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Conference Paper

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24th European Regional Conference of the International Telecommunications Society (ITS): "Technology, Investment and Uncertainty", Florence, Italy, 20th-23rd October, 2013

Provided in Cooperation with:
International Telecommunications Society (ITS)

Suggested Citation: Micallef, Paul Edgar (2013) : Enforcement and review of regulatory decisions in electronic communications: The Malta experience, 24th European Regional Conference of the International Telecommunications Society (ITS): "Technology, Investment and Uncertainty", Florence, Italy, 20th-23rd October, 2013, International Telecommunications Society (ITS), Calgary

This Version is available at:
https://hdl.handle.net/10419/88453

Enforcement and review of regulatory decisions in electronic communications: the Malta experience

Paul Edgar Micallef[1]

1.1 Introduction

The choice of the theme of this paper is motivated by the lack of importance given to the enforcement and review of regulatory decisions in electronic communications, and by the challenges that inevitably arise when discussing this subject. Having in place an effective regime to enforce and to review regulatory decisions should be a paramount consideration in the overall regulation of electronic communications, and yet it appears that not enough is being done to achieve this goal.

The European Union (EU) has not always been sufficiently pro-active in dealing with the enforcement and review of regulatory decisions and there is certainly scope for more robust intervention by the EU taking into account the diverse legal systems of the Member States and some of the measures adopted to deal with appeals in some of the Member States. The Regulatory Framework for Electronic Communications of the EU ("EU Regulatory Framework") provides for a few norms giving very limited direction on the subject, consequently leaving it mostly up to the individual Member States to deal with such matters. One asks whether the EU should be doing more to see that enforcement of regulatory decisions and the appeals procedures in some Member States are improved upon.[2]

This situation is, if anything, made even worse by the sparse research conducted. Studies have to date been few and far between. With the exception of some singular instances[3] the studies undertaken generally have been within the context of reviews by individual Member States evaluating their own enforcement and, or review procedures of regulatory decisions taken by National Regulatory Authorities (NRAs).[4] Clearly more research can and should be done, thereby prompting both the EU and individual Member States to take more concrete measures.

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[1] Dr. Micallef is the chief legal adviser with the Malta Communication Authority. The contents of this paper reflect only his views.

[2] Hence the EU recognises that there are issues relating to the lack of effective enforcement. See recital (51) of Directive 2009/140/EC (the Better Regulation Directive).

[3] One such study is that undertaken by Pierre Larouche and Xavier Taton for the Centre on Regulation in Europe (CERRE) in April 2011 entitled "Enforcement and judicial review of decisions of national regulatory authorities". This study focused on enforcement and judicial review relating to different utilities including electronic communications in selected EU Members States.

[4] See for example proposals by the Irish Government made in the report entitled "Consultation Paper on Regulatory Appeals" issued by the Department of the Taoiseach in July 2006.

The experience of Malta in dealing with the enforcement and review of regulatory decisions provides an interesting insight of the practical issues faced and the measures taken in addressing these issues. In a relatively short span of fifteen years commencing with the enactment of the first law setting up a telecommunications regulator[5], the regulatory landscape in Malta has changed, at times quite radically. The relevant parts of the law relating to the enforcement and to the review of regulatory decisions taken by the NRA has been amended on various occasions and these changes have in the main led to substantial improvement. There remains however scope for further change, which in the case of Malta is inevitably always conditioned by the human and financial resources available.

