³⁰³, and whether the amount of the appealed fine is in line with the proportionality principle that is laid down in Article 3:4, para. 2, of the *Awb*. In its proportionality control, the court takes all circumstances of the case into account, including the complexity of the legal duties and the impact of the infringement on the other firms of the sector³⁰⁴.

The Competition Appeal Tribunal considers that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner.³⁰⁵ However, it is not for the Tribunal to usurp Ofcom's decision-making role. The Tribunal's role is not to make a fresh determination, but only to review whether Ofcom committed the errors of fact, the errors of law and/or the wrong exercise of discretion that were alleged in the notice of appeal³⁰⁶.

³⁰³ Rb Rotterdam, 3 May 2010, AWB 08/5255, §§ 6.1 to 6.6.

³⁰⁴ Rb Rotterdam, 3 May 2010, AWB 08/5252, §§ 7.1 and 7.2; Rb Rotterdam, 3 May 2010, AWB 08/5253, §§ 5.1 and 5.2; Rb Rotterdam, 3 May 2010, AWB 08/5255, §§ 12.1 and 12.2.

³⁰⁵ [2008] CAT 11 (20 May 2008), § 164.

³⁰⁶ [2010] CAT 22 (8 July 2010), §§ 76 and 77.

The way in which the Tribunal exercises its jurisdiction is likely to be affected by the particular circumstances under consideration. The Tribunal should be slow to interfere where errors of appreciation are alleged, as opposed to errors of fact or law. Depending on particular circumstances, there may be a number of different approaches which Ofcom could reasonably adopt in arriving at its determination. To that extent, the Tribunal may be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case ³⁰⁷. However, it is still incumbent on Ofcom to conduct its assessment with appropriate care, attention and accuracy so that its results are soundly based and can withstand the profound and rigorous scrutiny of the Tribunal.³⁰⁸

The Competition Commission submits the price control matters subject to appeal to a rigorous and thorough scrutiny ³⁰⁹. However, the Competition Commission bears in mind the nature of the tasks, their difficulty, and the degree of judgment required of Ofcom, as well as the fact that Ofcom is a specialist regulator whose judgment should not be readily dismissed ³¹⁰.

The Competition Commission does not hold Ofcom to be wrong unless an error in reasoning is sufficiently important to vitiate Ofcom's decision on the point in whole or in part ³¹¹. The Commission identifies whether Ofcom's decision has been shown to be *materially* in error. Materiality is considered on a case-by-case basis at three stages of the Competition Commission's decision making process. First, the Commission will find that Ofcom made no error if the effort that Ofcom would have had to expend to satisfy the appellant's criticisms would have been disproportionate to the likely change that it would make to the regulated tariff. Secondly, Ofcom will not be held to have erred in setting the tariff where any error of fact or approach did not have a material effect on the regulated price set, when assessing the value of each error found. Third, the Commission considers materiality when deciding

³⁰⁷ [2008] CAT 12 (20 May 2008), § 82.

³⁰⁸ [2008] CAT 22 (18 September 2008), § 46.

³⁰⁹ CC, Case 1111/3/3/09 (31 August 2010), § 1.26.

³¹⁰ CC, Case 1111/3/3/09 (31 August 2010), §§ 1.32 and 1.66.

³¹¹ CC, Case 1149/3/3/09 (31 August 2010), § 1.29.

whether it is proportionate for the error to be corrected and looks at this stage at the balance between the effort and effect (or cost and benefit) of correcting such error.

Where a ground of appeal relates to a claim that Ofcom has made a factual error or an error of calculation, it may be relatively straightforward to determine whether it is well founded. Where, on the other hand, a ground of appeal relates to the broader principles adopted or to an alleged error in the exercise of a discretion, the matter may not be so clear. In a case where there are several alternative solutions to a regulatory problem with little to choose between them, the Competition Commission would not determine that Ofcom erred simply because it took a course other than the one that the Commission would have taken. If, out of the alternative options, some clearly had more merit than others, the Commission may more easily say that Ofcom erred if it chose an inferior solution. The Commission will only substitute its opinion where it holds that there is good reason to prefer an alternative approach to that relied on by the regulator. This is to be decided by the Commission on a case-by-case basis ³¹².

In its single judgment in the railway sector, the *High Court* submitted ORR's decision on track access charge to a marginal review. Given the ORR's expertise in this highly technical field, the Court held that it could not impugn ORR's view unless it would be unreasonable. It is no part of the Court's function to substitute its own view on matters of economic judgment or "second guess" an economic judgment made by the ORR. Since the ORR must achieve a number of objectives, some of which tend to point in different directions, ORR is conferred a very wide discretion as to the manner in which it deals with applications in relation to track access agreements ³¹³.

³¹² CC, Case 1111/3/3/09 (31 August 2010), § 1.32.

³¹³ *Great North Eastern Railway Ltd v Office of Rail Regulation & Ors* [2006] EWHC 1942 (Admin) (27 July 2006), §§ 39, 40, 44, 50 and 53.

Conclusion and recommendations

Although there are some differences between the standards of review of the various appellate courts, one can state a broad tendency towards a distinction between a full review of errors of law, a broad review of errors of fact (except by the *Conseils d'Etat* in Belgium and in France) and a marginal review of the exercise of discretion by the NRA.

Such approach deserves support, since the NRAs are specialist authorities and most review courts are not equipped to reconstruct the exercise of regulatory powers in an efficient way.



CENTRE ON REGULATION IN EUROPE

Question 10: Do the courts usually apply a formal analysis of the regulatory issues or do they rely on a substantive approach to economic regulation? Is there a correlation between the kind of court analysis and the percentage of judgments quashing appealed decisions?

By way of working definition, the analysis remains formal where the issues are settled on the mere basis of the legal rules and categories, for instance: did the NRA stay within the boundaries of its competence, did it correctly apply a given legal definition, etc. In contrast, a substantive analysis discusses the legal categories in the context of economic reality (background, consequences) and will naturally incorporate some measure of economic analysis. In practice, it is far from obvious to distinguish between a formal and a substantive analysis. The formal analysis indeed appears as a preliminary step of the substantive analysis, so that formal rules and categories should always be present in the reasoning of the review courts ³¹⁴.

The *Cour d'appel de Bruxelles* applies a formal analysis in its judgments. This is evidenced by the case law of the court on how amortization costs should be taken into account in the tariffs of distribution system operators for electricity and natural gas. In a first stage of the case law, the court ruled that amortization costs should be accepted by the CREG as they are mentioned in the annual accounts of the operators, since operators do not benefit from any derogation from the accounting rules.³¹⁵ At a later stage, the court ruled that the CREG was not bound by accounting rules and had the power to review the amount of amortization costs of a distribution system operator ³¹⁶. This change of case law was not motivated by a change of policy of the CREG or the *Cour d'appel de Bruxelles*. It was only justified by a new judgment of the ECJ according to which NRAs have the power to review the

³¹⁴ P. Reis, "Les méthodes d'interprétation, analyse formelle, analyse substantielle et sécurité juridique", in X., *Sécurité juridique et droit économique*, Larcier, Brussels, pp. 190 and 191.

³¹⁵ Brussel, 2 July 2007, 2007/AR/1239, §§ 12 to 16; Brussel, 5 March 2007, 2006/AR/576, §§ 26 to 49; Brussel, 27 February 2007, 2006/AR/570, §§ 28 to 51.

³¹⁶ Brussel, 30 September 2008, 2007/AR/213-2007/AR/1237-2007/AR/2001-2007/AR/2823, §§ 26 to 40.

methodology and calculation of amortization costs of operators in the sector of electronic communications ³¹⁷.

The court also applies a formal analysis when it rules that a distribution system operator's legal duty to manage costs does not allow the CREG's policy to impose a reduction of costs ³¹⁸.

On the other hand, there are some issues where the *Cour d'appel de Bruxelles* applies a more substantive approach, like when the court acknowledges the legitimacy of the billing of ancillary services by the transmission system operator with regard to the technical situation of the sector ³¹⁹.

The *Cour de cassation* only applies a formal analysis.

In Germany, the starting point for the courts decision is the written German law; the courts are strictly bound by law. It is the courts' task to interpret the relevant provisions and to subsume the facts of the case to the relevant statutory provisions. While interpreting the provisions, the courts are free to consider the economic context as long as this interpretation is covered by law.

The Competition Appeal Tribunal applies a formal analysis for the purpose of constructing EU or domestic legislation. As an example, the Competition Appeal Tribunal used formal arguments to rule that the proper meaning of the EU law requirement to "make available" the 900MHz and 1800MHz bands for UMTS systems by 9 May 2010, is that harmonisation measures had to be put in place by 9 May 2010 to ensure that these bands were available to be authorised for use with this technology, but not that the network operator had a directly effective right to the removal of the conditions in its licences limiting the use of these bands to GSM technology ³²⁰.

