



# Judicial review of regulator decisions: next steps toward effective control and protection rights

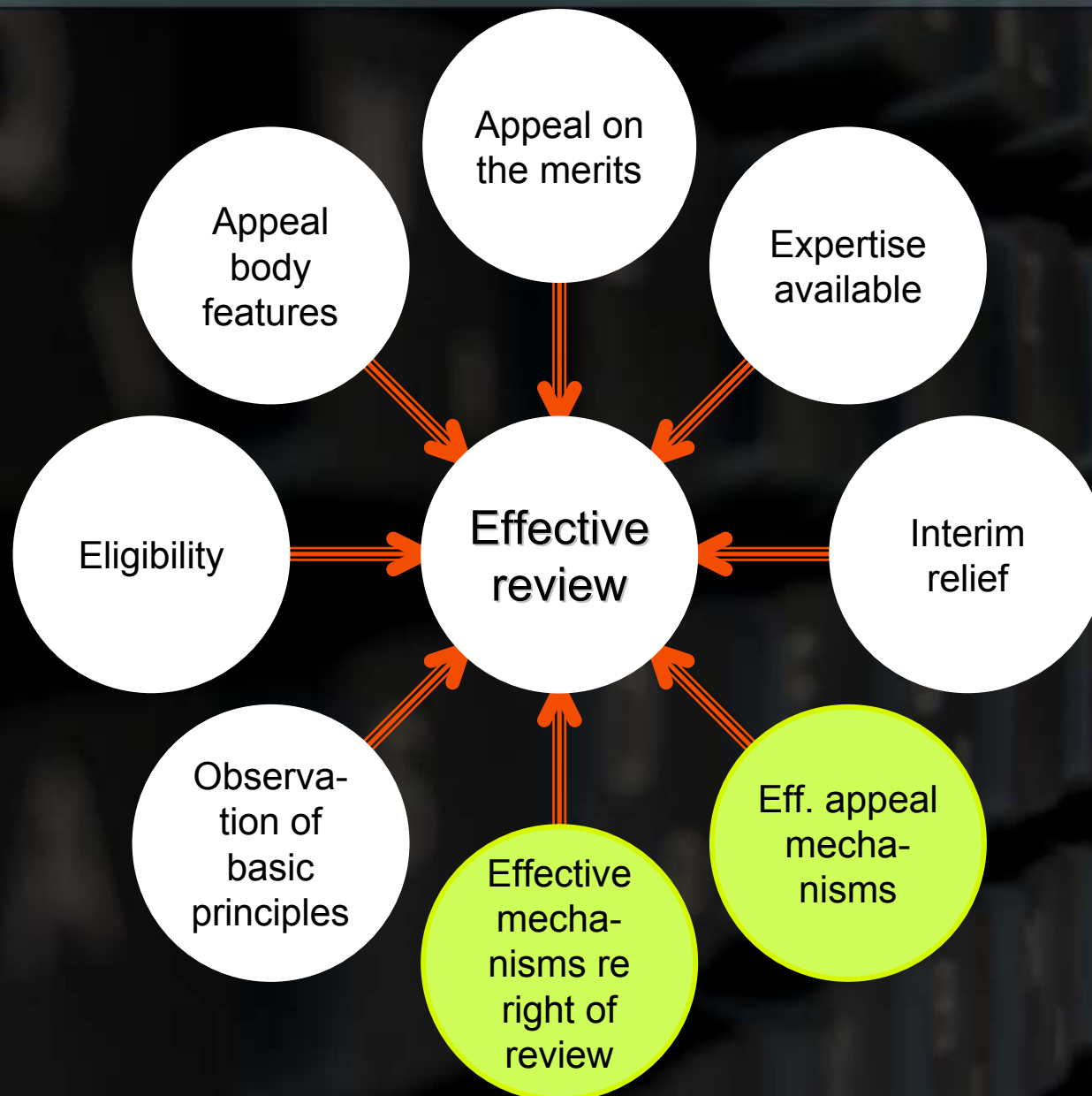
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# Questions to be addressed

- **Was Art. 4 FWD properly implemented?**
  - What are the EC requirements, which need to be implemented?
  - Are these requirements substantial for an effective judicial review?
  - Were they properly implemented in the MS?
  - If not, why?
  - How and to which extent do these problems influence effectiveness?
- **How could effective implementation be ensured?**
- **Are the solutions offered by Art. 4 FWD appropriate?**
- **Is there a need for additional measures?**

