Enforcement and judicial review of decisions of national regulatory authorities

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Outline

- Background and scope
- Methodology
- 12 issues and recommendations
- Questions for discussion
Background

- CERRE study, sponsored by 6 members, across sectors, countries and functions

- Researchers

- Coverage
  - Energy, telecom, rail
  - Belgium, France, Germany, Netherlands, UK
Methodology

- Functionalist methodology: implications
- Study of legislation and cases
- Theoretical background to enforcement and appeals
  - Preserve the rights of the parties involved
  - Ensure effectiveness of law
  - Make procedure as efficient as possible
  - Trade-offs
1. Enforcement of NRA decisions

- EU law: effective, proportionate and dissuasive penalties

- 3 systems:
  - Penalties for breach of legal provisions
  - Penalties for breach of NRA decisions
  - Mixed system

- Recommendation: penalties directly available for breach of NRA decision
2. Stay of enforcement pending appeal

- EU law: no automatic stay
- Various regimes at national level
- Very small impact on the regulatory process in current practice
- Recommendation: NRA decisions remain enforceable pending the proceedings, save for fines

⇒ link with other questions
3. Nature of the review courts

- EU law: independence and expertise
- Civil / administrative / specialised courts and bodies

Implementation:
- Exclusive competence $\Rightarrow$ Expertise
- Cross-sectoral approach
- Increased complexity
- No correlation with outcome of appeals

- No preferrable approach
4. Parties before the review courts

- EU law: affected party has the right of appeal
- Claimants: broader class?
- NRAs as parties before the review courts
- Joinder of related appeals / third-party interventions
- Consequences: information of the court, length of proceedings, protection of confidential information
- Recommendation: broader standing and intervention rights, joinder of cases
5. Length of proceedings

- No provision in EU law
- Length: about 1.5 year on average
- Concern about the small number of allocated judges in CA Brussels
- Recommendation: shorten proceedings via EU-level deadlines?
### Average length of the proceedings before judgment on the merits

<table>
<thead>
<tr>
<th>Location/Institution</th>
<th>Days</th>
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<tr>
<td>CA Paris (21)</td>
<td>251</td>
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<td>VW Köln (all)</td>
<td>282</td>
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<tr>
<td>Court of Appeal (5)</td>
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<td>CAT (17)</td>
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<td>CA Brussels (86)</td>
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<td>Rb Rotterdam (8)</td>
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<td>CE fr (25)</td>
<td>635</td>
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<tr>
<td>College van Beroep (15)</td>
<td>715</td>
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6. Protection of confidential information

- EU law: protection by NRA

- All national laws deliver on the protection

- 3 types of regimes: withdrawal of information from
  - Court, opposing party and counsel
  - Opposing party and opposing counsel
  - Opposing party only, circulated to counsel

- Recommendation: last type offers optimal balance
7. Scope of review

- EU law: merits of the case must be taken into account
  - Art. 4 of the Electronic Comm. Framework Directive
- Converging pattern: all legal, factual and policy issues
- Councils of State: review limited to unlawfulness
- Review by reference to the grounds of appeal
- Recommendation: no limitation on scope, but limit to grounds raised by parties
8. Investigating powers of the courts

- No provision in EU law
- Converging pattern: all review courts may order investigating measures
- At the request of parties or *ex officio*
- Scarcely used in practice
- Recommendation: no need to increase the investigation powers of the courts
9. Standards of review

- No specific rule in EU law
- Various standards of review in national law
- Tendency towards a distinction between:
  - Full review of errors of law
  - Broad review of errors of fact
  - Marginal review where NRA has discretion
- Recommendation: follow the above
10. Formal or substantive analysis

- No provision in EU law
- Specialised courts: used to substantive analysis
- Other courts: reluctant to abandon formal analysis
- Recommendation: substantive analysis, coupled with marginal review
11. Coordination across jurisdictions / sectors

- Few mechanisms available
- Few judgments rely on case law from other jurisdictions or other sectors

Recommendations:
- Cross-sector approach on jurisdiction
- Network of review courts
- Case-law database
12. Decisional powers of the courts

- No provision in EU law
- Type of order: quashing / direction / substitution
- Retroactive (ex tunc) / prospective (ex nunc)
  - Complex issue, brings together previous questions
  - Advantages and disadvantages of each
- Recommendation: on balance, better to give no retroactive effect to the remedies granted by the review court
Main conclusions

- Enforcement and review of NRA decisions largely left to the Member States

- Harmonisation of substantive law at EU level vs. diversity of national procedural laws

- Horizontal approach of enforcement and review is to be followed
Main recommendations

- Penalties directly available for breach of NRA decision
- UK practice on confidential information
- Marginal review where NRA enjoys discretion
- Substantive analysis of policy issues
- Cross-fertilisation between jurisdictions/sectors
- Better no retroactive effect for court remedies
Open questions (1)

- Is there a need for enhanced coordination and networking between review courts, including where several NRAs decide jointly?

- Are retroactive remedies effective in practice? Can the risk of NRA misuse of powers be contained through other measures such as ex ante improvements?
Open questions (2)

- Should EU law provide enhanced harmonisation of rules on appeal proceedings, for instance on length of the proceedings?
- How can we reach the best possible balance between the protection of confidential information, the principle of adversarial proceedings and the need for outside checks on the evolution of the law?