³¹⁷ *Ibid.*, § 23.

³¹⁸ Bruxelles, 18 December 2007, 2007/AR/194-2007/AR/1143-2007/AR/1927, §§ 37 to 42.

³¹⁹ Bruxelles, 16 November 2006, 2006/AR/402, §§ 31 to 33.

³²⁰ [2010] CAT 25 (7 October 2010).

On the other hand, the Competition Appeal Tribunal applies a substantive analysis for the purpose of reviewing the proportionality, in terms of costs and benefits, of decisions where a number of different approaches could be reasonably adopted ³²¹.

The Competition Commission applies a substantive analysis of policy issues relating to price control matters. This was the case when the Commission ruled that Ofcom's task was to apply an efficiency target that would incentivize the network operator to bring its costs in line with those of an efficient operator, rather than to set targets closely aligned with the actual savings that this operator proposes to make ³²². The Commission also performed a substantive analysis when it ruled that Ofcom did not err by adopting an approach that took greater account of productive efficiency considerations than allocative or dynamic efficiency considerations ³²³.

In its single judgment in the railway sector, the High Court first adopts a formal analysis by stating that the question is not whether the ORR's approach makes good sense in terms of transport economics, but whether it is compliant with the Railways Infrastructure (Access and Management) Regulations 2005. The court then chooses to adopt a purposive approach to the interpretation of these Regulations, with regard to their intended aim to implement the Directive 2001/14/EC, to the policies which are applied by the ORR when considering track access applications, as well as to the conditions of the market, which is heavily dependant on government subsidy. On such basis, the Court holds that franchised operators and open access operators are competitors in the same broad market for rail passenger services but that they play very different roles. In view of the whole regime of access to this market, the Court rules that there is no discrimination nor State aid from ORR when it imposes a fixed track charge on the franchised operator only ³²⁴.

³²¹ [2008] CAT 22 (18 September 2008), §§ 46 and 50 to 127.

³²² CC, Case 1111/3/3/09 (31 August 2010), § 2.165.

³²³ CC, Case 1149/3/3/09 (31 August 2010), §§ 3.176 to 3.179.

³²⁴ Great North Eastern Railway Ltd v Office of Rail Regulation & Ors [2006] EWHC 1942 (Admin) (27 July 2006), §§ 44 to 90.

Conclusion and recommendations

This question is not an easy one to answer in all jurisdictions, since the reasons for judgment in many cases are based on formal reasons, such as the lack of competency of the NRA, rather than on an analysis of the policy issues.

However, one can observe some divergence between specialised bodies such as the Competition Appeal Tribunal and the Competition Commission on the one hand, and the other courts on the other hand. The first are more used to submit the policy issues to a substantive analysis, while the latter seem reluctant to move away from the formal analysis.

In our view, it might be argued that a model of substantive analysis best suits the appeal proceedings against NRA decisions, provided that the judicial review is limited to a marginal review on issues where the NRA enjoys discretion. On the one hand, such regime would allow a complete judicial review of all aspects of the regulatory power exercised by the NRA and is likely to enhance the quality of the *ex ante* regulatory process as well as the confidence in the NRA decisions. On the other hand, it would acknowledge the structural differences between NRAs and review courts and the impossibility for review courts to act as substitutes for NRAs.



CENTRE ON REGULATION IN EUROPE



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Question 11: Which recourses are available to the Courts to ensure that their decisions are coordinated with other court decisions across the EU and across sectors? In comparison to the number of court judgments, how many rely on foreign case law and/or case law from other sectors? Is there a correlation between the reliance on foreign case law or on case law from another sector, and the percentage of judgments quashing appealed decisions?

Very few recourses are available to the review courts to ensure that their decisions are coordinated with other court decisions across the EU and across sectors.

A cross-sector approach within the same Member State is encouraged when the same court has jurisdiction to rule on the appeals against various NRAs. However, this does not guarantee that the reasoning of such court will be perfectly aligned across sectors. For instance, the *Cour d'appel de Bruxelles* sometimes applies different reasonings to a similar issue in the energy and electronic communications sectors.

In one energy case, the *Cour d'appel de Bruxelles* relied on the case law of the ECJ in electronic communications. On the basis of the *Arcor* judgment of 24 April 2008, the *Cour d'appel de Bruxelles* ruled that the CREG has the power to review the calculation and the methodology of amortization costs of distribution system operators, in the same way as the NRAs in the sector of electronic communications

³²⁵ .

As far as other jurisdictions are concerned, review courts seem to be relying on the parties' invoking foreign case law, given the dearth of available databases.³²⁶ Among the cases reviewed here, very few judgments invoke decisions from the courts of other Member States.

³²⁵ Brussel, 30 September 2008, 2007/AR/213-2007/AR/1237-2007/AR/2001-2007/AR/2823, § 23.

³²⁶ See in the sector of electronic communications:
http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/eu_consultation_procedures/national_judiciaries/index_en.htm

In Germany, a certain synchronisation of the enforcement of European law is achieved through the case law of the ECJ. Otherwise it is rather unlikely that a German court will significantly rely on foreign case law.

In the railway sector, the available case law shows no recourse of the Dutch courts and the High Court to foreign case law or case law from other sectors.

Conclusion and recommendations

According to the available case law, the review courts in the various jurisdictions scarcely refer to case law from other jurisdictions and/or other sectors. When they did, such case law had often been put before them by the parties.

Yet as was seen previously, the Member States reviewed here have moved to streamline the review of NRA decisions by using the same procedure and the same review court across sectors, and by introducing a specialized review court (UK) or dedicating resources within the review court (elsewhere). Accordingly, it would be a small step only to bring the review courts from the various Member States in contact with one another to give them the benefit of sharing their experience and benchmarking their solutions. In addition to the existing European networks of regulators, now being further developed into BEREC (electronic communications) and ACER (energy), courts active in the competition law sector have already formed a pan-European network, the Association of European Competition Law Judges (<http://www.aeclj.com/>). The AECLJ could provide a useful model for a similar network of review courts in network industry regulation.

In this regard, Article 1.4 of the Directive 2009/140/EC brings a welcome improvement in the sector of electronic communications. This provision inserts an Article 4, para. 3, into the Framework Directive, which provides that Member States shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. Member States shall provide such information to the Commission and BEREC after a reasoned request from either.

A coherent and complete case-law database seems a first step that is required to ensure that the efforts toward a coherent implementation at the NRA level are not quashed by a lack of communication at the court level.



CENTRE ON REGULATION IN EUROPE

Question 12: What are the powers of the courts to rule on the regulatory issues themselves? May the court judgments regulate the market on some topics or must they refer them to the regulators if the appealed decisions are annulled? What is the impact of a “regulating power” of the courts? For instance, in comparison to the number of judgments quashing appealed decisions, how many judgments regulate thereafter the market in another way than what was decided by the NRA?

In Belgium, the *Cour d’appel de Bruxelles* will only substitute its judgment to an invalidated appealed decision (i) if the NRA is legally bound to adopt such decision so that it has no margin of assessment ³²⁷, (ii) if the Court has enough information to render a substituting judgment ³²⁸, and (iii) if the substituting decision falls under the scope of the legal competence of the NRA ³²⁹, and respects all formalities that are applicable to the taking of such decision ³³⁰, including the procedures of preliminary consultation and cooperation between regulators within the European Union ³³¹. According to the available case law, there were few cases where the *Cour d’appel de Bruxelles* substituted its judgment to the appealed NRA decision.

If one of these three conditions is not fulfilled, the *Cour d’appel de Bruxelles* will only quash the decision with retroactive effect. In this case, the NRA may (have to) render a new decision that is in line with the quashing judgment ³³², except if the judgment holds that there is a legal reason that prevents the NRA from taking any valid decision, e.g. lack of competence because of invalidity of the enabling legislative provision ³³³, that there was no reason for the NRA to impose the payment of a

³²⁷ Brussel, 14 September 2010, 2010/AR/114, §§ 30 and 31; Bruxelles, 2 February 2007, 2005/AR/656-2005/AR/1152-2006/AR/548-2006/AR/549-2006/AR/550; Bruxelles, 25 October 2005, 2004/AR/668, § 45.

³²⁸ Bruxelles, 27 October 2006, 2006/AR/543-2006/AR/1056, § 34.

³²⁹ Bruxelles, 12 May 2006, 2004/AR/174, § 60.

