

Dispute resolution under the new European framework

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1. Introduction

Since the Interconnection Directive (97/33/EC)¹ dispute resolution by the national regulatory authorities (“NRAs”) is a common telecommunications procedure in the different Member States. However, the ONP Directives did not harmonise the procedure itself, but merely stated that the Member States were obliged to introduce the possibility of dispute resolution. In accordance with the general principle of European law, i.e. *the principle of national autonomy* of legal proceedings, the national (procedural) rules do apply to the national dispute resolution procedures. According to this principle the Member States remain independent to set their own procedural rules, for example in relation to prescription, enforcement, sanctions and appeal procedures.² As a consequence, each Member State has its own rules and particularities which do complicate the implementation of the European regulation involved. This is also true for the telecommunications dispute resolution procedure, which has caused significant problems for NRAs and telecommunications operators.

However, this autonomy of the Member States is not absolute. The Court of Justice has imposed an obligation on the Member States - on the basis of Article 10 EC Treaty – to ensure that Community law is fully and effectively implemented. This principle is known as the *principle of effectiveness* and is applicable to Member States via their authorities, such as the courts and administrative and national regulatory authorities (NRAs)³. The exercise of

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¹ OJ L [1997] 33, Article 9 (5).

² See for example : Case C-60/92 *Otto vs. Postbank* [2003] Judgement of 10 November 2003 para. 14.

³ Case C- 8/88 *Germany vs. Commission* [1990] ECR I-2321 para.13. See J Temple Lang ‘The Duties of National Courts under Community Constitutional Law’ 22 *ELRev.* (1997) 3.

Community rights may not be made excessively difficult or impossible.⁴ This principle includes a positive duty to take all appropriate measures to ensure the fulfilment of Community obligations and a negative duty to abstain from any measure which would jeopardise the attainment of Treaty objectives.⁵ This principle includes the obligation to provide citizens with effective legal protection if their European rights are infringed.⁶ Translated to the context of dispute resolution in the telecommunications sector this principle means that the right of telecommunications undertakings to effective dispute resolution, as laid down in the European Directives, might not be endangered by the several national procedural rules of the Member States.

In the 1998 Implementation Report the Commission stated that ‘future assessments should concentrate on the effective application of measures transposing the [EC regulatory] package.’⁷ More specific concerns were raised in relation to the functioning and powers of NRAs. The Commission viewed the NRAs as *the* cornerstone of effective and consistent application of Community rules in the Member States. This implies that NRAs need a proper regulatory environment to function effectively.⁸ Important factors identified in the 1999 Report were that the NRAs should act in a proactive manner, have sufficient powers (which the NRA then should use in practice) and clear competences. Concerns relating to procedure were that delays in decision-making and during the appeals procedure may occur or review procedures do not take into account the merits of a case.⁹ Effective telecommunications regulation relies on timely and coherent decisions. Late decisions may factually be equivalent to the non-existence of regulation. The Commission stated that:

The disparities in the way in which NRAs are organised are reflected also in the procedures laid down for appeals against their decisions. Again, these are rooted in the legal and administrative cultures of the Member States, and as such are sometimes lengthy and may depend on a judiciary which may not be

⁴ See for example the case *Otto vs. Postbank*, as mentioned in note 2. The ECJ formulated a second condition in its case law: the principle of equivalence, requiring that procedures governing the exercise of Community rights are not to be less favourable than those applicable to similar claims in domestic law. In this paper this principle of equivalence will not be discussed.

⁵ See for example : cases T-186/97, T-187/97, T-190/97 to T-192/97, T210/97, T-211/97, T-216/97 to T-218/97, T-297/97, T-280/97, T-293/97 and T-147/99 *Kaufring AG & Others v EC Commission*: [2001] ECR II-1337, paras. 151 and 153.

⁶ E.g. Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 para.23.

⁷ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions *Fourth Report on the Implementation of the Telecommunications Regulatory Package* COM(98)594 (1998) 3.

⁸ Fifth Implementation Report 31.

⁹ Fifth Implementation Report 11-12.

*qualified to examine the technical complexities of telecommunications. Appeals procedures may also have suspensory effect which, in a fast-moving market, is likely to prejudice the interests in particular of new entrants, as do delays in clarification of the applicable regulatory regime generally.*¹⁰

In the 2001 Seventh Implementation the Commission explained that some major concerns as regards the functioning of NRAs still remained:

*There are also concerns relating to the organization of the national regulatory authorities, in particular as regards the assignment of powers and the ability to resolve disputes rapidly. Lengthy appeal procedures in virtually all Member States lead to regulatory uncertainty, and can be exploited by incumbents. Many NRAs consider themselves under-resourced, or staff numbers do not yet match the establishment plan. The new framework will place additional responsibilities on regulators, and further work needs to be done now to remove these concerns.*¹¹

The Eight Implementation Report¹² re-focuses the Commission's attention on the need to encourage and monitor the timely transposition in the Member States of the New Regulatory Framework (adopted March 2002). Some national regulatory procedures still negatively affect the regulators' ability to fulfil their tasks effectively. Those deficiencies continue to constitute a barrier to competition.¹³ One major point identified in the Eighth Report in this respect is the duration of appeals procedures against decisions issued by national regulators.¹⁴

The Commission, referring to NRAs, concluded that

*National regulatory authorities in all Member States [now] have the independence, skills and authority to regulate markets as required under the directives. Some are still hampered by heavy national procedures, which may adversely affect their ability to enforce obligations under the new regulatory framework. Lengthy appeals procedures may also result.*¹⁵

Concerns have risen to the powers of the NRAs, duration of procedures and the way national procedural rules may form an obstacle to the development of competition. The question is, whether these concerns can be claimed to be in conflict with the European principle of

¹⁰ Fifth Implementation Report 31.

¹¹ Seventh Implementation Report 6.

¹² Eight Report from the Commission on the Implementation of the Telecommunications Regulatory Package *European telecoms regulation and markets 2002* COM (2002)696 (2002).

¹³ Eight Implementation Report 19.

¹⁴ Eighth Implementation Report 5, 19.

¹⁵ Eight Implementation Report 5.

effectiveness. Although it was claimed in general that the right of telecommunications undertakings to effective dispute resolution was endangered by the way these procedures take place in the several Member States, the ONP Directives did not specify this right in detail nor did it give sufficient grounds to argue that the national procedures had to be adapted.

What do the new ONP Review Directives¹⁶ state in relation to dispute resolution and what does that mean for the different procedures in the Member States? In the new directives more provisions have been included in relation to powers of the NRA and procedural matters, specifically regarding dispute resolution. The question is, however, whether these provisions will prevent future (procedural) problems in the several Member States. In this paper these provisions of the new directives - in relation to dispute resolution - will be analysed against the background of the common problems raised during national procedures.¹⁷ Examples of different Member States will be used to illustrate these problems and to see whether they will be resolved after the implementation of the new directives.