In discussing the experience of Malta I refer to the experience of other EU Member States primarily the United Kingdom (UK) and Ireland. The choice of these countries is motivated in part by the approach taken by them in dealing with certain aspects relating to the enforcement and review of regulatory decisions. The Competition Appeal Tribunal (CAT), which in the UK determines appeals from regulatory decisions taken by the Office of Communications (Ofcom), has the merit of having a system which has access to a varied panel of experts and overall is generally perceived as one of the better review systems in place and a point of reference for other Member States in seeking solutions.[6] Ireland on the other hand has an interesting history having at least on two occasions changed the form of the appeal body in its attempts to have in place an efficient and informed review of regulatory decisions. Of particular interest in the Irish context is a consultative paper issued in 2006 which considered various options, this at juncture when two different solutions to deal with appeals had already been tried.[7]

1.2 The enforcement of regulatory decisions

The first part of this paper relates to the enforcement of regulatory decisions taken by NRAs. The availability of effective enforcement tools is imperative if there is to be compliance with the obligations emanating from NRA decisions. The enforcement tool generally used is the imposition of administrative fines whether one-off fines and, or fines on a daily basis for each day of non-compliance. In serious cases suspension or withdrawal of the authorisation to operate may be resorted to. However this latter measure is rarely used and then only if there are no other feasible options to ensure compliance with regulatory requirements.

[5] The first telecommunications regulator was established in 1998 following the enactment of the Telecommunications (Regulation) Act in December 1997. This law also provided for the establishment of the Telecommunications Appeals Board with a remit to determine appeals from decisions of the regulator.

[6] See for example "Consultative Paper on Regulatory Appeals" by the Department of the Taoiseach at p.24 et seq.

[7] See ibid. at p. 13 and 14, and at p. 29 et seq.

1.3 The review of regulatory decisions

The second and main part of this paper relates to the review of regulatory decisions taken by NRAs. One must bear in mind when discussing the review of regulatory decisions that electronic communications is a dynamic sector conditioned at times by unpredictable technological developments and that therefore some degree of certainty in having appeals definitively decided in short order is of essence to the well-being and development of the sector.[8] Furthermore it must constantly be underlined that the appeal body has the authority to over-rule regulatory decisions taken by a NRA. This in turn means that the appeal body should ideally be composed in such a manner so that it is in a position to give an informed decision not only in a relatively short time, but which also factors the various complexities that characterise many regulatory decisions taken by the NRA. In practice however in several Member States the review of regulatory decisions resides with appeal bodies which are not always composed of persons with in-depth expertise in electronic communications. This has in some instances impacted negatively on the role of such appeal bodies and on their decisions.

Initially the approach taken in Malta was to establish a specialised appeal tribunal – the Telecommunications Appeals Board, later renamed as the Communications Appeals Board (CAB) – with the power to review regulatory decisions.[9] Subsequently the determination of such appeals was transferred to the Administrative Review Tribunal (ART), an adjudicative body which determines appeals from administrative or regulatory decisions taken by various public authorities regulating different sectors.[10] The effectiveness of the appeals system in Malta was, at least until the transfer of the determination of appeals from NRA decisions was made to the ART, seriously hampered by adequate lack of human, material and financial resources. Now whilst there remains scope for improvement in the present appeals process before the ART, the transfer of the review of such regulatory decisions to the ART has, if anything, ensured that the appeal body is backed by an adequately resourced administrative set-up, something which before was sorely lacking.[11]

[8] Unforeseen technological developments have in the past decade characterised electronic communications services with some predictions not taking place whereas others not foreseen taking place. See "The Triangular Relationship between the Commission, NRAs and National Courts Revisited" by Pierre Larouche et in Communications & Strategies no. 64, 4th quarter 2006, p.125.

[9] Initially when the Telecommunications Appeals Board was first set up in 1997, its jurisdiction was limited to appeals from regulatory decisions taken by the NRA with regard to telecommunications services and, or networks. In 2004 its nomenclature was changed to Communications Appeals Board and its remit was extended to appeals from any regulatory decisions taken by the Malta Communications Authority in relation to the various laws that it enforces, including those relating to postal services and to electronic commerce.

[10] The disputes falling within the remit of the ART range from income tax contestations to appeals from regulatory decisions relating to the energy sector. See the Administrative Justice Act, Cap. 490 of the Laws of Malta.

[11] The former Communications Appeals Board for example for some time had no fixed premises where to hold its sittings and was supported only by a part-time secretary.