³³⁰ Bruxelles, 16 March 2006, 2004/AR/738; Bruxelles, 15 October 2004, 2003/AR/1664, §§ 34 à 42.

³³¹ Bruxelles, 18 June 2004, 2003/AR/2249, §§ 65 and 66.

³³² Brussel, 5 March 2007, 2006/AR/576, § 52; Brussel, 27 February 2007, 2006/AR/570, § 66.

³³³ Bruxelles, 4 September 2007, 2006/AR/3247. In other cases, the Court refers the matter to the NRA even if the regulatory framework is held to be invalid (Brussel, 26 November 2009, 2008/AR/3202; Bruxelles, 15 October 2009, 2009/AR/169).

contribution by a firm ³³⁴, or that there was no legal basis for the imposition of an administrative fine ³³⁵.

If the NRA renders a new decision that is not in line with the quashing judgment, the new decision may itself be quashed for breach of *res judicata* ³³⁶.

In case of tariffs in the energy sector, the Articles 20 of two Royal Decrees of 2 September 2008 on tariffs ³³⁷ provide that the operator must submit a new tariff proposal to the CREG. If the CREG does not rule on this new proposal within a period of 60 calendar days, the tariffs proposal is accepted. If the CREG decides that it is not able to take a stand on the new proposal the *Cour d'appel de Bruxelles* will substitute its judgment and accept the tariffs proposal ³³⁸.

In the sector of electronic communications, Article 14, § 2, 6°, of the Act of 17 January 2003, which was inserted by a Act of 18 May 2009, provides that the BIPT may re-adopt the appealed decision with retroactive effect if it respects the grounds for annulment and if it is necessary for the implementation of the main objectives of the Act on electronic communications.

The *Cour d'appel de Bruxelles* may not order penalties for late performance in its judgments that quash appealed decisions ³³⁹.

The *Cour de cassation* may only quash the judgments of the *Cour d'appel de Bruxelles* for breach of Act.

The *Conseil d'Etat* may only quash the appealed decisions. However, it may order penalties for late performance.

³³⁴ Brussel, 20 July 2009, 2007/AR/1445, where the Court orders the CREG to reimburse the contribution that was paid by the firm. See also Brussel, 20 July 2009, 2008/AR/3235, where the Court orders the CREG to reimburse provisionally 80% of the contribution to the firm while the CREG must take a new decision after the quashing judgment.

³³⁵ Bruxelles, 11 February 2010, 2008/AR/1152.

³³⁶ Brussel, 29 June 2010, 2009/AR/14, § 26; Bruxelles, 7 January 2010, 2009/AR/2257, § 18; Bruxelles, 7 January 2010, 2009/AR/2260, § 17.

³³⁷ These Royal Decrees have been confirmed with retroactive effect by Articles 41 and 42 of a Act of 15 December 2009, *M.B.*, 23 December 2009, p. 80.840, which entered into force on 2 January 2010.

³³⁸ Brussel, 22 September 2010, 2010/AR/636; Bruxelles, 22 September 2010, 2010/AR/610.

³³⁹ Brussel, 30 September 2008, 2007/AR/213-2007/AR/1237-2007/AR/2001-2007/AR/2823, § 54.

In France, the appeals against the decisions on dispute resolutions may aim at the quashing of the decisions (“*annulation*”) or at having the Court substitute its own judgments to the appealed decisions (“*réformation*”) ³⁴⁰.

The *Conseil d’Etat* may substitute its judgment to the disputed decision in case of application for judicial review against sanctions ³⁴¹. It is only entitled to quash the other disputed decisions.

According to § 83 of the *EnWG* and § 113 of the *VwGO*, the German courts will dismiss the case, quash the decision of the BNetzA or oblige the BNetzA to adopt a certain decision. The courts therefore have the power to decide whether a regulatory decision was valid or not; however, they cannot exert regulatory powers and proceed to decide themselves. The reason for this is the separation of powers, prescribed in Art. 20 of the German Constitution. This basic principle of German constitutional state is repeated in § 1 of the *VwGO*. In case a review court finds that the BNetzA’s administrative act was invalid, it will rather oblige the BNetzA to reform its act in accordance with the court’s directions.

If Dutch courts allow the appeal, they quash the disputed decision, in whole or in part. The court then remits the decision under appeal to the NRA with the duty to comply with the judgment, or substitute for the decision, in whole or in part, its own judgment ³⁴². The court substitutes its judgment to the disputed decision in all cases of appeals against administrative fines ³⁴³.

The court may also impose penalties for late performance ³⁴⁴, a.o. in case they acknowledge an appeal for late decision-making of the NRA ³⁴⁵.

³⁴⁰ Article L36-8, III, para. 1, of the Code of Posts and Electronic communications; Article 38, II, para. 1, of the Act no. 2000-108 of 10 February 2000; Article 16.III, para. 2 of the Act no. 2009-1503 of 8 December 2009.

³⁴¹ Article L311-4, 3°, 9° and 10°, of the Code of Administrative Justice.

³⁴² Article 8:72, para. 1 to 4, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

³⁴³ Article 8:73, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

³⁴⁴ Article 8:72, para. 7, of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

³⁴⁵ Articles 4:16 to 4:20 of the *Awb*; Article 19, para. 1, of the *Wet bestuursrechtspraak bedrijfsorganisatie*.

In the sector of electronic communications, the Competition Appeal Tribunal's decision must include a decision as to what (if any) is the appropriate action for Ofcom to take in relation to the subject-matter of the decision under appeal. The Tribunal then remits the decision under appeal to Ofcom with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision. Ofcom must comply with every direction of the Tribunal ³⁴⁶.

When the Competition Appeal Tribunal rules that Ofcom should seek anew the views of the industry on the issue subject to appeal, such as the best way of implementing number portability, it remits the whole matter to Ofcom for reconsideration ³⁴⁷. Apart from this situation, the Tribunal remits the disputes to Ofcom with clear directions, such as to the rates which should be set between the parties, rather than remitting the disputes more generally to Ofcom to carry out a further investigation ³⁴⁸. If necessary, the Tribunal allows the parties to supplement the existing evidence before the Tribunal with any contemporaneous evidence on which they seek to rely to justify a change in price ³⁴⁹.

In case of referral of specified price control matters, the directions of the Competition Commission should settle the question of what the price control should be for the period covered by Ofcom's appealed statement. While it is acknowledged that it might not always be possible for the Competition Commission to set an alternative regulated tariff, the appeal should result in a revised tariff being finalized without delay and avoid a situation where some issues require substantial further work and the exercise of judgment by Ofcom ³⁵⁰.

The Court of Appeal has recently rendered a ruling on the question whether the Competition Appeal Tribunal may direct Ofcom to impose revised price controls on a retrospective basis (i.e. in respect of a period that has already elapsed when the revisions come into effect) or only on a prospective basis (i.e. in respect of the unelapsed period of the appealed statement on price control). The Competition

³⁴⁶ Section 195, (3), (4) and (6) of the Communications Act 2003.

³⁴⁷ [2008] CAT 22 (18 September 2008), § 159.

³⁴⁸ [2008] CAT 19 (15 August 2008); [2008] CAT 12 (20 May 2008), § 190.

³⁴⁹ [2008] CAT 12 (20 May 2008), § 194.

Appeal Tribunal had found that its powers should extend to the correction of Ofcom's error for the whole of the period of price control (on a retrospective basis) because otherwise it would not be able to give effect to its decision ³⁵¹. However, the Court of Appeal allowed the appeal against this judgment and ruled in the opposite direction. The Court decided in its 20 April 2010 judgment that the directions of the Competition Appeal Tribunal are circumscribed by Ofcom's ordinary powers and that Ofcom only has the power to amend an existing SMP condition with prospective effect ³⁵².

As a matter of example, one of the latest judgments of the Competition Appeal Tribunal was rendered on an appeal against an Ofcom decision of 22 May 2009 setting out a regulated tariff for the period from 19 June 2009 until 31 March 2011, i.e. a period covering 1 year and 285 days. After a determination by the Competition Commission on 31 August 2010, the Competition Appeal Tribunal ruled on the appeal on 11 October 2010: it upheld some grounds of appeal and thereby remitted the matter to Ofcom, directing Ofcom to adopt a revised tariff for the unelapsed period, i.e. a period covering only 171 days at the time of judgment ³⁵³.