2. Powers of the NRA

The Commission recognised that the way the functioning and powers of the NRAs were organised in the different Member States formed a bottleneck and delayed the liberalisation process. The following provisions have now been included (in as far as relevant for dispute resolution).

dispute resolution

Appropriate powers for NRAs in interconnection disputes are crucial for the functioning of the interconnection regime. If negotiations fail, the applicant depends on regulatory

¹⁶ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services. OJ [2002] L 108/33 (Framework Directive), Directive 2002/20/EC on the authorisation of electronic communications networks and services OJ [2002] L 108/21 (Authorisation Directive), Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities OJ L [2002] 108/7 Access and Interconnection Directive), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services OJ [2002] 108/51 (Universal service Directive), Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector OJ 2002 [2002] 201/37 (Privacy Directive).

¹⁷ For procedures in general in relation to the new directives see e.g. the German situation: M. Wissmann and M. Klümper 'Effizienter Rechtsschutz und Rechtsweg im künftigen Kommunikationsrecht', *Kommunikation & Recht*, Heft 2/2003, p. 52-58.

intervention and efficient dispute resolution mechanisms.¹⁸ In the Framework Directive a very broad obligation to provide dispute resolution powers is now introduced in Article 20 (1):

In the event of a dispute arising in connection with obligations arising under this directive or the Specific Directives between undertakings providing electronic communications networks or services in a member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.

This intervention shall be provided in *all* disputes relating to obligations under the European Directives¹⁹ and the NRA must have the power to issue a *binding* decision to *resolve* the dispute. The NRA shall be able to impose a solution on the parties and take the appropriate measures. This article should be read in conjunction with Article 8 (1) Framework Directive, where it is stated that the Member States shall ensure “that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take *all reasonable measures* which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4.”.

A similar provision on dispute resolution, with special regard to access and interconnection disputes, is to be found in Article 5 (4) of the Access and Interconnection Directive. This provision replaces Article 9 (5) of the existing Interconnection Directive (97/33/EC).²⁰

In the recent past in Member States the national courts considered that the NRA concerned did not have the power to resolve certain disputes relating to interconnection nor to issue the appropriate measures.

The Netherlands

This was for example the case in the dispute between KPN Telecom vs. Telfort Mobile in The Netherlands on the mobile terminating tariffs. OPTA, the Dutch regulator, started its investigation into the mobile terminating tariffs of the 5 Dutch mobile operators (at the time KPN Mobile, Libertel Vodafone, Dutchtone, Telfort Mobiel and Ben) in May 2001. On 13 June 2001, KPN launched a complaint against

¹⁸ C. Koenig and S. Loetz ‘Framework for Network Access and Interconnection’ in C Koenig, A Bartosch and J-D Braun (eds) *EC Competition and Telecommunications Law* (Kluwer The Hague 2002), p. 399.

¹⁹ Framework Directive Recital 32.

²⁰ Article 9 (6) provides NRAs with competence, as a last resort, to order interconnection and set the terms of interconnection.

Telfort Mobile claiming that its mobile terminating tariffs were too high, and therefore not “reasonable”. This dispute was, for OPTA, the triggering event to start a further investigation. This dispute also contained a legal complication. The interconnection between KPN Mobile and Telfort Mobile consisted of indirect interconnection, through the transit network of KPN Telecom.²¹ On that basis, Telfort Mobiel had pleaded that OPTA had no authority to resolve the dispute, as the article 6.3, sub 2 TA only referred to direct interconnection. On 10 April 2002, OPTA made its decision.²² Telfort Mobiel appealed against this decision before the President of the Court of Rotterdam, asking for non-execution, pending the outcome of the internal administrative appeal procedure with OPTA. The President suspended the OPTA’s decision in its judgement of 1 May 2002.²³ The president was – on the basis of a strict interpretation of the law - of the opinion that OPTA lacked the powers to resolve a dispute on indirect interconnection, as long as the parties were not exempted from the statutory obligation to offer direct interconnection. On 10 September 2002, OPTA took the decision in the internal administrative appeal procedure of Telfort Mobiel and upheld its decision: OPTA forced Telfort Mobiel (renamed “O2”) to reduce its mobile terminating tariffs. Again, O2 asked the President of the Court of Rotterdam – pending O2’s appeal before the court of Rotterdam - to suspend the decision, and again the Court granted the application.²⁴ OPTA did not take any new steps in all disputes pending, before the case became before the full Court of Appeal in the appeal case. The full court also decided in favour of O2.²⁵ It confirmed that OPTA did not have the authority on the basis of the TA to resolve a dispute on indirect interconnection.

Germany

Another example can be taken from the case law in Germany. It is unclear, due to recent jurisprudence, what kind of powers are being conferred on RegTP in the course of an interconnection dispute resolution procedure. On 10 October 2002, the Administrative Court Cologne stated that RegTP is not empowered to set conditions for interconnection under the normal dispute settlement procedure (s. 37 Telekommunikationsgesetz, “TG”) but only under the procedure related to the abuse of a dominant position (s. 33 TG).²⁶ As a consequence, only the remedies in s. 33 may be applied and no time limit is imposed on the regulator (this is about to change with the new implementation legislation). The Higher Administrative Court Munster subsequently questioned this reading of the relationship between s. 33 and 37 TG.²⁷ In a decision of 13 November 2002 the Higher Administrative Court Munster ruled that the

²¹ Almost in all cases the mobile networks are connected with each other another fixed network through the transit network of KPN.

²² www.opta.nl.

²³ Vz. Rb. Rotterdam 1 mei 2002, Telfort Mobiel vs. OPTA, www.rechtspraak.nl. (LJN-nr.: AE2382).

²⁴ Vz. Rb. Rotterdam 29 november 2002, O2 e.a. vs. OPTA, reg. nr.: VTE, www.rechtspraak.nl. (LJN-nr.: AF1538), *Mediaforum* 2003-3, Jur. Nr. 17, m.nt. ATO.

²⁵ Rb. Rotterdam 25 april 2003, O2 vs. OPTA, www.rechtspraak.nl (LJN-nr.: AF8131), *Mediaforum* 2003-9, Jur. Nr. 41, m.nt. ATO.

²⁶ 1 L 1617/02.

²⁷ Decision 13 B 2175/02 of 18 February.

