

The triangular relationship between the Commission, NRAs and national courts revisited

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Outline

- Legal uncertainty and the decision-making chain model
- NRAs and the Article 7 procedure
- Accountability, judicial review and the role of national courts
- Conclusion

How can we confidently predict the future?

- We cannot of course ...
 - > Especially lawyers; must resist temptation
- Implications
 - > No right answers
 - > Policy trade-offs
 - > Nature of decisions
 - Mechanical application OR
 - Chain of decisions

Decision
chain model

Article 7
procedure

Accountability

Conclusion

The decision-making chain model

Example: the regulation of mobile termination

Market power → Asymmetric regulation



Alignment with competition law → SMP procedure



Market selection → Three-criteria test



Market for call termination on individual mobile networks



No effective competition → SMP designation



Appropriate remedy → price regulation



Appropriate costing standard → LRIC



Regulated price fixed for each operator

Decision chain model

Article 7 procedure

Accountability

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Decision
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**Article 7
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What is the role of an individual NRA in the broader regulatory scheme?

- > Fact-finding under national circumstances
OR ALSO
- > Policy-making

What is the role of the Commission in relation to NRA decisions?

- > Judicial review / appeal
- > Control for specific purposes
 - Within decision chain, not outside/above it

Decision
chain model

**Article 7
procedure**

Accountability

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- *What should be the standard of review under Article 7?*
 - > ‘It considers that the draft measure would create a *barrier to the single market* or [...] it has *serious doubts* as to its compatibility with Community law and in particular the objectives referred to in Article 8’ [emphasis added]
 - > Interpret in line with general EC law
- A mere consistency/coherency test??
 - > Not about whether Commission agrees
 - > Misconceived strategic approach

Decision
chain model

**Article 7
procedure**

Accountability

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RIP regulatory emulation?

- > What it could mean under the Framework Directive: balance between static and dynamic aspects
- > What are the pre-conditions
- > How it could unfold
- > Why it would be useful
- How the practice is different
 - > Historical explanations
 - > Influence of Article 7 procedure
 - > Consequences for small Member States and latecomers

Which parts of the decision-making chain should be subject to some accountability mechanism (review or other) ?

Decision
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- > Commission soft law instruments
- > ERG documents
- > Commission letters and decisions under the Article 7 procedure
- > NRA decisions

→ Accountability problem

If accountability is achieved through judicial review, who is best placed to carry it out?

Decision
chain model

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- National courts
 - > Need for judicial education
 - > Cannot deal with “higher” documents
- ECJ
 - > Problems with Article 230 EC
- European Communications Appeal Tribunal/Panel
 - > Constitutional constraints
 - Creating it
 - Imbedding it in national procedure

Decision
chain model

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What should be the breadth and depth of judicial review?

- Problem in the interface between Article 4 and national systems:

'the merits of the case are duly taken into account'

- > Continent: impact on breadth of review
 - > UK/ Ireland: impact on depth of review
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- Any room for improvement?
 - > Review on the merits, but marginal
 - > Economic analysis of judicial review / accountability ?

The interplay between Articles 4 and 7 – Call termination cases (Markets 9, 16)

- Key: CBP and strict/modified Greenfield approach

Decision chain model

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	NRA	Comm	Nat'l ct	Reference to Art. 7 Comments
Ireland (Mkt 16)	3 rd op → SMP	OK	Annuls	None.
Germany (Mkt 9)	ANOs → No SMP	Veto		
UK (Mkt 16)	3 rd op → SMP	OK	Annuls	None, but DE veto and IRL decision referred to.
Netherlands (Mkt 16)	All ops → SMP	OK	Annuls	Mention only. IRL and UK decisions alluded to.

Conclusion

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- Commission proposals remain superficial
 - > Leave key issues and their implications outside of discussion
 - > Missing an integrated vision of Articles 4 and 7
- At a glimpse
 - > Veto over remedies: NOT without clarification on standard of review
 - > Simplify Article 7 procedure: YES, could go further
 - > Article 5(1) decisions: YES
 - > Suspensive effect: YES
 - > Missing: standard of review under Article 7
accountability of “higher steps”
breadth and depth of judicial review