In the energy sector, the Energy Act 2010 will provide the Competition Appeal Tribunal with considerable flexibility to uphold the original order, set it aside, remit the appealed matter to Ofgem, or substitute the Tribunal's own final or provisional order (all possibilities being available against the whole or only part of the original order). ³⁵⁴ In case of appeals against penalties, the Competition Appeal Tribunal will have even broader remedial powers. It will be entitled to uphold the penalty, set it aside the penalty, substitute a penalty of an amount decided by the Tribunal, or vary any date by which the penalty, or any part of it, is required to be paid ³⁵⁵. The decision of the Tribunal will have the same effect as, and may be enforced in the same manner as, a decision of the Ofgem. ³⁵⁶

³⁵⁰ [2008] CAT 5 (18 March 2008), §§ 15 and 16; CC, Case 1111/3/3/09 (31 August 2010), § 1.22.

³⁵¹ [2009] CAT 11 (2 April 2009), § 67; [2009] CAT 1 (22 January 2009), §§ 42 and 46.

³⁵² [2010] EWCA Civ 391 (20 April 2010), §§ 34 to 40.

³⁵³ [2010] CAT 26 (11 October 2010).

³⁵⁴ Section 20 (3) and (4) of the Energy Act 2010.

³⁵⁵ Section 21 (3) of the Energy Act 2010.

³⁵⁶ Section 21 (7) of the Energy Act 2010.

In case of judicial review proceedings, the High Court may make mandatory, prohibiting and quashing orders as well as certain forms of declaration and injunction.³⁵⁷

The Court may make a quashing order in respect of the decision to which the claim relates. The court may then remit the matter to the decision-maker and direct it to reconsider the matter and reach a decision in accordance with its judgment, or in so far as any enactment permits, substitute its own decision for the decision to which the claim relates³⁵⁸.

The High Court may make a declaration or grant an injunction in any case where an application for judicial review, seeking that relief, has been made and the Court considers that, having regard to the nature of the matters, the nature of the persons and bodies against whom relief may be granted, and all other circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be³⁵⁹.

In case of application against penalties or orders requiring the payment of a sum in the railway sector, the High Court has broader powers. The Court may indeed, if satisfied that the ground of appeal is established, quash the penalty or the order, make a provision substituting a penalty or a sum of such lesser amount as the court considers appropriate in all the circumstances of the case, or make a provision substituting the date by which the penalty or the sum is to be paid³⁶⁰.

Conclusion and recommendations

It is on this last question that the laws of the Member States seem to diverge the most.

In most jurisdictions, the review courts are only entitled to quash the appealed decisions and they are not allowed to substitute their judgments to such decisions.

³⁵⁷ [2008] EWCA Civ 1373, § 17.

³⁵⁸ Civil Procedure Rule 54.19.

³⁵⁹ Section 31 (2) of the Supreme Court Act 1981.

³⁶⁰ Sections 57 (2B) and (2C) and 57F (4) and (5) of the Railways Act 1993.

The quashing judgments have retroactive effect, meaning that the quashed decisions of the NRA are deemed never to have been made.

The situation of the Competition Appeal Tribunal is exceptional in this regard. It is entitled to issue precise directions that must be complied with by Ofcom, and its judgments only have prospective effect.

Both regimes have pros and cons. They can be considered in terms of theoretical models, protection of the rights of the market players and coherent regulation of the market.

Ex tunc or retroactive annulment

The power of the review court to quash the appealed decisions with retroactive effect is in line with a public law litigation model, where the applicant claims that the impugned administrative act was invalid from the time of its enactment and where a successful appeal therefore invalidates such act *ex tunc* (retroactively). In some Member States, there are strong dogmatic arguments in favour of the *ex tunc* or retroactive model. They are essentially based on the rule of law: administrative authorities are not entitled to enact illegal orders nor to impose illegal obligations upon citizens. Without ignoring these considerations, our analysis cannot be pre-empted by any theoretical standpoint arising from one or the other national legal system. The mere fact that other Member States within the EU have chosen another path shows that it is possible to have an *ex nunc* model within a constitutional order committed to the rule of law. As with other questions, our analysis takes a more functional comparative approach.

The *ex tunc* or retroactive model seems at first sight to offer the applicants a better protection of their rights. If the NRA enacted an invalid decision, the effects of that decision are made undone retroactively. It is interesting to look at what that theoretical position would imply, however.

The implications vary depending on the nature of the remedial action ordered by the NRA in the original case. We can distinguish between (i) the imposition of fines, (ii)

the regulation of prices or tariffs and (iii) the imposition of an obligation to give access to facilities.

A *fine* can be reimbursed, if necessary with interest (to the extent that the appeal did not suspend the payment of the fine, see above under Question 2).

Decisions imposing a *regulated price* are already more troublesome. We presume here that the regulated price was fixed at too low a level by the NRA in the original decision. In principle, following a retroactive annulment, either a new regulated price should be fixed or perhaps the price would end up not being regulated at all. If the price in question is a *retail price*, presumably the regulated firm could be allowed to adjust its price upwards in a subsequent period, so as to recover its losses. This is not a very attractive proposition from a commercial perspective. If the price in question is a *wholesale price*, then the applicant should in theory be allowed to recover from its wholesale clients (most likely its competitors); at the same time, if the market was competitive, then the wholesale clients passed on the low access price to their own customers. Furthermore, from a regulatory policy perspective, allowing an operator to temporarily overcharge at wholesale level – even for the sake of undoing the effects of an invalid decision – would undermine the objective of maintaining and if possible promoting competition on the regulated markets.

Finally, decisions ordering *wholesale access to be offered* (where it was not previously or was not planned to be offered) are even more problematic, given that they also require the regulated firm to divert resources to implementing the access obligation and thereby to incur opportunity costs.

Of course, if losses cannot be recovered through market mechanisms, it is also possible to turn against the NRA by way of State liability for the losses incurred during the period in which an invalid NRA decision had to be complied with. At a theoretical level, there is a gap between State liability and judicial review: the mere fact that a decision of a State organ or agency is invalid does not imply that the State is liable for damages. Indeed most legal systems submit State liability to additional conditions, such as that the State organ or agency had committed a “sufficiently

serious breach” or “manifestly disregarded its powers”.³⁶¹ In practice, even if State liability was available, the budget of the NRA itself will often not be sufficient for the payment of any ensuing damages. Holding the State liable for the NRA, while it might guarantee recovery, would cast a shadow on NRA independence.

In the end, the *ex tunc* model might therefore not deliver much satisfaction to the aggrieved firm, beyond the declaration that the NRA decision was invalid.

From a broader social perspective of efficient regulation, the *ex tunc* model carries a risk of ineffective regulation, if NRA decisions have to be frequently undone. It also increases the incentive for regulated firms to lodge an appeal, if they can hope for a retroactive unwinding of an NRA decision in addition to any prospective advantage. Furthermore, while the appeal is pending, the regulated firm would have an incentive to keep its compliance effort (including investments) at the lowest possible level that allows it to claim that it is complying with the decision, by way of speculation on its further quashing.³⁶² Belgian law recently tried to address this issue by providing in Article 14, § 2, 6°, of the Act of 17 January 2003, that the BIPT may adopt the invalidated decision anew with retroactive effect, if the BIPT respects the grounds for annulment and if re-adoption is necessary for the implementation of the main objectives of the Act on electronic communications. No case law is available for the moment about the retroactive effect of the decision that reinstates a quashed decision. However, this system may create a “snowball effect” since the re-adopted decision of the BIPT may itself be subject to appeal before the *Cour d’appel de Bruxelles*.

³⁶¹ To use the terminology of EU law, as regards the liability of the EU or its Member States for breaches of EU law: see ECJ, 4 July 2000, Case C-352/98 P, *Bergaderm v. Commission* [2000] ECR I -5291. Member State laws are often also structured so as to put some distance between the legality of administrative decisions and the liability of the State: see W. van Gerven et al., *Tort Law* (Oxford: Hart Publishing, 2000), Chapter 3, Heading 3.3.

³⁶² It must be borne in mind that, as discussed above under Questions 1 and 2, regulated firms can generally be held liable for non-compliance with NRA decisions, and appeals against NRA decisions have no suspensive effect. If remedies on appeal are strictly prospective or *ex nunc*, regulated firms have little incentive to shirk on compliance (considering the potential liability for non-compliance). If remedies on appeal are retroactive or *ex tunc*, then firms have a counterbalancing incentive to shirk on compliance, if they can invoke retroactive invalidity to defend against non-compliance (unless they can fully recover all compliance costs, which is problematic, as set out in the main text).

Ex nunc or prospective remedies only

The power of the review court to substitute its judgment, without retroactive effect – or the closely related power to issue directions to the NRA on remit – is more in line with the usual nature of private law appeals, where the judgment in first instance defines the rights of the parties pending the appeal and the judgment of the appellate court is only enforceable *ex nunc* (prospectively).