*RegTP could not force Deutsche Telekom to submit a request for tariff authorisation.²⁸ The European Commission stated that the 'RegTP's lack of powers to set interconnection tariffs and to order interconnection agreements as part of a dispute settlement, which is a consequence of the jurisprudence, seriously affects its powers to settle disputes in conformity with the Interconnection Directive.'*²⁹

France

Also in France the powers of the NRA was subject of litigation. Two rulings on 28th April 1998 by the Appeal Court of Paris³⁰ confirmed the powers that the law granted to ART to settle disputes between operators. France Télécom sustained that ART had overstepped its powers by stipulating the practical conditions whereby the network owner must perform the work to upgrade the network. The Court formally replied to such argument by deeming that " ART is vested with the power to issue specifications, even decree restraining or non-restraining injunctions, in order to enable suitable performance of the works and services required to ensure free access to telecommunications services."

In addition, France Télécom deemed that ART acted against its ownership rights and contractual prerogatives. The Court stipulated that "concerning contractual prerogatives, the restrictions imposed have been stipulated by law which, for economic public order reasons, has entrusted to the Regulatory Authority, when exercising its public power prerogatives, for the task of imposing an enforcement decision on the parties involved in a claim to settle their disputes related to signing or performing a telecommunications network interconnection or access agreement". The Court thus confirmed that ART may determine a specific schedule in its decisions for performing the works and services required to operate access services to the Internet. Above and beyond the legal arguments, there was a great deal at stake in the two decisions on 10th July 1997; it meant opening high-speed access to the Internet for 3 millions homes.

Under the new regimes too limited powers of the NRAs are in conflict with the new ONP review directives, as stated above.

²⁸ See European Commission *Eighth Report on the Implementation of the Telecommunications Regulatory Package* COM (2002) 695, Annex 23, 27.

²⁹ European Commission *Eighth Report on the Implementation of the Telecommunications Regulatory Package* COM (2002) 695, Annex 23 (emphasis added). The Commission further states: 'It is doubtful whether the German [interconnection] framework adequately safeguards the principle that the party requesting dispute settlement has a right to obtain a decision within six months. Although the jurisprudence gives scope to RegTP to set tariffs in the framework of an own-initiative tariff approval procedure if the DT fails to file a request for tariff approval in good time, the German procedural framework does not guarantee that those time limits will be observed. This highlights the need for a statutory period within the abusive-positions procedures, where there are currently no time limits for rendering a decision.' (ibid.).

³⁰ Judgment of 28 April 1998, Cour d'appel de Paris, 1ère chambre, section H; numéro d'inscription au répertoire général : 97/17847; See the comment on the decision by I de Silva AJDA (1998) 835; also *Droit des affaires* (1998) 992.

Problem of retrospective effect of decisions of the NRA

Under national administrative law the prohibition of retrospective effect of decisions of an administrative body is an important principle of law. This principle causes problems in those cases where the parties request the NRA to set tariffs as from the moment the negotiations started or the dispute arose. The decision of the NRA can in that case have no retrospective effect as from the date of the dispute. Nor the Framework Directive nor the Access and Interconnection Directive give a solution for this problem.

France

In France for example there is an important principle of law under which administrative decisions cannot have retrospective effect. Therefore, in principle ART's decisions under article L. 36-8 can only have effect as from the date of the decision. However, ART takes the view that when a dispute relates to an existing interconnection agreement between the parties, ART has the authority to take a decision which effects will start from the day the dispute arose. On the contrary, if the dispute relates to a new matter not belonging to any agreement signed by the parties, effect of the decision can only have effect for the future.

For example, in the MFS case ruled in February 2002, ART decided that the request from MFS to apply new conditions to leased lines between MFS and FT from a day previous to the decision is not admissible since that new service does not belong to their interconnection agreement. On the contrary, see Cegetel 1999. UPC appealed the ART decision concerning termination call ratse. ART decided in this decision that its effects should be in force since 2001, the year from which the dispute concerning the rates arose. UPC is arguing before the Court that this statement of ART is contrary to the administrative principle under which administrative decisions should not have retrospective effect. It has to be seen what the Court will decide.

Mediation

In accordance with Article 20 (2), national regulatory authorities may decline to deal a dispute when other mechanisms (e.g. mediation) exist which would better contribute to the resolution of the dispute. Therefore, discretion for the NRA exists to decide whether dispute resolution seems to be appropriate.

Own initiative

In Article 5 (4) of the Access and Interconnection Directive it is explicitly stated that – apart from disputes - the NRA must also have the authority to initiate an investigation and proceedings at its own initiative. This article reads as follows:

With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy

objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).

This authority could be used on the basis of a complaint or after own investigation of the NRA. This power is important as the NRA should not be dependent on disputes or complaints brought before it.

The Netherlands

For example in The Netherlands, OPTA relied mostly on its dispute resolution powers and does not act on its own initiative. This route is only followed in exceptional cases. The question has arisen whether OPTA has the authority to take enforcement measures outside the scope of a dispute in those cases which could fall within the scope of a dispute. Or to state it differently: whether OPTA is obliged to follow the dispute resolution route or whether it can enforce the law (e.g. special access obligations) ex officio outside the dispute procedures. As far as is known, OPTA has in only one case initiated a procedure ex officio. For that reason OPTA has been qualified as an “ex post dispute oriented regulator”.³¹ In the case KPN vs. OPTA and Versatel and MCI,³² the President of the Court considered that the actions of OPTA outside the scope of the dispute procedures (concerning the enforcement of collocation tariffs) were prima facie acceptable. It has to be seen whether the full court will follow this position.

In the judgement of last week of the Court of Appeal (CBB) in the Dutch case UPC, Canal+ and OPTA³³ the court makes an explicit distinction between the powers of OPTA on the basis of dispute resolution and the powers to investigate infringements of the act. The dispute powers are limited, i.e. that OPTA was authorised to set “reasonable” (cost oriented) tariffs, but it could not set the tariff at zero in order to prevent discriminatory behaviour.

Under the new regime it should be clear that a NRA has the power –outside the scope of a dispute - to investigate and resolve infringements of the requirements of the new directives, but also the other way round: resolving a dispute requires broad powers to impose obligations on the parties.

Cross border disputes

Establishing a framework for cross-border disputes amongst parties from different member states, Article 21 Framework Directive provides for a special dispute resolution system

³¹ Dommering e.d, ‘*Toezicht en regulering in de Telecommunicatiemarkt. Een analyse van sectorspecifiek en algemeen mededingingstoezicht*’, Amsterdam: Universiteit van Amsterdam, (IViR), 2001, p. 84.

³² Pres. Court Rotterdam 29 July 2003 (VTETEC 03/1803-MES en VTELEC 03/1804-MES), not published.