2.1 The enforcement of regulatory decisions - the EU Dimension

The regulation of electronic communications in the EU has in recent years, undergone substantial changes and probably for the foreseeable future will continue to be characterised by more changes given the dynamic nature of electronic communications. The enactment in 2002 by the EU of a regulatory framework for electronic communications has served as the foundation for the regulatory framework in the various EU Members States, Malta included. And yet whilst the EU Regulatory Framework[12] provides in some detail for the scope, design and operations of the NRAs, the same framework does not go into any great detail about the enforcement of NRA regulatory decisions and about the tools available to ensure compliance, providing only for a few provisions which touch upon the enforcement of regulatory decisions, leaving this aspect of regulation very much in the hands of the individual Member States.

In the Framework Directive the EU does not go beyond stating that the penalties to be provided for "must be appropriate, effective, proportionate and dissuasive", words which sound nice but do not really help much in understanding for example what constitutes a "dissuasive" penalty.[13] Exceptionally in the case of spectrum hoarding the Framework Directive does amplify by stating that Member States may apply "penalties, including financial penalties or the withdrawal of the rights of use in case of non compliance", with deadlines imposed for the effective exploitation of the rights of use by the holder of such rights.[14]

In the Authorisation Directive the EU goes a bit further in providing some direction to Member States and in relation to the specific breaches referred to in that Directive, requires that Member States impose "dissuasive financial penalties where appropriate which may include periodic penalties having retroactive effect", and issue "orders to cease or delay provision of a service or bundle of services which if continued, would result in significant harm to competition, pending compliance with access obligations imposed following a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive)".[15] The Authorisation Directive goes on to state that the measures and reasons for the regulatory decision taken when imposing enforcement measures are to

[12] In referring to the EU Regulatory Framework I refer to the totality of the various directives and regulations which make up this Framework including Directive 2002/21/EC (Framework Directive), Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive), and Directive 2002/58/EC (Directive on privacy and electronic communications) as amended by Directives 2009/140/EC (Better Regulation Directive) and 2009/136/EC (Citizens' Rights Directive).

[13] Article 21a of the Framework Directive.

[14] Article 9 para.7.

[15] Article 10 para.1 of the Authorisation Directive. This article provides that if a NRA finds that an undertaking is not complying with one or more conditions of a general authorisation or of rights of use or with specific obligations referred to in Article 6(2) of that Directive, then Member States must ensure that their NRAs have the enforcement powers stated in Article 10.

be communicated to the undertaking concerned "without delay" and a "reasonable period" given to the undertaking to comply with the enforcement measure.[16]

It is pertinent to note that the Authorisation Directive as originally made in 2002 provided for a one month period from notification of a breach, during which period the undertaking concerned could state its view or remedy the breach.[17] The Authorisation Directive as amended in 2009[18] now leaves it up to each Member State to determine the length of the time that should be given to the non-compliant undertaking to remedy or make submissions. This amendment to the Authorisation Directive demonstrates the difficulties of imposing specific timescales on Member States when dealing with the enforcement process. In the case of Malta for example there were instances where the former timescale of one month hampered the taking of regulatory measures in good time when there was no apparent valid reason why the undertaking being the subject of a regulatory measure, should be given at least a month to state its view or to remedy a breach. In practice undertakings which were the target of enforcement action taken in this context invariably would wait until the very last day before making their submissions or remedying matters as required by the NRA. In a dynamic sector such as electronic communications where undertakings are continuously competing with each other offering innovative and attractive services at times with improved conditions to end-users, time is of essence in ensuring prompt regulatory compliance and NRAs should be given enough latitude to determine on a case by case basis what timescales to impose in requiring regulatory compliance.