At the outset, it should be pointed out that the *ex tunc* annulment also produces effects *ex nunc*. The issue is rather whether the consequences of the decision of the review court should be prospective *only*.

The *ex nunc* model seems at first sight to deprive the appellants of a part of the protection to which they are entitled for their rights. However, in its judgment of 20 April 2010, the UK Court of Appeal expressly mentioned that it did not rule on the question whether the appellant would benefit from other causes of action (i.e. liability) that would allow it to recover compensation for the damage it suffered over the elapsed part of the regulatory period. Should the appellant have such a supplemental cause of action, this would be subject to the same issues of practical implementation as in the *ex tunc* model discussed above. For the sake of argument, we assume that the applicant is left with no retroactive remedy whatsoever, i.e. that it must accept the past consequences of an NRA decision subsequently found invalid, even if they were detrimental to the applicant's interests.

The *ex nunc* model implies that the NRA is granted an “off-limit” zone, free from judicial control, in the period that will have elapsed between its original decision and the decision of the review court at the end of the appeal proceedings. This could significantly reduce the incentive for the NRA to adopt justified, valid and reasonable decisions in order to stand the test of judicial review. This is not desirable; yet the potential for the NRA to game the process depends on a number of factors covered in previous questions, such as the duration of appeal proceedings (Question 5) and the parameters of judicial review (scope (Question 7), standard (Question 9)). A shorter duration of appeal proceedings, for instance, reduces both any incentive of the NRA to misuse its powers and the impact of any such misuse.

Beyond that, one could argue that judicial review is not the only tool available for enhancing the quality of NRA decisions. Rather than relying on *ex post* judicial review, one might think of designing better *ex ante* processes, with extensive consultation and discussion with all market participants, with a view to reaching decisions that could be considered as fair and balanced by most firms. In that case, the risk attached to the *ex nunc* approach – giving an ‘off-limit’ zone to NRAs – would be minimized.

Conclusion

In a nutshell, it is difficult to choose between the *ex tunc* or the *ex nunc* model, i.e. to decide whether the remedies granted by review courts should have retroactive effect or not. As was apparent from the above, this issue is linked with most of the other issues discussed previously.

One could think of leaving it to the review court to decide, on a case-by-case basis, whether its remedy should have retroactive effect or should be prospective only. However, this intermediate solution does not seem to be desirable since it increases legal uncertainty about the outcome of the appeal proceedings for both the regulators and the appellants.

Nevertheless, in the end, it seems that, from a pragmatic perspective, (i) retroactive remedies on appeal can prove to be illusory, considering that applicant might not in practice be able to recoup losses incurred while appeal proceedings are pending and (ii) the risk that the NRA misuses its powers if appeal remedies are not retroactive can be contained through other measures (reducing the length of appeal proceedings, improving the quality of NRA decisions *ex ante*). On balance, looking at the issue from a social welfare perspective, it would seem preferable not to give retroactive effect to appeal remedies, i.e. to take an *ex nunc* approach.



CENTRE ON REGULATION IN EUROPE

General conclusions

From our study of the 12 questions above, the following recommendations emerge as to the best practices for the enforcement and review of NRA decisions.

Enforcement of NRA decisions. It is preferable to give NRAs the power to impose penalties directly for failure to comply with their own decisions (as opposed to a power to act against breaches of the regulatory framework, which would comprise their own decisions).

Stay of NRA decisions during appeal proceedings. An appeal against an NRA decision should have no automatic or systematic suspensive effect, with the possible exception of appeals against NRA decisions ordering the payment of fines. As compared to the situation some years ago, concerns for the effectiveness of regulation, stemming from excessive use of stays of enforcement, seem to have abated.

Nature of review court. Member States should allocate the review of NRA decisions to a specialist court (or a specialist body within an existing court). We recommend a horizontal, cross-sector approach in designing the review regime, such that a single court would be responsible across the various sectors, in order to maximise the chances of cross-fertilisation and synergies between sectors.

Standing and third-party intervention. Standing to appeal against an NRA decision should be granted to all parties who are affected by the decision, subject perhaps to a requirement that the party has participated in the proceedings before the NRA. Third parties whose interests are affected should be able to join review proceedings. The NRA itself should appear before the review court in order to defend its decision. As long as the review court has the ability to join related proceedings, the study shows that the conduct of proceedings has not been significantly affected by the presence of multiple parties.

Length of proceedings. In general, review proceedings take long: in observable cases, the average duration has been close to a year and a half. An EU-level

benchmark norm on duration might be envisaged. Some Member States do not commit enough resources to the handling of the appeal proceedings; in particular, enough qualified judges should be available.

Confidential information and business secrets. That information is well protected in all Member States, although procedures vary. The best practice is to allow the review court to gain knowledge of the information, which is then shared with a restricted circle of counsel for the parties to the case, without being available to the parties themselves.

Scope of review. Review courts should be entitled to review all factual, legal and policy issues, as long as the parties to the case brought these issues before the court.

Investigating powers. Since the NRA file is usually quite extensive and the parties provide the NRA with comprehensive submissions, review courts have not been using much of their current investigating powers in practice. There is no need to increase such powers.

Standard for review. All review courts should use the same standard for review, namely a full review of issues of law, a broad review of the errors of fact and a marginal review of the exercise of discretion by the NRA.

Formal or substantive analysis. If marginal review is the standard, where the NRA enjoys discretion, substantive analysis would best suit review proceedings. In any event, multiple-stage review (because a review of the substance would be pre-empted by a first stage of formal review) should be avoided.

EU-level coordination. Cross-fertilisation is lacking as between the various sectors and the various jurisdictions under study. A complete and coherent case-law database on NRA review should be established, and the various Member State courts discharging the review of NRA decisions should be regrouped in a European association, on the model of the Association of European Competition Law Judges.

Retroactive effect of remedies upon review. It is difficult to choose between the *ex tunc* and *ex nunc* models, i.e. to decide whether the remedies granted by review courts should have retroactive effect or not. On balance, leaving aside dogmatic considerations arising from one or the other national legal system, it would be preferable, from a pragmatic perspective, not to give retroactive effect to the remedies granted by the review court (be it quashing of the NRA decision or substitution of a new decision by the review court).

It must be underlined that these questions are interrelated, so that for instance the risks linked with not giving retroactive effect to the remedies granted by the review court would be minimized by a shorter duration of review proceedings.



CENTRE ON REGULATION IN EUROPE

Appendix: lists of reviewed judgments

1 Electronic communications

1.1 Belgium

Cour d'appel de Bruxelles

- Bruxelles, 18 June 2004, R.G. 2003/AR/2249 (interconnection)
- Bruxelles, 14 October 2004, R.G. 2003/AR/2463 (number portability)
- Bruxelles, 15 October 2004, R.G. 2003/AR/1664 (interconnection)
- Bruxelles, 15 February 2005, R.G. 2005/AR/296 (provisional measure)
- Bruxelles, 18 March 2005, R.G. 2005/AR/588 (provisional measure)
- Bruxelles, 7 April 2006, R.G. 2005/AR/296 – 2005/AR/588 (provisional measure)
- Bruxelles, 15 September 2005, R.G. 2004/AR/2216 (interconnection)
- Bruxelles, 14 October 2005, R.G. 2003/AR/2339 (reference offer)
- Brussel, 25 October 2005, R.G. 2004/AR/668 (access to NRA file)
- Bruxelles, 9 December 2005, R.G. 2004/AR/174 (reference offer)
- Bruxelles, 16 March 2006, R.G. 2004/AR/738 (reference offer)
- Bruxelles, 12 May 2006, R.G. 2004/AR/174 (reference offer)
- Bruxelles, 15 June 2006, R.G. 2004/AR/2657 (reference offer)
- Bruxelles, 16 June 2006, R.G. 2004/AR/1249 (publication of financial reports)
- Bruxelles, 16 June 2006, R.G. 2004/AR/1777 (reference offer)
- Bruxelles, 16 June 2006, R.G. 2005/AR/707 – 2005/AR/756 (appointment of expert by NRA)
- Bruxelles, 22 June 2006, R.G. 2005/AR/3300 (duty to submit information to NRA)
- Brussel, 30 June 2006, R.G. 2003/AR/2474 (interconnection)