³³ Judgment of 3 December 2003 (Nrs. AWB 03/406, 03/418 en 03/425), not yet published.

whenever national regulatory authorities from more than one Member State are involved. This is an interesting new procedure, which might bring up all sorts of new legal questions. How will both NRAs work together and how will the procedures be coordinated? How can (confidential) information be exchanged? May a NRA interfere in the procedure of the other Member State, for example if it disagrees with the outcome of the case? Does it have *locus standi* before the national court of the other Member State?

In this respect a case before the Dutch administrative High Court (Afdeling Bestuursrechtspraak Raad van State) in the television case RTL4 vs. Commissariaat voor de Media can be mentioned.³⁴ The Court considered that in this case there was a duplication of supervision: two authorisations were to be requested from the regulators in conflict with EC law. The consequence of the judgement in this case is that the Dutch Media Authority (Commissariaat voor de Media) should contact the Luxembourg authority and – if necessary – initiate a legal procedure against the decision of the Luxembourg authority. In that case the administrative law of Luxembourg will determine whether such an appeal would be admissible.³⁵

3. Procedural rules for disputes

Time scales

The NRAs are obliged to issue a binding decision within the shortest possible time frame and, in any case within *four months* from a request from one of the parties to resolve the dispute (Article 20 (1) Framework Directive). It may take longer only if exceptional circumstances exist. The NRA is therefore under the obligation to ensure efficient and quick procedures. To meet this deadline and to improve the transparency for the parties concerned, Oftel (now OFCOM) has published special guidelines: ‘Dispute resolution under the new EU Directives’.³⁶ Oftel has set stricter rules for evaluating the dispute and submitting information. Oftel will be more rigorous in establishing the scope of a dispute and in ensuring that this scope does not change in the course of this investigation. When accepting a dispute, Oftel will publish a statement of the scope for that dispute and will not, except in special circumstances, broaden the scope during its investigation. Also, under the old regime, Oftel has often been asked to make major decisions about access obligations when resolving the dispute. Under the

³⁴ Afdeling Bestuursrechtspraak Raad van State August 2003, RTL/HMG c.s. vs. CvdM, *Mediaforum* 2003-9, Jur. Nr. 44.

³⁵ K. Mortelmans, ‘RTL4 en RTL5: toch een verwijzing naar Luxemburg’, *Mediaforum* 2003-9, p. 280-287.

³⁶ A statement by Oftel and the Radio communications Agency of 28 February 2003, www.oftel.gov.uk.

new regime, Oftel will usually address such decisions via own initiative investigations or market reviews. The reasons for this are simple, as Oftel states: “Oftel will run such investigations and reviews promptly, but will not be bound by the statutory dispute resolution time limit.”³⁷ It intends to complete its own initiative investigations under the new Directives within six months. The consequence of the strict time limitation of 4 months could therefore be that NRAs will not be willing to handle a case as a dispute, but will prefer their own initiative powers to solve the matter. The question arises how they will be able to refuse the matter as a “dispute” and handle the case as a “normal” investigation.

*For example in The Netherlands deadlines are in many cases not met. There is no penalty for not meeting the time frame. In theory, a party could ask the administrative court to oblige OPTA to come to a decision, but in practice – as far as known - this is never done (in relation to the decision making process of a dispute). According to the data available from the study performed by the Institute for Information Law³⁸ dispute procedures take **on average 192 days (6 months)** (with a minimum of 52 days and a maximum of 648 days).³⁹*

So far the experience in the different Member States regarding time scales for regulatory decisions and appeals is as follows:

[schedule opnemen!!!!]⁴⁰

Another question which will arise is what is meant by “exceptional circumstances”, as mentioned in Article 20 (1) framework Directive. For example, in The Netherlands OPTA has used the argument in the past (with some legal basis in Dutch administrative law) that the legal term can be extended in cases where parties need to deliver (on request from OPTA) information/documents. OPTA deducts this time from the overall period (the counting is

³⁷ Statement, p. 3.

³⁸ E.J. Dommering, N.A.N.M. van Eijk, A.T. Ottow, O.L. van Dalen, ‘Zes Jaar Bestuur en Rechtspraak in de Telecommunicatiemarkt’, Amsterdam: University of Amsterdam, December 2003.

³⁹ These figures relate to the period 1 August 1997 – 1 August 2003 and relate only to those disputes which have resulted in court cases.

⁴⁰ This schedule is published in the report of the British Institute page 16-17 and is based on information obtained from the different national correspondents.

suspended). However, it is questionable whether OPTA can still use this argument in the context of Article 20 of the Framework Directive.

Consultation and Transparency

In accordance with Article 6 of the Framework Directive, national regulators need to give ‘interested parties’ the opportunity to comment on draft measures having a significant impact on the relevant market. Exceptions are provided for measures taken on the basis of Article 7 (6), 20 and 21 of the Framework Directive. The results of the consultation procedure shall subsequently be made available to the public, although confidential information will have to be omitted.

On the basis of the overarching goal of consolidating the internal market for electronic communications and consistent application of European telecommunications legislation, Article 7 Framework Directive provides for a duty of cooperation between national regulatory authorities and the European Commission. They shall cooperate and consult each other in a transparent manner. In limited circumstances the European Commission has the right to veto a national measure but not over the scope or nature of the remedy selected.⁴¹

Consultation of and cooperation with the national competition authorities is also compulsory for the NRA “where appropriate (...) on matters of common interest” (Article 3 (4) Framework Directive). In some Member States the NRA has concurrent powers to apply competition law (e.g. the United Kingdom), in others such powers do not exist (e.g. France and The Netherlands). Complicated consultation procedures must take place to coordinate decisions and actions. This causes considerable delays in solving the disputes. Moreover, procedural rules in many cases do not exist which makes the consultation intransparent for the parties concerned.

The Netherlands

In the TA 1998 it is stated in Article 18.3 (3) that OPTA is obliged to ask the advice from the NMa in case it interprets legal notions from competition law when applying the TA 1998. On the basis of article 18.3, sub 3 TA, OPTA is obliged to consult the NMa and ask for its advice before it uses powers which overlap with the NMa (in this context, Article 24 CA (the abuse of a dominant position)). In the so called

⁴¹ Framework Directive Article 7 (4).

'Cooperation Protocol' (*Samenwerkingsprotocol*)⁴², OPTA and the NMa have formulated rules to coordinate their overlapping authority (to avoid forum shopping), and have formulated rules for the application of article 18.3, sub 3 TA. As a result of the Cooperation Protocol, the authority of OPTA prevails in cases where it has powers under the TA 1998. If not, the NMa may decide to take up the matter. In practice, the NMa will only act in exceptional cases. In practice, OPTA asks the advice from the NMa in many cases. It lacks transparency for the parties involved. Which procedure is followed in those cases and which documents are exchanged is unclear. So far the Court of Rotterdam has approved this process.