Recital (27) of the Authorisation Directive in explaining the enforcement measures and application of the penalties directs that "(S)ave in exceptional circumstances, it would not be proportionate to suspend or withdraw the right to provide electronic communications services or the right to use radio frequencies or numbers where an undertaking did not comply with one or more of the conditions under the general authorisation". The Directive in this context goes on to provide that in "serious or repeated" breaches where other enforcement measures have failed, NRAs may then prevent an undertaking from continuing to provide electronic communications services and, or networks.[19] Exceptionally in the case of infringements of national provisions adopting the Directive on privacy and electronic communications Members States are required "where appropriate" to include criminal sanctions.[20]

[16] Article 10 para.3.
[17] See Article 10 paras 2 and 3 of the 2002 version of the Authorisation Directive. Under the 2002 version it was possible for an NRA to impose a shorter timescale in case of repeated breaches by the undertaking concerned.
[18] Amendment to Article 10 of the Authorisation Directive as a result of the enactment of Directive 2009/140/EC.
[19] Article 10. para.3.
[20] Article 15a para 1 of Directive 2002/58/EC on privacy and electronic communications.

2.2. Enforcement of regulatory decisions under Maltese law

The provisions relating to the enforcement of regulatory decisions are primarily provided for under the Malta Communications Authority Act (MCA Act)[21] which defines the procedure to be followed in dealing with any infringements of any regulatory decisions and the penalties applicable. The Malta Communications Authority (MCA) may, if an undertaking[22] has failed to comply with a regulatory decision[23], impose an administrative fine, order the cessation of any act or omission which is in breach of that decision, and, or order the delay of a service or bundle of services which if continued, may result in significant harm to competition, pending compliance with access obligations following a market analysis carried out in accordance with the Electronic Communications (Regulation) Act (ECRA).[24] In cases where the MCA considers that an undertaking has "seriously and repeatedly" infringed a regulatory decision the MCA may withdraw or suspend the authorisation of the undertaking concerned.[25]

Before proceeding to take any of the above mentioned enforcement measures the MCA is required to write to the undertaking concerned, warning it of the measure that may be taken and the specific reason why it may be taken. In its warning to the undertaking the MCA is empowered to impose such conditions as it may consider "reasonable" in the circumstances.[26] The undertaking is furthermore required to cease or to rectify any acts or omissions and to make its submissions to the MCA within a period of not less than fifteen days.[27] If the envisaged enforcement measure consists of an administrative fine then the MCA is required to inform the undertaking of the amount of the fine that may be imposed.[28] If the MCA considers that the continuation of the infringement impacts negatively on the effective exercise by the MCA of its regulatory functions and, or that such infringement

[21] See Part VII of the MCA Act (Chapter 418 of the Laws of Malta). The enforcement provisions of the MCA Act apply to all the communications sectors regulated by the MCA which sectors apart from electronic communications include postal services, e-commerce and certain aspects of data protection in electronic communications.

[22] The MCA Act enforcement provisions actually refer to infringements by a "person", the use of which term at law applies to both legal and physical persons, and is therefore not limited to undertakings authorised to provide electronic communications networks and, or services.

[23] See article 31 of the MCA Act. The MCA may take similar enforcement measures in relation to an infringement of any provisions of any laws it is entitled to enforce or of any authorisation conditions.

[24] ECRA (Chapter 399 of the Laws of Malta) and the Electronic Communications Networks and Services (General) Regulations (SL 399.28 of the Laws of Malta) (ECNS Regulations) in line with the EU Regulatory Framework specifically Chapter IV of the Framework Directive, detail the procedure to determine if operators have significant market power, the identification of such markets, the market analysis procedure and the remedies that may be imposed. See article 9 of ECRA and Part III of the ECNS Regulations.

[25] Article 31(2) of the MCA Act. The MCA may also take such measures where the infringement relates to a breach of any law MCA enforces or of any authorisation condition.

[26] Article 32(1).

[27] Ibid.

