



The need for more effective appeal mechanisms

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The Problem for Operators

- Effective regulation and competition law require effective appeal procedures
- Current inconsistent application of the regulatory framework at the national level
- Current damaging delays in obtaining competition law judgments at European level

.....*and an operator's solution*

- National Level - Article 95 powers should be used to facilitate consistent application of the regulatory framework at the national level
- European level - Set up a Specialised Competition Tribunal under Article 225A

Regulatory Framework: the issue

- Article 4(1) Framework Directive (FD):
 - **Effective appeal mechanisms** shall exist at national level
 - **Any person** who is affected by a decision of the NRA shall have a right of appeal
 - **NRA decision shall stand**, pending the outcome of any such appeal, unless the appeal body decides otherwise

National Appeal Systems: findings in the 11th implementation report

**length of appeal procedure
(17 Member States)**

**practice of systematic appeals
(10 Member States)**

**suspensory effect of appeals /
suspensions on a regular basis
(6 Member States)**

**denial of third parties' rights of
appeal (1 Member State)**

**effective
application of
the Regulatory
Framework
may be
undermined**

Member State	Issue identified by the Commission ?			
	length of appeal procedure?	practice of systematic appeals?	suspensory effect of appeals* or suspensions on a regular basis**?	right to appeal for third parties denied?
AUSTRIA			Yes*	
BELGIUM	Yes	Yes		
CYPRUS		Yes		
CZECH REPUBLIC	Yes			
DENMARK			Yes**	
ESTONIA	Yes	Yes		
FINLAND	Yes		Yes**	
FRANCE	Yes			
GERMANY	Yes			
GREECE	Yes	Yes		
HUNGARY	Yes	Yes		
IRELAND	Yes			
ITALY		Yes		
LATVIA				
LITHUANIA			Yes**	
LUXEMBOURG	Yes			
MALTA	Yes			
POLAND	Yes	Yes	Yes*	
PORTUGAL	Yes			
SLOVAKIA	Yes	Yes		
SLOVENIA				
SPAIN	Yes			
SWEDEN	Yes	Yes	Yes* **	Yes
THE NETHERLANDS		Yes		
UNITED KINGDOM	Yes			

Case study: Sweden

THE PROBLEM

- Market reviews: Out of 34, 24 have been appealed (majority of those not appealed have lifted regulatory controls on the incumbent)
- lower court has granted suspensory injunction in majority of appeals.
- Only 1 appeal process under the EU Regulatory Framework of 2003 concluded
- Implementation delays of 24 months with suspended effects during delay

PROPOSED CHANGES (following 2006 report)

- Time limits on PTS' decisions and appeals decisions
- new procedural rules to increase efficiency
- increased use of economic experts
- reduce appeal stages from 3 to 2,

Effect on BT

- BT provides services to businesses and government purchasers in every country in the EU, including Sweden
- Key monopoly access inputs include wholesale leased lines (known as ppcs) and wholesale broadband services (known as bitstream). These are required to be provided by BT in the UK as a result of application of the EU Framework. Abuse of the appeals process in Sweden means that they are not available in Sweden.

2006 Review:

- BT's view, advised by Brick Court Chambers, is that the Community legislature has the power on the basis of Article 95 to:
- Impose time limits on national courts determining appeals under Article 4 of the Framework Directive;
 - time limits facilitate proper application of Article 6 ECHR which confers an express right to a “hearing within reasonable time”
- Place limits on the number of instances of national appeal;
- Set out substantive rules governing the circumstances in which interim relief may be granted.

European level: The problem

- **Overloaded CFI**
- **Current timescales (end of 2005)**
 - preliminary rulings: 20.4 months
 - direct actions: 21 months
 - appeals: 21 months
- **Timescales for antitrust/merger cases (end of 2005)**
 - currently 33 months for anti-trust cases
 - 10 – 12 months fast track – mergers (though 19 for Sony/BMG)
 - fastest merger case: 7 months (EVP v Commission T-87/05)

Business need for change to competition law appeals

- **Business concerns:**
 - Speed – too slow
 - Uncertainty has negative effects on investment
 - Delay prevents effecting of efficiencies from mergers (BT/AT&T - £100m per month)
 - Slows down pace of development of European competitiveness
- **Business conclusion:**
 - Urgent need for action

Potential reform solutions

- **Procedural improvements**
 - Increased use of expedited (“fast track”) procedures
 - Change to language regime (change to Article 35 of the CFI Rules of Procedure)
- **Specialised Competition Court operating as CFI Judicial Panel under Article 225A EC Treaty**
- **Change to modus operandi of CFI**

3 levels of jurisdiction:

 - First instance tribunal
 - Appeal to full CFI
 - Exceptional appeal to ECJ
- **System of full jurisdiction**

Specialised Competition Court (under Art 225A EC Treaty)

- **Considerations/Advantages**

- Competition cases comprise 12 % of total CFI cases
- Specialised judges and more resources for competition cases
- Speedy merger review
- No need to alter CFI Rules of Procedure
- Court could opt to conduct court procedures in language of the parties/case (potential significant time saving)
- Consistency in interpretation and uniformity in application of EC law
- Would require unanimous approval of Council under Article 225A to set up

Conclusion

- Article 95 powers should be used to place time limits on appeal processes in Member States
- A Specialised Competition Court operating as a CFI Judicial Panel should be formed
- Both changes can and will increase business certainty
- Changes will contribute to economic efficiency