4. Measures by NRA

Remedies

The Framework and Access and Interconnection Directive leave much discretion to the NRAs to choose the appropriate remedies to solve the dispute. An informal harmonisation will however take place through the European Regulators Group of NRAs (ERG) which prepare a common position on appropriate remedies. This common position will no doubt influence the NRAs in choosing their remedies and the national courts in reviewing these decisions. However, problems of national (administrative) law will remain, e.g. what the relation is between the authority of the NRA to impose a measure on a party with significant market power and its powers to impose measures in a dispute and the power of the NRA to impose administrative penalties in case a party refuses to implement the measures imposed.

The Netherlands

Under Dutch Administrative Law a distinction is made between ex ante and ex post measures. The former are measures which OPTA will take as a result of a dispute, imposing on a party an instruction to behave in a certain manner. Ex post measures impose penalties on parties because of an infringement of the TA 1998. In both cases, OPTA may also impose a compulsory measure with a penalty (imposed on a daily basis in the case of non-compliance). To date OPTA has only imposed penalties in a few cases. With regard to disputes, it is unclear which kind of measures OPTA can take. In most cases, OPTA has set tariffs between parties without any difficulties, as well as imposed other obligations. In the UPC case, related to access to cable infrastructure, however, the court ruled that OPTA could not - in the context of a dispute - impose the obligation to set the tariff at zero.⁴³ In the O2 case the President of the Court disputed that OPTA was able to set cost orientated tariffs for mobile termination. In the past, OPTA has used periodic penalties, which require a certain amount of money to be paid for every day of non-compliance. OPTA has however not felt encouraged to use this instrument much, due to restrictive legal interpretations made by the administrative court (which decides on the basis of criteria such as

⁴² www.opta.nl.

⁴³ Court Rotterdam 26 February 2003, *Mediaforum* 2003/4, 46-152, note N. van Eijk.

reasonableness, proportionality and whether there are sufficient grounds). In general, OPTA feels it lacks the power to enforce its dispute decisions effectively.⁴⁴

Interim measures

In the new directives nothing is mentioned about the power of the NRAs to issue interim measures pending a dispute procedure. However, this is an important instrument in a dynamic market, such as the telecommunications market. In urgent circumstances it might be necessary to safeguard competition and to impose obligations on undertakings concerned, awaiting the definitive outcome of the dispute resolution procedure.

The Netherlands:

Article 6.3 (3) (b) TA 1998 confers on OPTA the power to grant interim measures. This will also be the case under the new TW (implementing the new directives) in relation to all disputes (see article 12.5, section 2). From 87 filed disputes in 2002, only 2 interim decisions were issued by OPTA (in relation to disputes).⁴⁵ So far, OPTA has only issued about 10 interim decisions.⁴⁶ The total time of this procedure varies from 1 month to 1 year. In general, interim measures will only be given in exceptional circumstances. However, compared to the practice of the NMa, OPTA is more willing to consider such matters. Within the remit of the NMa, those measures are only available if the undertaking concerned is almost bankrupt due to the (abusive) behaviour of a market party.

United Kingdom

Under section 98 of the Communications Act, Ofcom has powers to deal with urgent cases. An urgent case is one which creates an immediate risk of (a) a serious threat to the safety of the public, to public health or to national security; (b) serious economic or operational problems for persons who are communications providers; or, (c) serious economic or operational problems for persons who use electronic communications. Once Ofcom considers that a case is urgent, it may forego certain of the procedural requirements pertaining to investigations.

⁴⁴ Communication from the Commission to the Council, the European Parliament, The Economic and Social Committee and the Committee of the regions *Eight Report on the Implementation of the Telecommunications Regulatory Package* COM (2002) 695 def., Annex 3.10, 122.

⁴⁵ See *OPTA Annual Report (2002) Annex .3.6*.

⁴⁶ This figure has been calculated on the basis of the information published by OPTA on its website (www.opta.nl). OPTA has not published an official figure regarding interim measures. As OPTA is not publishing all decisions on its website, it is not known whether more interim decisions are taken.

5. Provision of information and the treatment of business secrets

Article 5 (1) of the Framework Directive confers powers on regulatory authorities to request undertakings to provide all the information (including financial information) which is necessary for regulatory authorities to take their decisions and to ensure conformity with legislative provisions.⁴⁷ Requests for information have to be proportionate to the aims sought by the regulator and undertakings shall provide this information promptly and as detailed as required by the regulator. Article 5 (3) obliges the regulators (and the European Commission) to ensure that confidentiality for confidential information is guaranteed.

This provision attempts to set up a regime in accordance with which confidential information does not constitute an obstacle to effective regulatory enforcement. As expressed in Recital 13, '[n]ational authorities need to gather information from market players in order to carry out their tasks effectively.' On the other hand, the exchange of confidential information between the Commission and other regulators may only take place when such an exchange is 'strictly necessary'.⁴⁸ Many have identified the treatment of business secrets as a major obstacle to effective competition. This is particularly true for the German market.⁴⁹

Germany

On appeal RegTP is in many cases prevented from submitting the relevant documents to the courts since rules on court proceedings provide for a right of the parties to consult the documents. Those documents however are protected by rules on confidentiality and must therefore not be submitted. As a consequence, the courts and competitors of Deutsche Telekom do not have access to the latter's confidential information during the court proceedings. They are prevented from responding to the allegations made by Deutsche Telekom, and RegTP is also not in a position to submit the relevant documents to justify its decision on tariff approval. In practice, this problem could be resolved if involved parties waived their right to see the documents. As a result, many appeals cannot be dealt with by the courts, and a number of court proceedings are simply concerned with confidentiality aspects.⁵⁰ The prospect of litigating for

⁴⁷ On the overlap of this provision with Art 11 of the Authorisation Directive see Farr and Oakley 56.

⁴⁸ Framework Directive Recital 14.

⁴⁹ See European Commission *Eight Report on the Implementation of the Telecommunications Regulatory Package* COM (2002) 695, Annex 24; and Monopolkommission *Wettbewerbsentwicklung bei Telekommunikation und Post 2001: Unsicherheit und Stillstand*. Sondergutachten 33 (2002) 140-143. See further: B. Holznagel, 'Geheimnisschutz versus effektiver Rechtsschutz. Eine kritische betrachtung der para. 75a TKG und 99 Abs. 2VwGO', *Multimedia und Recht*, Beilage 12/2002, p. 34-38.