[28] Ibid.

warrants the immediate intervention of the MCA, then the MCA may abridge the fifteen day period.[29]

If the MCA has prima facie evidence that the infringement represents "an immediate and serious threat to public safety, public security or public health"; or else "creates or may create serious economic or operational problems for other providers or users of communications services or networks, or other users of radio spectrum"; or may result in "significant harm" to competition in the electronic communications market pending compliance with access obligations imposed following a market analysis, then MCA in any of these instances is empowered to take urgent interim measures to remedy the situation in advance of reaching a final decision. Such interim measures may include the ordering of the immediate cessation of the act or omission giving cause to the infringement, requiring the cessation or delay of the provision of a service or bundle of services, or the imposition of administrative fines.[30] The MCA, before taking such interim measures, is required to give a "reasonable opportunity" to the undertaking concerned allowing it to state its views and to propose any remedies. The interim measures can be valid for only a maximum period of three months subject to an extension of a further period of three months where enforcement procedures have not been completed.[31]

If the undertaking remedies the act or omissions giving cause to the infringement within the period given by the MCA and the undertaking agrees in writing to abide with any conditions that the MCA may impose, then the MCA at its discretion may desist from taking any further proceedings, this without prejudice to any regulatory measures that may have already been imposed.[32] Conversely if after the lapse of the said period given by the MCA, the undertaking concerned does not give any valid reasons why no measures should be taken, then the MCA if it considers there is still scope for taking enforcement measures subsequent to the warning issued, is required to notify the undertaking, specifying the nature of the infringement, the measure being taken, and if the measure is an administrative fine, the amount of the fine being imposed.[33]

What is interesting with regard to the enforcement measures described above is that whilst these measures have been based on the enforcement measures provided for in the Authorisation Directive[34], unlike the Authorisation Directive the enforcement measures under Maltese law apply to any infringements of any regulatory decisions taken by the MCA including regulatory decisions taken with regard to the other communications sectors regulated by MCA.[35] In fact whereas the Authorisation Directive refers to the exercise of

[29] Ibid.
[30] Article 32(4).
[31] Ibid.
[32] Article 32(2).
[33] Article 32(3).
[34] See Article 10 para. 2 of the Authorisation Directive.
[35] See article 31(1) of the MCA Act.

enforcement with regard to compliance "with the conditions of the general authorisation or of rights of use and with the specific conditions referred to in Article 6(2)"[36], Maltese law refers to the taking of enforcement measures with regard to the infringement of regulatory decisions, of any laws which the MCA enforces or of any authorisation conditions.[37]

2.3. Enforcement of regulatory decisions under Irish law - a different approach

Under Irish law the enforcement procedure adopted is different from that under Maltese law. If the Commission for Communications Regulations (Comreg)[38] finds that an undertaking has not complied with "an obligation, requirement, determination or direction" including a regulatory decision by the Comreg[39], then the Comreg must notify the undertaking giving it the opportunity to state its views or if the non-compliance can be remedied, to remedy the non-compliance with a "reasonable time limit" specified by the Comreg. If at the end of the period given by the Comreg to the undertaking, the Comreg determines that the undertaking has failed to comply, then the Comreg may apply to the High Court for the issue of an order which the Comreg considers as appropriate in the circumstances including for a declaration of non-compliance, an order directing compliance or an order directing the remedy of any non-compliance.[40] It is up to the High Court on the hearing of the application by the Comreg to make such order as it thinks fit.[41]

The Maltese and Irish enforcement procedures provide two contrasting systems. In the case of the Maltese procedure the NRA is empowered to issue a binding decision to enforce a regulatory decision provided that before doing so the undertaking concerned is afforded the opportunity to make its submissions or to remedy matters. Conversely in the case of Ireland, the NRA must apply to the High Court for an order, justifying before that Court why a court order directing compliance with the regulatory decision of the NRA is necessary. In the case of Malta the intervention of the appeal body only comes into being if the undertaking concerned decides to contest the regulatory decision of the MCA imposing sanctions to ensure compliance.[42] It is pertinent to note that in the case of Malta, the MCA can initiate proceedings to enforce a decision imposing administrative fines only once it has notified the