- Bruxelles, 21 September 2006, R.G. 2004/AR/2962 (reference offer)
- Bruxelles, 21 September 2006, R.G. 2005/AR/3114 (duty to submit information to NRA)
- Brussel, 4 October 2006, R.G. 2005/AR/38 (interconnection)
- Bruxelles, 4 October 2006, R.G. 2005/AR/63 (interconnection)
- Bruxelles, 20 October 2006, R.G. 2006/AR/1339 (reference offer)
- Bruxelles, 27 October 2006, R.G. 2006/AR/2332 – 2006/AR/2628 – 2006/AR/2629 (market analysis)
- Bruxelles, 14 December 2006, R.G. 2004/AR/3047 (reference offer)
- Bruxelles, 14 December 2006, R.G. 2004/AR/3048 (reference offer)
- Bruxelles, 2 February 2007, R.G. 2005/AR/656 – 2005/AR/1152 – 2006/AR/548 – 2006/AR/549 – 2006/AR/550 (access to NRA file)
- Bruxelles, 23 March 2007, R.G. 2004/AR/3047 (reference offer)
- Bruxelles, 10 May 2007, R.G. 2004/AR/2962 (reference offer)
- Bruxelles, 11 May 2007, R.G. 2004/AR/3048 (reference offer)
- Bruxelles, 1 June 2007, R.G. 2006/AR/2154 (market analysis)
- Bruxelles, 21 June 2007, R.G. 2005/AR/2331 (universal service)
- Bruxelles, 21 September 2007, R.G. 2004/AR/1777 (reference offer)
- Bruxelles, 23 October 2007, R.G. 2005/AR/1251 (reference offer)
- Brussel, 15 February 2008, R.G. 2005/AR/38 (interconnection)
- Bruxelles, 15 February 2008, R.G. 2005/AR/63 (interconnection)
- Bruxelles, 15 February 2008, R.G. 2006/AR/2756 (market analysis)
- Bruxelles, 15 February 2008, R.G. 2006/AR/2763 (market analysis)
- Bruxelles, 15 February 2008, R.G. 2006/AR/2764 (market analysis)
- Brussel, 15 February 2008, R.G. 2006/AR/2765 (market analysis)
- Bruxelles, 15 February 2008, R.G. 2007/AR/931 (market analysis)
- Bruxelles, 4 April 2008, R.G. 2007/AR/3394 (market analysis)
- Bruxelles, 9 May 2008 (reference offer)

- Bruxelles, 11 June 2008, R.G. 2008/AR/425 – 2008/AR/427 (market analysis)
- Bruxelles, 27 June 2008, R.G. 2006/AR/468 (reference offer)
- Bruxelles, 12 November 2008, R.G. 2006/AR/2484 (reference offer)
- Bruxelles, 23 December 2008, R.G. 2008/AR/2877 (reference offer)
- Bruxelles, 23 March 2009, R.G. 2006/AR/3416 (reference offer)
- Bruxelles, 7 May 2009, R.G. 2008/AR/787 (market analysis)
- Bruxelles, 19 May 2009, R.G. 2007/AR/302 (reference offer)
- Bruxelles, 30 June 2009, R.G. 2006/AR/2332 – 2006/AR/2628 – 2006/AR/2629 – 2007/AR/3394 – 2008/AR/425 – 2008/AR/427 (market analysis)
- Bruxelles, 20 July 2009, R.G. 2008/AR/3162 (license)
- Bruxelles, 22 September 2009, R.G. 2008/AR/3257 (license)
- Bruxelles, 6 October 2009, R.G. 2006/AR/2823 (reference offer)
- Bruxelles, 15 October 2009, R.G. 2007/AR/930 (market analysis)
- Bruxelles, 25 February 2010, R.G. 2008/AR/2211 (reference offer)
- Bruxelles, 1 April 2010, R.G. 2009/AR/1497 (license)
- Bruxelles, 22 April 2010, R.G. 2008/AR/2211 (reference offer)
- Brussel, 7 September 2010, R.G. 2009/AR/1871 (universal service)
- Bruxelles, 14 September 2010, R.G. 2010/AR/2003 (market analysis)
- Bruxelles, 15 February 2011, R.G. 2010/AR/2003 (market analysis)

Cour de cassation

- Cass., 12 April 2007, R.G. C.04.466.F – C.05.44.F (interconnection)
- Cass., 23 April 2009, R.G. C.06.296.F (reference offer)
- Cass., 12 October 2007, R.G. C.06.654.F (publication of financial report)
- Cass., 4 December 2009, R.G. C.08.72.F (market analysis)
- Cass., 19 March 2010, R.G. C.08.48.F (reference offer)

1.2 France

Cour d'appel de Paris

- C.A. Paris, 30 May 2006, n° 2005/24129 (settlement of disputes)
- C.A. Paris, 12 September 2006, n° 2006/7121 (settlement of disputes)
- C.A. Paris, 30 January 2007, n° 2006/7964 (settlement of disputes)
- C.A. Paris, 3 April 2007, n° 2006/11319 (settlement of disputes)
- C.A. Paris, 26 May 2009, n° 2008/16665 (settlement of disputes)
- C.A. Paris, 30 June 2009, n° 2008/22440 (settlement of disputes)
- C.A. Paris, 3 February 2011, n° 2010/24436 (settlement of disputes)

Cour de cassation

- Cass. comm., 12 December 2006, n° 1429 FS-P+B (settlement of disputes)
- Cass. comm., 4 November 2008, n° 1137 F-D (settlement of disputes)
- Cass. comm., 14 December 2010, n° 1320 FS-P+B (settlement of disputes)

Conseil d'Etat

- C.E., 17 March 2006, n° 289403 (sanction)
- C.E., 31 March 2006, n° 291497 (license)
- C.E., 30 June 2006, n° 289564 (license)
- C.E., 10 July 2006, n° 274455 (universal service)
- C.E., 4 October 2006, n° 289337 (sanction)
- C.E., 24 November 2006, n° 289915 (license)
- C.E., 29 December 2006, n° 288251 (market analysis)
- C.E., 25 April 2007, n° 279262 – 279275 (universal service)
- C.E., 25 April 2007, n° 282138 – 282187 (universal service)
- C.E., 25 April 2007, n° 284275 – 285969 (universal service)
- C.E., 25 April 2007, n° 288902 – 288903 (universal service)
- C.E., 25 April 2007, n° 290019 (universal service)

- C.E., 25 April 2007, n° 287528 (market analysis)
- C.E., 16 November 2007, n° 298941 (license)
- C.E., 19 May 2008, n° 311197 (market analysis)
- C.E., 19 January 2009, n° 301148 – 301175 (sanction)
- C.E., 27 April 2009, n° 312741 (license)
- C.E., 19 June 2009, n° 310452 – 310454 (interconnection)
- C.E., 19 June 2009, n° 310453 (market analysis)
- C.E., 24 July 2009, n° 324642 – 324687 (definition of remedies)
- C.E., 2 April 2010, n° 319816 (access)
- C.E., 12 October 2010, n° 332393 – 332394 – 332421 – 336802 – 336904 (license)

1.3 The Netherlands

College van Beroep

- College van Beroep, 2 February 2010, AWB 08/923 (fine)
- College van Beroep, 3 February 2010, AWB 08/424 – AWB 08/431 – AWB 08/552 t.e.m. 08/555 (market analysis)
- College van Beroep, 10 February 2010, AWB 08/263 – AWB 08/267 (NRA costs)
- College van Beroep, 13 April 2010, AWB 09/214 t.e.m. 09/217 (market analysis)
- College van Beroep, 12 May 2010, AWB 10/372 (market analysis)
- College van Beroep, 26 May 2010, AWB 07/674 – AWB 07/675 – AWB 07/676 – AWB 07/679 – AWB 07/680 – AWB 07/681 (market analysis)
- College van Beroep, 2 July 2010, AWB 07/484 – AWB 08/228 – AWB 08/20 – AWB 08/251 (fine)
- College van Beroep, 18 August 2010, AWB 09/536 t.e.m. 09/539 – AWB 09/541 t.e.m. 09/548 (market analysis)
- College van Beroep, 20 December 2010, AWB 10/1256 (enforcement)
- College van Beroep, 19 January 2011, AWB 10/1312 (enforcement)

Rechtbank te Rotterdam

- Rb Rotterdam, 3 February 2010, AWB 08/3102 (fine)
- Rb Rotterdam, 9 September 2010, AWB 09/1977 (license)