⁵⁰ For further references see A. Zerres 'Erfahrungen mit der gerichtlichen Kontrolle von Regulierungsentscheidungen.', *MultiMedia und Recht*, Beilage 12/2002 11-12.

months, or even years, tends to deter potential claimants from bringing actions since they will *not be able* obtain effective judicial remedies within a reasonable period of time.⁵¹

Amendments in the TK in relations to the protection of business secrets and the rules on confidentiality. In accordance with section 75a TK, RegTP will continue to decide on whether information is to be treated as confidential and should therefore not be transmitted to the court. This is laid down in s. 133 (1) of the draft TK. whenever a dispute about confidentiality issues arises (in particular, whether confidential information is to be submitted to the courts), the administrative court will decide 'in-camera' (section 133 (2)). The same court which also rules on the merits of the case has access to all documents, while it is bound by confidentiality and obliged not to disclose any confidential information in its decisions. Criteria to be taken into account by the courts when deciding on confidentiality are (1) relevance for decision-making and (2) whether, in the individual case at issue, confidentiality is outweighed by an interest in disclosure of the documents.

6. Effective appeals mechanism

Article 4 of the Framework Directive Requires Member States to have in place an 'effective appeals mechanism'. Under this mechanism users or undertakings 'affected' by a decision of a regulatory authority have the right of appeal to an independent body with appropriate expertise. The appeal body – which may be a court – shall be able to duly take into account the merits of the case. Article 4 (1) reads as follows:

Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking 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 is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

This rule should be read in accordance with the case law of the Court of Justice in relation to the principle of effectiveness. The duty of national courts to ensure the application and effectiveness of Community law in the national legal order includes the obligation to provide

⁵¹ Monopolkommission Wettbewerbsentwicklung bei Telekommunikation und Post 2001: Unsicherheit und Stillstand. Sondergutachten 33 (2002) 141.

citizens with effective legal protection if their Community rights are infringed.⁵² For the telecommunications sector this right was discussed in the *Connect Austria* case.⁵³ The ECJ upheld the right of individuals to appeal against a decision by the regulator despite the fact that this possibility was explicitly excluded by the Austrian legal system. The national rule had to be set aside to comply with the requirements laid down in a directive.

Different national appeal mechanisms

It is clear from the text of Article 4 Framework Directive that practice in the different Member States regarding appeals was contra-productive. Long delays – in favour of the incumbent – were common:

'In a fast-moving market, players look to the NRA to resolve disputes rapidly. There is, however, clearly a trade-off between the quality of decisions on the one hand and rapid decision-making in line with market developments on the other. In some Member States the incumbent (and in some cases its subsidiaries) has been able to seize first mover advantage in the roll-out of DSL services while entrants have been engaged in lengthy proceedings with regulators and the courts.(...)

In a related matter, it appears that incumbents have, as a matter of strategy, continued the practice of appealing systematically against NRA decisions (...). While due process is a fundamental legal principle, NRAs need to put in place disincentives for excessive delaying measures. Operators are concerned at lengthy appeal procedures in Belgium, Germany and the Netherlands, Austria and Finland.⁵⁴

*For example in the Netherlands there is an internal administrative revision procedure within OPTA, before the case can be taken to the Court. The revision procedure is obligatory. Only in Denmark and Spain such a procedure does exist, although in Spain this procedure is not obligatory. The whole subject matter of the decision can fall within the scope of the internal revision procedure. Only incidentally, around 10 % of the cases (and mostly after an interim decision of the President of the Court of Rotterdam), OPTA comes to another decision in the revision procedure. This obligatory administrative procedure delays procedures extensively. According to Article 7:10 of the General Administrative Law Act (the so called Algemene Wet Bestuursrecht) the administrative body must take its decision within 6 weeks (with one possible extension of 4 weeks). On average it took OPTA **243 days** (with a **minimum of 42 days** and a **maximum of 554 days**), more than 34 weeks, to take a decision in a revision procedure.⁵⁵*

⁵² J Schwarze 'The Europeanization of National Administrative Law' in J Schwarze (ed) *Administrative Law under European Influence: On the convergence of the administrative laws of the EU Member States* (Nomos Baden-Baden 1996) 809.

⁵³ Case C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, and Mobilkom Austria AG* [2003] Judgment of 22 May 2003.

⁵⁴ See Seventh Implementation Report (2001), 15.

⁵⁵ These figures come also from the study of the Institute for Information Law (Amsterdam), 'Zes Jaar bestuur en rechtspraak in de telecommunicatiemarkt', taking into account the decisions of OPTA over the period 1 August 1997 – 1 Augustus 2003. These figures do only take into account those decisions in the revision procedures which lead to a court decision.

Currently (September 2003) 170 cases are still pending before OPTA to decide upon in the revision procedure, where the term of 10 weeks has already passed.⁵⁶

There is, however, little clarity provided in the text of Article 4 of the Framework Directive as to what constitutes an ‘effective’ appeals mechanism. In any case, adaptations have been made in different Member States to introduce more efficient appeal mechanisms.

The United Kingdom

In the United Kingdom, an (statutory) appeal instance has been introduced as a result of the Framework Directive. Against decisions of Ofcom, full appeal on the merits can be initiated with the (new) Competition Appeal Tribunal instead of only a limited judicial review system of the past (judicial review to the High Court). It may be that – in the light of the new regime – judicial review would no longer be available. If an appeal raises a price control matter, the Competition Appeal Tribunal must before reaching its decision refer the matter to the Competition Commission for determination. In its decision the Tribunal must follow the Competition Commission concerning the price control matter, unless that determination would to be set aside applying the principles applicable on a claim for judicial review.

Germany

Currently, appeals against decisions of RegTP can be lodged with the Administrative Court Cologne (Verwaltungsgericht Köln) and subsequently, in second instance, with the Higher Administrative Court Münster (Oberverwaltungsgericht Münster). Finally, appeals on points of law only may be brought before the Federal Administrative Court (Bundesverwaltungsgericht). There is no internal review within the regulator. Section 132 (3) of the draft TA confines appeals on the merits (including fact-finding) to only one instance. As a consequence, appeals against judgments and decisions of the Administrative Court to the Higher Administrative Court are no longer possible. Parties may in last instance appeal decisions of the Administrative Court to the Federal Administrative Court on questions of law only.

The Netherlands

During Parliamentary discussions on the new Telecommunications Act (implementing the new directives), the appeal procedures have been adapted fundamentally. A new proposal is submitted to Parliament to abandon the internal revision procedure all together in dispute cases.⁵⁷ This would limit the length of procedures in an extensive way. Moreover, it has been decided that appeal will – in most cases - no longer take place in two instances, but only one (this is only not true for decisions of OPTA including penalty sanctions). An appeal against a decision of OPTA can only be made directly to the CBB (the higher court of appeal), instead of first to the District Court Rotterdam and then to the CBB.