[36] Article 10 para.1 of the Authorisation Directive.
[37] Article 31(1) of the MCA Act.
[38] The Comreg is the competent Irish regulator. See the Communications Regulation Act, 2002, section 6 et seq.
[39] See (Irish) regulation 37 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.
[40] Regulation 37(4).
[41] Regulation 37(5). A similar procedure applies in the case of enforcement of other Irish laws implementing the EU Regulatory Framework. See for example regulation 16 of the European Communities (Electronic Communications Networks and Services)(Authorisation) Regulations, 2011. Unlike under Maltese law where a uniform enforcement procedure applies to all regulatory decisions taken by the NRA, under Irish law different laws detail the enforcement procedures which in practice are quite similar.
[42] Article 38 of the MCA Act.

undertaking concerned with that decision and the timescale for contesting such a decision has lapsed with no appeal of that decision being filed before the ART.[43]

TO CONTINUE

3.1. The review of regulatory decisions – the EU dimension

The Framework Directive in dealing with the review of regulatory decisions by NRAs requires that Member States ensure that "effective mechanisms" exist at a national level whereby any user or undertaking providing electronic communications networks or services who is affected by a decision of a NRA, has the right of appeal against that decision to "an appeal body that is independent of the parties involved."[44] The Directive goes on to state that this body, which may be a court, must have "the appropriate expertise to enable it to carry out its functions effectively."[45] Member States are required to ensure that the merits of the case are duly taken into account and that "there is an effective appeal mechanism". Significantly the Directive requires that pending the outcome of the appeal the decision of the NRA stands unless interim measures are granted in accordance with national law.[46] Where the appeal body is not judicial in character, the Directive requires that the appeal body must give written reasons for its decisions which decisions must be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty establishing the European Community.[47]

The Framework Directive does not elaborate any further on the right of appeal. Whilst the Framework Directive twice refers to the obligation of Members States to ensure that there are "effective mechanisms" whereby an aggrieved user or undertaking can appeal a regulatory decision, the Directive fails to amplify, leaving it up to each Member State to determine the form of and the procedure underlying such "effective mechanisms". The Framework Directive fails to adequately address such crucial matters as the length of proceedings, the nature and the powers of the appeal body, the scope of the review and the standard for review.[48] The only point that the EU does in substance address is the requirement that NRA decisions even if contested, stand for the duration of the appeals

[43] Article 32 of the MCA Act requires that the MCA notifies the undertaking with the decision imposing the administrative fine which notification upon the expiry of the timescale for an appeal from that decision so notified, becomes an executive title upon the service of a copy of that notification by a judicial act on the undertaking concerned. One here must distinguish between two different processes namely the notification of the final decision imposing the fine on the undertaking and subsequently if the decision so notified has not been contested, the issue of a judicial act demanding payment of the fine imposed once the decision, not having been contested, constitutes an executive title and is enforceable as such by the MCA.

[44] See Article 4 of the Framework Directive.

[45] Article 4 para.1.

[46] Ibid.

[47] Article 4 para. 2.

[48] This failure by the EU to deal in depth with the review of NRA decisions is also found in other sector specific regulatory regimes. See CERRE ibid. at p. 17.

process, a measure that minimises the abuse of the appeal process by curbing the lodging of appeals filed with the scope of delaying the immediate applicability of regulatory decisions.

One measure introduced in 2009 changes to the EU Regulatory Framework, was the requirement that Member States collect information for the EU Commission on the "general subject matter of appeals", the number of requests for appeals, and significantly the duration of appeal proceedings and the number of decisions to grant interim measures.[49] Whilst this measure in itself is positive, it does not contribute to the resolution of various issues that continue to undermine the effectiveness of the appeal process in some Member States.