1.4 The United Kingdom

Competition Appeal Tribunal

- The Carphone Warehouse Group Plc v Office of Communications (Wholesale Line Rental) [2010] CAT 27 (11 October 2010) (price controls)
- The Carphone Warehouse Group Plc v Office of Communications (Local Loop Unbundling) [2010] CAT 26 (11 October 2010) (price controls)
- Cable & Wireless UK v Office of Communications (Leased Lines Charge Control) [2010] CAT 23 (20 September 2010) (price controls)
- Telefónica O2 UK Limited v Office of Communications (900 MHz Band) [2010] CAT 25 (7 October 2010) (use of bands)
- British Telecommunications Plc v Office of Communications (Termination Charges: 080 calls) [2010] CAT 22 (9 September 2010) (settlement of dispute)
- British Telecommunications Plc v Office of Communications (Termination Charges: 080 calls) [2010] CAT 19 (23 July 2010) (settlement of dispute)
- British Telecommunications Plc v Office of Communications (Partial Private Circuits) [2010] CAT 18 (9 July 2010) (settlement of dispute)
- British Telecommunications Plc v Office of Communications (Termination Charges: 080 calls) [2010] CAT 17 (8 July 2010) (settlement of dispute)
- British Telecommunications Plc v Office of Communications (Partial Private Circuits) [2010] CAT 15 (11 June 2010) (settlement of dispute)
- The Carphone Warehouse Group Plc v Office of Communications (Local Loop Unbundling) [2009] CAT 37 (29 December 2009) (price controls)
- The Carphone Warehouse Group Plc v Office of Communications (Local Loop Unbundling) [2009] CAT 30 (23 November 2009) (price controls)
- VIP Communications Limited (in administration) v Office of Communications [2009] CAT 28 (19 November 2009) (abuse of dominant position)

- Hutchison 3G UK Limited & British Telecommunications plc v Office of Communications (Mobile Call Termination) [2009] CAT 17 (26 May 2009) (price controls)
- Hutchison 3G UK Limited & British Telecommunications plc v Office of Communications (Mobile Call Termination) [2009] CAT 11 (2 April 2009) (price controls)
- The Number (UK) Limited and Conduit Enterprises Limited v Office of Communications [2009] CAT 4 (24 February 2009) (settlement of disputes)
- The Number (UK) Limited and Conduit Enterprises Limited v Office of Communications [2008] CAT 33 (24 November 2008) (settlement of disputes)
- Hutchison 3G UK Limited & British Telecommunications plc v Office of Communications (Mobile Call Termination) [2008] CAT 23 (23 September 2008) (price controls)
- Vodafone Limited v Office of Communications [2008] CAT 22 (18 September 2008) (number portability)
- T-Mobile (UK) Limited & Telefonica O2 UK Limited v Office of Communications [2008] CAT 21 (3 September 2008) (use of bands)
- T-Mobile (UK) Limited - British Telecommunications plc - Cable & Wireless & others v Office of Communications (Termination Rate Disputes) [2008] CAT 19 (15 August 2008) (settlement of disputes)
- T-Mobile (UK) Limited - British Telecommunications plc - Cable & Wireless & others v Office of Communications (Termination Rate Disputes) [2008] CAT 17 (23 July 2008) (settlement of disputes)
- Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination) [2008] CAT 16 (23 July 2008) (market analysis)
- T-Mobile (UK) Limited & Telefonica O2 UK Limited v Office of Communications [2008] CAT 15 (10 July 2008) (use of bands)
- T-Mobile (UK) Limited - British Telecommunications plc - Cable & Wireless & others v Office of Communications (Termination Rate Disputes) [2008] CAT 12 (20 May 2008) (settlement of disputes)
- Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination) [2008] CAT 11 (20 May 2008) (market analysis)

- Hutchison 3G UK Limited & British Telecommunications plc v Office of Communications (Mobile Call Termination) [2008] CAT 10 (20 May 2008) (market analysis)
- Hutchison 3G UK Limited & British Telecommunications plc v Office of Communications (Mobile Call Termination) [2008] CAT 5 (18 March 2008) (price controls)
- Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination) [2008] CAT 2 (15 January 2008) (price controls)
- Orange Personal Communications Services Limited v Office of Communications [2007] CAT 36 (21 December 2007) (settlement of disputes)
- British Telecommunications plc v Office of Communications (Mobile Call Termination) [2007] CAT 35 (17 December 2007) (price controls)
- Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination) [2007] CAT 33 (23 November 2007) (price controls)
- T-Mobile (UK) Limited - British Telecommunications plc - Cable & Wireless & others v Office of Communications (Termination Rate Disputes) [2007] CAT 31 (20 November 2007) (settlement of disputes)
- T-Mobile (UK) Limited v Office of Communications (Donor Conveyance Charge) [2007] CAT 32 (14 November 2007) (settlement of disputes)
- Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination) [2007] CAT 27 (4 October 2007) (market analysis)
- Hutchison 3G UK Limited v Office of Communications (Mobile Call Termination) [2007] CAT 26 (15 August 2007) (market analysis)
- VIP Communications Limited (in administration) v Office of Communications [2007] CAT 17 (2 April 2007) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2007] CAT 16 (15 March 2007) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2007] CAT 15 (15 March 2007) (abuse of dominant position)

- VIP Communications Limited (in administration) v Office of Communications [2007] CAT 12 (28 February 2007) (abuse of dominant position)
- VIP Communications Limited (in administration) v Office of Communications [2007] CAT 3 (22 January 2007) (abuse of dominant position)
- VIP Communications Limited (in administration) v Office of Communications [2006] CAT 34 (13 December 2006) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2006] CAT 17 (31 August 2006) (abuse of dominant position)
- Media Marketing Promotions v Office of Communications [2006] CAT 12 (15 May 2006) (number portability)
- Hutchison 3G (UK) Limited v Office of Communications [2006] CAT 8 (31 March 2006) (market analysis)
- Hutchison 3G (UK) Limited v Office of Communications [2005] CAT 39 (29 November 2005) (market analysis)
- Floe Telecom Limited (in liquidation) v Office of Communications [2005] CAT 35 (13 October 2005) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2005] CAT 28 (20 July 2005) (abuse of dominant position)
- Wanadoo UK plc (formerly Freeserve.com plc) v Office of Communications [2005] CAT 24 (14 June 2005) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2005] CAT 17 (5 May 2005) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2005] CAT 14 (5 May 2005) (abuse of dominant position)
- British Telecommunications plc v Office of Communications (CPS save activity) [2004] CAT 23 (9 December 2004) (interconnection)
- Floe Telecom Limited (in liquidation) v Office of Communications [2004] CAT 22 (1 December 2004) (abuse of dominant position)

- Wanadoo UK plc (formerly Freeserve.com plc) v Office of Communications [2004] CAT 20 (29 November 2004) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2004] CAT 18 (19 November 2004) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2004] CAT 7 (30 April 2004) (abuse of dominant position)
- Floe Telecom Limited (in liquidation) v Office of Communications [2004] CAT 2 (6 February 2004) (abuse of dominant position)

Competition Commission

- The Carphone Warehouse Group Plc v Office of Communications (Wholesale Line Rental) Case 1149/3/3/09 (31 August 2010) (price controls)
- The Carphone Warehouse Group Plc v Office of Communications (Local Loop Unbundling) Case 1111/3/3/09 (31 August 2010) (price controls)
- Cable & Wireless UK v Office of Communications (Leased Lines Charge Control) Case 1112/3/3/09 (30 June 2010) (price controls)

Court of Appeal

- Hutchison 3G UK Limited & British Telecommunications plc v Office of Communications (Mobile Call Termination) [2010] EWCA Civ 391 (20 April 2010) (price controls)
- The Number (UK) Limited and Conduit Enterprises Limited v Office of Communications [2009] EWCA Civ 1360 (15 December 2009) (settlement of disputes)
- Floe Telecom Limited (in liquidation) v Office of Communications [2009] EWCA Civ 47 (10 February 2009) (abuse of dominant position)
- T-Mobile (UK) Limited & Telefonica O2 UK Limited v Office of Communications [2008] EWCA Civ 1373 (12 December 2008) (use of bands)
- Floe Telecom Limited (in liquidation) v Office of Communications [2006] EWCA Civ 768 (15 June 2006) (abuse of dominant position)