France

All decisions adopted under Article L.36-8 Code des Postes et Télécommunications can be brought for appeal before the civil court, the Appeal Court of Paris, instead of the administrative court of Appeal. All other decisions adopted by the ART, including those adopted under Article L 36-11 CPT relating to the sanctioning power of ART, must be appealed before the administrative courts.

⁵⁶ This figure is available from the case register of OPTA, published at their website www.opta.nl.

⁵⁷ *Kamerstukken II*, vergaderjaar 2003-2004, 28 851, nr. 22, Derde Nota van Wijziging, artikel 17.1 new TA.

Affected parties

The Directive does not mention further criteria for ‘affected’ users or undertakings. Recital 12 also does little to clarify the concept. It states that ‘any party who is the *subject of a decision* by a national regulatory authority should have the right to appeal.’ This leaves a broad margin of appreciation for member states in implementing this provision, in particular related to *locus standi* for third parties to a dispute.⁵⁸

The Netherlands

In The Netherlands due to a judgement of the Court of Rotterdam in the Versatel case⁵⁹, third parties cannot intervene in a dispute (appeal) procedure. Only the parties direct related to the (contractual) dispute have locus standi. Third parties must initiate their own (interconnection) disputes. Mostly it is the incumbent, acting against a decision of OPTA, initiating the administrative appeal procedure. OPTA is in that case the defendant in the litigation and the original complainant who started the dispute will act as the “third party”. However, the role of the original complainant might be limited and the procedure will in practice be between the incumbent, as the appellant and OPTA, as the defendant. This situation is fundamentally different in France where the dispute resolution is seen as a civil action. Appeals will therefore be held before the civil appeal court (judicial appeal court of Paris). The litigation takes place between the two telecommunications undertakings concerned, and the NRA (ART) is not a party to that procedure. ART can only send its observations as the expert witness.

Germany

For an over view of the German case law on “Klagebefugnis Drittbetroffener”: J. Scherer, Streitbeilegung und Rechtsschutz im künftigen TK-recht’, MMR beilage 12/2002, p. 26-27.

Interim measures by the court

As follows from the last sentence of Article 4 (1) Framework Directive, pending the outcome of an appeal, the decision will stand, unless the appeal body decides otherwise.⁶⁰ This is an important rule, as a suspension of the NRA’s decision might cause extensive delays in

⁵⁸ See J. Scherer, Streitbeilegung und Rechtsschutz im künftigen TK-recht’, *MultiMedia und Recht*, Beilage 12/2002, p. 27.

⁵⁹ Court Rotterdam 28 February 1998, Versatel vs. OPTA, reg. nr. VWTv 97/42S5-S1, *Mediaforum* 1998-5, Jur. nr. 28 en *Computerrecht* 1998/2, p. 89-97, note P. Burger.

⁶⁰ Framework Directive Article 4 and Recital 12.

implementing the decisions of the NRA. However, it is left to national law on which grounds the court may decide to suspend the decision. The tests applied by the national (president of the) courts is therefore crucial. In some countries, the courts are rather lenient in providing suspension to the NRA decision. As a result, pending the appeal the obligations imposed by the regulator are not implemented and legal uncertainty for market participants persists. Long delays in judicial proceedings and the process of restructuring on the telecommunications markets are likely to make judgments superfluous, inasmuch as they do not reflect economic realities by the time the decision has been rendered.⁶¹

Germany

The duty to implement obligations resulting from a decision issued by the RegTP is frequently suspended by the courts.⁶² It is widely known that Deutsche Telekom systematically makes use of its right to apply for interim measures.⁶³

The Netherlands

The President of the Court of Appeal of Rotterdam does apply a more lenient test than for example used in France. From the study of the Institute of Information Law it follows that the President in 50% of the cases suspends the decisions of OPTA. This had severe consequences for the opening up of the telecommunications market. In many cases the President came to this conclusion on the basis that OPTA did lack the power to intervene using in those cases a strict interpretation of the regulation of the Telecommunications Act.

France

Appeal does not suspend the execution of the ART decision. However, suspension of enforcement of the decision may be ordered when asked by one party, if the decision could lead to clearly excessive consequences or, after its notification, new extremely serious facts arise.

More recently, France Télécom brought a claim before the first president of the Appeal Court of Paris, to suspend enforcement of the ruling dated 18th May 2001 ordering France Télécom to fulfil the request for indirect interconnection with third party billing/collection on behalf of 9 Télécom for routing internet traffic to destination numbers with the format 0860PQMCDU paid by the callers of 9 Télécom. In the ruling dated 17th August 2001, the judge pointed out that "only the impact of the measures approved by ART on the operation and the financial situation of the company concerned may be taken into consideration to decide upon the adequate grounds for the petition to suspend enforcement, excluding the measures stemming from the nullity or the grounds of the decision, which are not within the competence of the First President". As France Télécom did not allege new facts of particular seriousness that had arisen after the decision, this petition for suspension of enforcement was dismissed.

Spain

For example in Spain, requests for interim measures have always been refused by the president of the court applying very strict tests for interim measures. Decisions of the Spanish NRA have never been suspended.

⁶¹ W Büchner et al (eds) *Beck'scher TKG-Kommentar* (Beck München 2000) § 80 Rz 11.

⁶² See, as an example, the decision of the Administrative Court Cologne of 15 October 2002 suspending the obligation to implement a decision of 31 May 2002 issued by RegTP (regarding time limits and conditions for the delivery of leased lines).

⁶³ See, amongst others, U Immenga 'Telekommunikationsrechtliche Verfahren und gerichtliche Kontrolle' (2002) *TeleKommunikations- & MedienRecht*, Tagungsband zur Veranstaltung "Das neue TKG" 23.

Review of NRA decisions by the court

Nothing is stated in the Directives how the national courts must review decisions of the NRAs. This is entirely a matter of national law. However, due to case law of the Court of Justice, national courts are under the obligation to interpret national law in accordance with the text and objectives of the Directives. Moreover, it can be expected that the national courts will more and more take into account the decisions of NRAs in other Member States and the case law in those countries. This will also be encouraged by the obligatory involvement of the European Commission and the NRAs of other Member States in the decision making process of the NRAs.

Moreover, Article 4 of the Framework Directives states that the Member States must ensure that the merits of the case are duly taken into account. This might refer to national courts which hide behind formal aspects or procedural matters of a case, without looking into the content or the economic aspects of a case. It is, however, questionable, whether the application of Article 4 of the Framework Directive will prevent national courts to take this attitude.

