



The need for more effective appeal mechanisms

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Regulatory Framework

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

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**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

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Member State	Issues identified by the Commission?			Right to appeal for third parties denied?
	length of appeal procedure?	practice of systematic appeals?	independent office of appeals or suspension of a limited sector?	
AUSTRIA			Yes	
BELGIUM	Yes	Yes		
CYPRUS		Yes		
CZECH REPUBLIC	Yes			
GERMANY			Yes**	
HUNGARY	Yes	Yes		
IRELAND	Yes		Yes**	
FRANCE	Yes			
GRECE	Yes			
GERMANY	Yes	Yes		
GREECE	Yes			
HUNGARY	Yes	Yes		
IRELAND	Yes			
ITALY	Yes	Yes		
NETHERLANDS				
ESTONIA			Yes**	
LUXEMBOURG	Yes			
NETHERLANDS	Yes			
POLAND	Yes	Yes	Yes*	
PORTUGAL	Yes			
ROMANIA	Yes	Yes		
SLOVAKIA	Yes			
SPAIN	Yes			
SWEDEN	Yes	Yes	Yes**	Yes
UNITED KINGDOM	Yes	Yes		

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Case study: Sweden

- Market reviews: 34: 24 have been appealed (majority of those not appealed are those which have lifted regulatory controls on the incumbent)
- Majority of those appealed, the lower court has granted a suspensory injunction.
- An additional 30-35 interconnection disputes are in front of the courts
- 1 appeal process under the EU Regulatory Framework of 2003 has been concluded.
- 11th Implementation Report:
"The most serious challenge to achieving the goals of the regulatory framework in Sweden is the functioning of the appeal process."
- Previous Swedish government appointed an independent expert to assess appeals process. Report is expected within weeks.


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Bitstream in Sweden

- Key product for IT/Outsourcing solutions
- Bitstream SMP decision announced November 2004
- Decision appealed and suspended by lower instance court.
- Judgement for NRA April 2006, suspension lifted.
- TeliaSonera appeals to second instance; leave not granted July 2006.
- TeliaSonera appeals to Supreme Court; leave granted July 2006 and suspension reinstated.
- TeliaSonera announce complete withdrawal of existing wholesale service from December 2007 (sales end December 2006).

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Operational effect on BT in Sweden

- BT provides services to businesses and government purchasers in every country in the EU, including Sweden
- BT has own infrastructure outside the UK but must complement that with monopoly access inputs. In order to serve its customers anywhere, a communications provider must provide connectivity everywhere
- 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.

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Case example: Germany

- An element used to be too many instances: situation improved in 2003.
- Principal issue now is the test for suspensive relief (Section 80(5) of the Admin Ct Procedure Act).
- Two limbed: does potential harm to the party outweigh the interest of the NRA to execute the decision.
- In practice, the German courts focus on the second part only which leads them to take a rule of thumb view on the likelihood of the NRA's decision withstanding the appeal. The theory is that the NRA could have no interest in applying a decision that is likely to fail.
- The view of our legal advisors in Germany is that when the Court's come to hear the full appeal they then merely copy across the decision in the hearing for suspensive review.
- There are no published figures. Our guess, approximately 50% of NRA decisions with respect to market regulation are appealed. 50% of these are suspended.
- Our view is that this is a contributory factor to the extraordinary tardiness of the German NRA; key access products which are regulated in most other Member State (bitstream, ppcs, mobile termination) are not yet regulated in Germany.

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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;
- Place limits on the number of instances of national appeal;
- Set out substantive rules governing the circumstances in which interim relief may be granted.

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