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The potential conflict between judgments of national courts and Commission recommendations on remedies in the telecommunications sector

Observations from a Dutch perspective

Winfred Knibbeler, 14 November 2014

Outline

- **Harmonisation of communications regulations across the EU through Framework Directive**
- **Commission's review of SMP designations**
- **Commission's review of remedies imposed by NRAs**
- **Role and consequences of Commission recommendations**
- **Commission recommendation on termination charges**
- **Effective legal protection by national courts, role of Commission**
- **The position of NRAs that are caught between a national court judgment and a Commission recommendation**

EU Framework Directive

- Role of NRAs and obligation to provide effective legal protection
- Obligations on NRAs under article 8
- Ex ante regulation after prospective analysis
- Recommendation on the relevant markets, SMP guidelines
- SMP conditions

Commission's review of SMP designations

- Article 7 Framework Directive
- Serious doubts letters
- Veto after further two months
- NRA must amend or withdraw draft measures within 6 months after Commission decision
- Significant harmonisation achieved

Commission's review of remedies imposed by NRAs

- Result of the 2009 reforms
- Article 7a Framework Directive → one month → three months
- Significant role of BEREC
- The Commission does not have power of veto, but can adopt further harmonisation measures under article 19 of the Framework Directive

Role and consequences of Commission recommendations

- Article 15(3), 16, 19 Framework Directive: NRAs shall define and analyse markets and impose remedies taking “the utmost account” of the recommendation on relevant markets, SMP guidelines, and - if applicable - recommendation on remedies
- Obligation for NRAs to inform Commission if they deviate from remedies recommendation
- Judgment Alassini: recommendations have legal consequences because courts are obliged to take recommendations into account
- Are recommendations still soft law?

Commission recommendation on termination charges

- Significant divergence in Europe in termination rates
- 2009 recommendation stating that “pure BULRIC model” is the only legitimate cost accounting methodology under the Regulatory Framework
- Mark-up for not incremental fixed costs unacceptable from a policy perspective

Effective legal protection by national courts, role of Commission

- Dutch Tribunal for Trade and Industry annuls decision of Dutch NRA (following Commission recommendation) on termination charges in August 2011
- Dutch NRA follows court decision and publishes new decision on 2 July 2012, ignoring Commission recommendation and specific decision of the Commission of 13 June 2012 confirming that proposed measure violates EU law
- New decision of Dutch NRA of 5 August 2013, following Commission recommendation, Dutch Tribunal for Trade and Industry currently considers reference to ECJ

The position of NRAs that are caught between a national court judgment and a Commission recommendation

- Need for effective legal protection?
- Nature of Commission recommendations?
- Role of Commission in national litigation?
- Suitability of reference to ECJ?
- Preference for direct appeals against Commission veto decisions and recommendations?
- Admissibility issues?

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