The Netherlands

In general one could say that the courts have the tendency to limit themselves to a rather formal review or procedural issues. In many cases, the court of Rotterdam focused on the question whether OPTA had a legal authority to act and at the same time interpreting the legal basis in the TA restrictively. The court did follow a formal approach and does not play an active role. As a result, in those cases it was decided that OPTA did not have the legal powers to intervene. This can be best illustrated by the decisions of the (President of the) Court of Rotterdam in the mobile terminating tariff cases of O2. The Court of Appeal (the CBB), however, decided in the Dutchtone case⁶⁴ that the articles of the TA must be interpreted in the light of the objectives of national and European telecommunications law. This interpretation methodology leads to a broader interpretation of the rules of the TA. Although the Court of Rotterdam followed this methodology in the Denda case⁶⁵, it did not follow this line of reasoning in other cases, such as the O2 case (see case study in Chapter I) on mobile terminating tariffs. In other cases, (due to the principles of administrative law) procedural issues formed the core of the judgment, without dealing with material telecommunications law.⁶⁶ For example, in the Kerktelefonie⁶⁷ case, it was decided that competitors did not have standing in one of OPTA's proceedings, where it controlled the end user tariffs of KPN. In the

⁶⁴ CBB 25 april 2001, KPN vs. OPTA en Dutchtone, *Mediaforum* 2001-6, Jur. nr. 28, note A.T. Ottow and *Computerrecht* 2001/4, p. 207, note E. J. Dommering.

⁶⁵ Court Rotterdam 21 June 2001, KPN and Denda vs. OPTA, nrs. TELECOM 01/066-SIMO, TELECOM 01/111-SIMO en TELECOM 01/191-SIMO, *Actualiteiten Mededingingsrecht*, September 2001, nummer 7, p.180-184, note RM.

⁶⁶ See A.T. Ottow, 'Het verschil tussen duivenhokken en telecommunicatie. De bestuurs(proces)rechtelijke obstakels bij het toezicht op de telecommunicatiemarkt.', In: prof. mr. B.M.J. van de Meulen en mr A.T. Ottow, *Toezicht op markten*, VAR-reeks 130, Den Haag: Boom Juridische Uitgevers, 2003, chapter 4.

⁶⁷ Pres. Court Rotterdam 31 March 2000, Landelijke Organisatie Kerktelefoon/OPTA, reg. nr. VTELECOM 00/0083-SIMO, *Mediaforum* 2000-6, Jur. Nr. 42, note W. Hins.

Libertel case⁶⁸, it considered that competitors of the SMP company could not be involved in the proceedings. Only in a later stage was this overruled by the court..

According to the judgment of the CBB in the Wegener case⁶⁹ (dealing with a decision of the NMa on the basis of the CA), the courts must be reluctant to deal with the evaluation of complex economic evidence performed by the authority (in this case the NMa). In this case, the CBB followed the jurisprudence of the European Court of First Instance.⁷⁰ This case law seems to apply to telecommunications. However, there are no cases yet where the Court of Rotterdam had (or wanted) to deal with material economic issues.

Regarding dispute resolution, it can be noted that the national courts have difficulties in qualifying the dispute settlement powers of the NRA within their national law system. The courts have struggled conceptually to bring public law protections to private law sources of power. To combine public rules and powers with the contractual law aspects of the dispute has not only raised procedural questions but also material ones. For example, whether contractual or public law aspects to the case should prevail. In case contractual law prevails, there is a danger that the public law aspects of the dispute (i.e. the regulation of the contract between the parties by imperative law) are overlooked.

United Kingdom

In the (older) case Mercury Communications Ltd. Vs. The Director General of Telecommunications and another⁷¹ the House of Lords decided that the dispute could be reviewed by the Commercial Court. Because the dispute was presented as contractual in form it should be classified as one of private rather than public law.⁷²

The Netherlands

The Court of Rotterdam decided in the Energis case⁷³ the court stated that as the dispute relates to a contractual issues, the rules on contractual law should prevail over the public law aspects of the case, i.e. the powers of OPTA to set (public) rules between the parties in order to resolve the dispute were restricted by the contractual aspects of the case.

⁶⁸ Pres. Court Rotterdam 24 December 1999, Libertel/OPTA, reg. nr. VTELEC 99/2547-SIMO, *Mediaforum* 2000-2, Jur. nr. 13, note E. Loozen & K. Mortelmans.

⁶⁹ CBB 5 December 2001, d-g NMa en Wegener, *Mediaforum* 2002-4, Jur. nr.15, p. 131-145, note F. Leeftang & K. Mortelmans.

⁷⁰ ECJ judgement 30 January 2002, *Max. Mobil telekommunikation Service GmbH vs. Commissie*, case T-54/99, r.ov.58-59.

⁷¹ The Times, February 10, 1995 (H.L.).

⁷² A. McHarg, 'Regulation as a private law function?', [1995] *PL* 539.

⁷³ Court of Rotterdam 31 January 2003, *Mediaforum* 2003-4, Jur. Nr. 21, note A.T. Ottow.

7. Enforcement of decisions of the NRA

Mainly in interconnection disputes relating to tariffs problems can exist in relation to the refund of money already paid to the other party (mostly the incumbent) once the correct tariffs has been established by the NRA. The directives do not regulate this issue. One of the main problems is the fact that this is mainly a contractual issue, while the decision of the NRA is mostly seen as a decision of administrative law. The NRA lacks in many cases the power to force the party concerned to pay the amount due.

The Netherlands

In The Netherlands this problem has been a major obstacle for newcomers on the market. Due to the legal system they are forced to litigate before OPTA and the administrative appeal courts and only after a final judgement is given, they can start civil litigation before the civil courts to collect their money. Only in exceptional cases a President of a civil court is willing to force the party concerned (mostly KPN) to make advance payments.

United Kingdom

Under the current regime, Ofcom has similar powers of enforcement in respect of all types of conditions set pursuant to the Act.⁷⁴ Where Ofcom has reasonable grounds to believe that a person is or has been in breach of any condition, it may notify that person accordingly, and allow him a specified period of time in which to make representations and to take steps to comply with the condition or remedy the breach. Upon the failure of an operator to comply with such a notification, Ofcom may serve an enforcement notice. Those persons to whom an enforcement notification relates are under a duty, enforceable via civil proceedings, to comply with it.⁷⁵ Ofcom also has the power to impose a financial penalty and suspend the entitlement to provide networks, services and associated facilities.

8. Conclusion

The new Directives provide more guidance on procedural rules in relation to dispute resolution and the powers to be endorsed on the NRAs. However, national (procedural) rules of administrative and civil law will remain and have their effect on the implementation of the Directives in the different Member States. There is still a danger that these national rules form an obstacle to the realisation of effective competition in the telecommunications market. The legislators of the Member States should – on the basis of the European principle of effectiveness – recognise the problems and issue measures to minimise these obstacles (of administrative law).

⁷⁴ Communications Act, s.94.

⁷⁵ *ibid.*, s.95.