# EC main implementation requirements



# Are they substantial?

1. Eligibility
2. Appeal body–  
status
3. Expertise
4. Appeal on the  
merits
5. Interim relief
6. Art. 8 FWD  
basic  
principles
7. Effectiveness  
re right of  
appeal
8. Effectiveness  
re appeal  
mechanisms


## Problem was addressed by:

- 10th Implementation report (COM)
- Infringement proc (SE)
- Preliminary ruling (AT)
- Case law (HU)

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**Addressed by:**

10th report

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Addressed by: impartiality

review decision

10th report

MS case law (Hutchinson 3G IE)

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**Adressed by:**

6, 8, 11th report

Court of Justice (Connect Austria - disapplication)

MS case law (Hutchinson 3G IE)

# What is the scope of the appeal on the merits?

- **Common law approach**
- **Statute law approach**
- Clearly more than a legality check – supported by „appropriate expertise”
- But! Clearly less than a de novo reassessment – who is the real regulator?
- Typically a common law category – find the content, then apply to continental practice
- IE – examination of the decision whether SMP (evidence, materials, inferences, conclusions)
- Errors of fact or law – includes erroneous inferences of fact, errors as to jurisdiction and procedure
- Errors need to be significant (had a bearing on the decision) and material (objectively relevant and have a bearing on the conclusion) allows substitution by the court
- Appeals must extend into matters of fact decided by the NRA (questions of simple fact, questions of complex fact, discretionary evaluations) at least one stage of the appeal (Lasok)

# What is the scope of the appeal on the merits?

- **Common law approach**
- **Statute law approach**
- Review of legality – core concept
- Error of law – both material and procedural
- Review possible: Material: decision is contrary to law in its merits; not the right provision was applied or the provision was wrongly interpreted; Procedural: error is significant, with an effect on the merits of the case
- Review of discretionary decisions: in some MS discretionary powers to be laid down by law in some others by the decision of the NRA; conditions: the bearings of a case were clarified to a necessary extent, according to the procedural rules; the conditions of discretion can be defined concretely (in the decision or in law); in the reasoning of the decision the reasonableness of discretion is obvious

# What is the scope of the appeal on the merits?

- Where are the merits?
  - Courts do not have policy interests – reassessment of policy only upon a legality check
  - Function of the courts: not to supervise markets in all aspects but to understand and review the logic and reasonableness of the decisions if needed.
  - If it's enough: reject appeal or change decision
  - If not: cassation and new procedure

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**Adressed by:**

9-10-11th impl. report  
Infringements (PL, AT)

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subject to review

**Addressed by:**

9th impl. report

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# Are they substantial?

## Summary

8. Effectiveness re appeal mechanisms	

## Other factors not in Art 4 FWD

- Need to be clarified
  - Reformatory powers
  - Length of the procedures (10th 11th report)
  - Stages of appeal
  - Effective implementation into the continental legal order (secondary harmonisation goals) – effective control
  - Relationship with Art. 7 procedure
  - Role of EC soft law measures
  - ERG
  - Disapplication

# Measures?

- Proper enforcement of Art. 4 FWD implementation
- Modification of Art. 4 maybe with other provisions of FWD
- Harmonised solutions at EU level
- Disapplication?
- Awareness raising

# How could effective implementation be ensured?

- **Implementation**

- Non-implementation is still one of the main reasons of lack of effective review
- Design of national legal systems is a general issue and prerogative of the MS – due to heavy side-effects MS reluctant to change
- Some substantial problems are addressed by the Commission, some not.
- Several issues require in-depth and complex investigation
- Instead of heading to the wall why not opt for the side door?
- Instead of addressing the courts why not addressing NRA decisions in order to equip them for effective review? (e.g. review in the merits)

# Are the solutions offered by Art. 4 FWD appropriate?

- **Modifi-  
cations**

- **To a large extent yes, but need full implementation and further clarification**
- **Conditions for suspension (attention!!!)**
- **Increasing role of specialist bodies (expertise)**
- **Duration**
- **Relationship with Art. 7 proc., soft law enforcement, ERG, Court of Justice**

# Awareness raising

- Ensure uniform application
- Commission as amicus curiae – would correspond to the functions carried out by MS courts
- Training program for judges
- Database of respective decisions
- Elaboration of guidelines
- Common programs with competition appeals

**Thank you!**

**More info on our project:  
[www.ijc.hu](http://www.ijc.hu)**