Finally the EU has in recent years been organising an annual one day information seminar on electronic communications legislation aimed at members of appeal bodies. Whilst this is a positive measure, much more is required to improve the effectiveness of the appeal process in Member States, not least the introduction of new measures in the EU Regulatory Framework which expressly address the effectiveness of the appeal process.[50]

3.2. The suspension of decisions under appeal

Under Maltese law a regulatory decision of the MCA if appealed stands and the parties to whom the decision applies are required to adhere to the decision.[51] The ART may on the application of a party to the appeal suspend the decision of the MCA pending the final determination of the appeal.[52] The ART in deciding to suspend the regulatory decision being contested is required to state its reasons for doing so.[53] In the case of appeals from regulatory decisions imposing an administrative fine, the position is different. In such a case if the undertaking against whom a fine has been imposed decides to appeal and concurrently with that appeal requests the ART to suspend the effects of the decision imposing the fine, then the MCA is required to desist from issuing a judicial act to enforce its decision and to collect the fine, this until such time when the request for suspension has been determined, withdrawn or otherwise dealt with. The ART in such instances is required

[49] Article 4 para 3 of the Framework Directive.
[50] CERRE in this regard makes two proposals – the creation of a complete and coherent case law data based on NRA reviews and the grouping of members of appeal bodies in a European association on the model of the Association of European Competition Law Judges. See CERRE ibid. p.162.
[51] Article 42(1) of the MCA Act.
[52] The Court of Appeal also has a similar power. Under Maltese law there is a further right of appeal on a point of law from a decision of the ARTto the Court of Appeal in its inferior jurisdiction. This right of appeal can be availed of by all parties to the original appeal including the NRA. See Administrative Justice Act (Cap.497 of the Laws of Malta), article 22.
[53] Article 42(2) of the MCA Act.

to determine a request for suspension "expeditiously" giving the MCA reasonable opportunity to reply to the request for suspension.[54]

What is noteworthy is that in the case of a request for a suspension of a MCA decision imposing a fine, the regulatory process to enforce and collect the fine stops once a request for suspension has been made even though the ART has not determined the request for suspension. Conversely in the case of other requests for the suspension of an MCA decision under appeal, the regulatory decision continues to stand until such time when the ART determines the request for suspension. The reasoning for the different treatment of requests for the suspension of MCA decisions imposing fines and of other regulatory decisions is motivated by the consideration that in the case of the former the delay in deciding such requests may have a serious prejudicial impact on the undertaking concerned more so where a substantial fine has been imposed. The current provisions were enacted purposely to cater for those cases where the undertaking requests a suspension of a regulatory decision imposing a fine, and a decision is either not given or is given only late in the day.[55] One must appreciate that legally an undertaking, if the regulatory decision imposing the fine is not suspended, is required to pay the fine imposed, hence the introduction of the measures whereby the process in enforcing regulatory decisions imposing fines is suspended if the undertaken appeals the decision and concurrently files a request for suspension of that decision.

In the case of Ireland undertakings who wish to contest a decision taken by the Comreg may lodge an appeal before the High Court.[56] The lodging of an appeal from a Comreg decision does not per se effect the operation of the decision or prevent action from being taken to implement the decision. However the High Court may make an order staying or otherwise effecting the operation or implementation of the regulatory decision or part of that decision as the High Court may consider appropriate "for the purpose of securing the effectiveness of the hearing and determination of the appeal".[57] The High Court in making such an order has the authority to include "conditions", which in practice gives the High Court the faculty of including such conditions as it may consider necessary if it decides to suspend an NRA decision.

In the UK appeals from NRA decisions in context of the laws implementing the EU Regulatory Framework are in most cases heard by the CAT which is a specialised judicial body which determines cases concerning competition and economic issues including appeals from regulatory decisions taken by Ofcom.[58] A party to an appeal before the CAT

[54] Article 32(5).
[55] This measure was introduced in 2007 to deal specifically with instances whereby requests for the suspension of decisions imposing substantial administrative fines, were not being decided in good time. See article 42 of Act XXX of 2007.
[56] Regulation 4 of (Irish) European Communities (Electronic Communications Networks and Services)(Framework) Regulations 2011.
[57] Regulation 7.
[58] See section 192 of the (UK) Competition Act 2003, section 192.