2 Electricity and gas

2.1 Belgium

Cour d'appel de Bruxelles

- Bruxelles, 27 October 2006, 2006/AR/543 – 2006/AR/1056 (tariffs of DSO)
- Bruxelles, 16 November 2006, 2006/AR/402 (access to the transport grid)
- Brussel, 27 February 2007, 2006/AR/570 (tariffs of DSO)
- Brussel, 5 March 2007, 2006/AR/576 (tariffs of DSO)
- Brussel, 22 May 2007, 2007/AR/61 (tariffs of DSO)
- Brussel, 12 June 2007, 2006/AR/618 (allocation of cross-border interconnection capacity)
- Brussel, 2 July 2007, 2007/AR/1239 (tariffs of DSO)
- Bruxelles, 4 September 2007, 2006/AR/3247 (tariffs of DSO)
- Bruxelles, 4 September 2007, 2006/AR/3139 (tariffs of TSO)
- Bruxelles, 14 September 2007, 2006/AR/3321 – 2007/AR/187 (tariffs of TSO)
- Brussel, 12 November 2007, 2007/AR/191 (tariffs of DSO)
- Bruxelles, 11 December 2007, 2007/AR/193 – 2007/AR/1144 – 2007/AR/1928 (tariffs of DSO)
- Bruxelles, 18 December 2007, 2007/AR/194 – 2007/AR/1143 – 2007/AR/1927 (tariffs of DSO)
- Brussel, 30 September 2008, 2007/AR/213 – 2007/AR/1237 – 2007/AR/2001 – 2007/AR/2823 (tariffs of DSO)
- Brussel, 10 November 2008, 2006/AR/3234 (tariffs of DSO)
- Brussel, 10 November 2008, 2007/AR/214 – 2007/AR/1236 – 2007/AR/2113 – 2007/AR/2821 (tariffs of DSO)
- Bruxelles, 10 November 2008, 2008/AR/1616 – 2008/AR/1617 – 2008/AR/1670 – 2008/AR/1671 (tariffs of TSO)

- Brussel, 18 November 2008, 2007/AR/215 – 2007/AR/1235 – 2007/AR/1999 – 2007/AR/2822 (tariffs of DSO)
- Brussel, 24 November 2008, 2007/AR/217 – 2007/AR/1238 – 2007/AR/2059 – 2007/AR/2820 (tariffs of DSO)
- Brussel, 18 May 2009, 2008/AR/145 – 2008/AR/1115 – 2008/AR/2047 – 2008/AR/2724 (tariffs of DSO)
- Bruxelles, 29 June 2009, 2008/AR/3212 (tariffs of DSO)
- Brussel, 20 July 2009, 2007/AR/1445 (public service obligations)
- Brussel, 20 July 2009, 2008/AR/3235 (public service obligations)
- Bruxelles, 9 October 2009, 2009/AR/153 (tariffs of DSO)
- Bruxelles, 15 October 2009, 2009/AR/169 (tariffs of DSO)
- Brussel, 26 November 2009, 2008/AR/3202 (tariffs of DSO)
- Bruxelles, 7 January 2010, 2009/AR/2257 (tariffs of DSO)
- Bruxelles, 7 January 2010, 2009/AR/2260 (tariffs of DSO)
- Bruxelles, 7 January 2010, 2009/AR/2261 (tariffs of DSO)
- Bruxelles, 11 February 2010, 2008/AR/1152 (fine)
- Bruxelles, 1 April 2010, 2010/AR/6 (tariffs of DSO)
- Bruxelles, 6 May 2010, 2007/AR/2930 (tariffs of DSO)
- Brussel, 10 June 2010, 2009/AR/133 (tariffs of DSO)
- Brussel, 29 June 2010, 2009/AR/14 (tariffs of DSO)
- Brussel, 14 September 2010, 2010/AR/114 (tariffs of DSO)
- Bruxelles, 22 September 2010, 2010/AR/610 (tariffs of DSO)
- Brussel, 22 September 2010, 2010/AR/636 (tariffs of DSO)

Cour de cassation

- Cass., 11 January 2008, C.07.107.F (access to the transport grid)
- Cass., 25 March 2010, C.09.0288.N (tariffs of DSO)
- Cass., 22 April 2010, C.09.0269.N (tariffs of DSO)
- Cass., 22 April 2010, C.09.0270.N (tariffs of DSO)

Conseil de la concurrence

- Raad voor de Mededinging, decision no. 2006-R/B-25 of 12 December 2006 (allocation of cross-border interconnection capacity)

Conseil d'Etat

- C.E., 31 January 2006, no. 154.304 (fine)
- C.E., 30 November 2009, no. 198.369 (fine)

2.2 France

Cour d'appel de Paris

- C.A. Paris, 10 December 2002, n° 2002/10760 (settlement of disputes)
- C.A. Paris, 24 February 2004, n° 2003/10671 (settlement of disputes)
- C.A. Paris, 6 April 2004, n° 2003/18241 (settlement of disputes)
- C.A. Paris, 11 May 2004, n° 2003/20473 (settlement of disputes)
- C.A. Paris, 8 June 2004, n° 2003/20637 (settlement of disputes)
- C.A. Paris, 25 January 2005, n° 04/12111 (settlement of disputes)
- C.A. Paris, 8 March 2005, n° 04/12606 (settlement of disputes)
- C.A. Paris, 4 October 2005, n° 2005/5502 (settlement of disputes)
- C.A. Paris, 13 December 2005, n° 2005/12411 (settlement of disputes)
- C.A. Paris, 30 May 2006, n° 2005/21057 (settlement of disputes)
- C.A. Paris, 23 January 2007, n° 06/06163 (settlement of disputes)
- C.A. Paris, 22 May 2007, n° 2006/16883 (settlement of disputes)
- C.A. Paris, 26 June 2007, n° 2006/19689 (settlement of disputes)
- C.A. Paris, 7 September 2010, n° 2009/22255 (settlement of disputes)

Cour de cassation

- Cass. comm., 22 February 2005, pourvoi n° 04-12618 (settlement of disputes)
- Cass. comm., 10 May 2006, pourvoi n° 05-13622 (settlement of disputes)
- Cass. comm., 17 June 2008, pourvoi n° 07-17314 (settlement of disputes)

Conseil d'Etat

- C.E., 13 March 2006, n° 255333 (public service)
- C.E., 13 March 2006, n° 263433 (public service)
- C.E., 13 March 2006, n° 265582 (public service)
- C.E., 30 March 2007, n° 289687 (cross-border interconnection)
- C.E., 17 July 2008, n° 316893 (tariffs)
- C.E., 31 July 2009, n° 307223 (public service)
- C.E., 12 November 2009, n° 332558 (new production units)

2.3 The Netherlands

- College van Beroep, 11 February 2010, AWB 08/873 (tariffs)
- College van Beroep, 10 March 2010, AWB 08/333
- College van Beroep, 10 March 2010, AWB 08/339 (tariffs)
- College van Beroep, 9 June 2010, AWB 08/253 (management of transport network)
- College van Beroep, 29 June 2010, AWB 09/162 t.e.m. 164 – AWB 09/169 – AWB 09/170 – AWB 09/417 (tariffs)
- College van Beroep, 29 June 2010, AWB 08/746 – AWB 08/753 – AWB 08/760 t.e.m. 08/765 (tariffs)
- College van Beroep, 29 June 2010, AWB 08/878 – AWB 08/880 (tariffs)
- College van Beroep, 10 November 2010, AWB 07/965 – AWB 07/966 (public service)

2.4 The United Kingdom

Competition Appeal Tribunal

- National Grid Plc v The Gas and Electricity Markets Authority & Ors [2008] CAT 26 (8 October 2008) (abuse of dominant position)
- National Grid Plc v The Gas & Electricity Markets Authority & Ors [2008] CAT 30 (17 October 2008) (abuse of dominant position)
- National Grid PLC v Gas and Electricity Markets Authority & Ors [2009] CAT 14 (29 April 2009) (abuse of dominant position)
- National Grid Plc v The Gas and Electricity Markets Authority & Ors [2009] CAT 21 (30 June 2009) (abuse of dominant position)
- National Grid Plc v Gas and Electricity Markets Authority & Ors [2009] CAT 24 (23 July 2009) (abuse of dominant position)

Court of Appeal

- National Grid plc v Gas and Electricity Markets Authority & Ors [2010] EWCA Civ 114 (23 February 2010) (abuse of dominant position)

3 Railway transport

3.1 The Netherlands

- College van Beroep, 27 April 2009, AWB 07/525 (settlement of dispute between firms)
- College van Beroep, 27 April 2009, AWB 07/872 – AWB 07/873 (settlement of dispute between firms)

Rechtbank te Rotterdam

- Rb Rotterdam, 30 September 2009, AWB 08/3831 – AWB 08/3832 (settlement of dispute between firms)
- Rb Rotterdam, 3 May 2010, AWB 08/5252 (fine)
- Rb Rotterdam, 3 May 2010, AWB 08/5253 (fine)
- Rb Rotterdam, 3 May 2010, AWB 08/5255 (fine)

3.2 The United Kingdom

- Great North Eastern Railway Ltd v Office of Rail Regulation & Ors [2006] EWHC 1942 (Admin) (27 July 2006) (access to the railway grid)



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