may apply for an interim order by the CAT asking for "interim relief" – in practice the suspension of the regulatory decision being heard by the CAT pending a final decision. In doing so the party concerned is required to state the circumstances giving rise to the urgency, and the factual and legal grounds establishing a prima facie case for the grant of interim relief. In issuing an order for interim relief the CAT is empowered to suspend in whole or in part the effect of any decision which is pending before it, granting any remedy it would have the power to grant in a final decision. The CAT in exercising these powers is required to take into account all relevant circumstances including the urgency of the matter, the effect on the party making the request if the relief sought is not granted, and the effect on competition if the relief is granted.[59]

From an evaluation of the above, two important points emerge which if implemented under Maltese law, can improve the current procedure relating to requests for the suspension of NRA decisions. The first is to empower the ART to include any such conditions as the ART may consider necessary when determining a request for a suspension of a NRA decision. The current provisions under the MCA Act do not give the ART such a power and it is suggested that the law should be amended accordingly. The other point is the need to introduce specific and clear criteria, possibly based on the UK experience, as to the circumstances when the ART may or may not suspend a NRA decision.

One final issue is whether a timescale should be introduced by when an application for suspension of a NRA decision must be determined. Clearly there is a need that such applications are decided in short order. Such applications by their nature should be treated as urgent issues that must be determined without delay. In the first instance the faculty to make such applications should be restricted only to applications made concurrently with the lodging of an appeal. One assumes that at that stage the appellant undertaking would be fully aware of any legitimate grievances it has about why the NRA decision being contested should be suspended for the duration of the appeal. In turn the respondent NRA in replying to applications for suspension should be tied by a short timescale in submitting a written response. The appeal body should only agree to hold oral hearings in extreme cases where it considers that the particular circumstances justify such a hearing.[60] In any case there should always be a precise timescale by when the appeal body must give its decision. Moreover when doing so the appeal body should be empowered to include such conditions as it may consider necessary.

[59] Rule 6 of the (UK) Competition Appeal Tribunal Rules, 2003.

[60] The CAT is required to schedule a date for the hearing of the request and to give the parties "any directions as may be necessary for disposing of the request for interim relief". See rule 6(8) Competition Appeal Tribunal Rules.

3.3. Length of proceedings and timescales for final decisions

The EU Regulatory Framework does not directly address the issue of the length of time taken by the appeal bodies to determine appeals, and only requires that Member States ensure that there is an "effective appeal mechanism" and that they collect information on the duration of appeal proceedings.[61] The length of time taken to conclude appeal proceedings impacts negatively on the appeal process giving cause to uncertainty in the regulation of the sector. Some Member States have further aggravated matters by not committing enough resources to the handling of such appeals and failing to ensure that there are enough qualified judges sitting on such appeal bodies.[62]

The obvious solution in addressing the length of proceedings is to impose timescales when appeals must be concluded and to ensure that these timescales are adhered to. This however is a route which few Member States are prepared to consider. Some Member States confronted with a situation where some appeals take too long to be concluded, have inserted norms requiring that appeals be dealt with 'promptly' without actually establishing precise timescales when an appeal should be determined.[63] However in practice without the imposition of clear measures establishing precise timescales and steps that may be taken if such timescales are not adhered to, the delay in concluding appeals has in many instances continued unabated.[64]

One questions whether it is reasonable to impose timescales. Moreover if timescales are to be imposed, in what circumstances are they to be imposed. There are various considerations that need to be factored. In the first instance in imposing timescales one must ensure that such measures do not undermine the right to a fair process. The parties to the appeal must be guaranteed a reasonable opportunity to state their case and to submit their evidence. On the other hand however the appeal process cannot be allowed to prolong indefinitely more so in a sector such as electronic communications, which is subject to innovative developments and where delay in concluding contestations of regulatory decisions can undermine the competitiveness of the sector to the detriment of

[61] Article 4 paras 1 and 3 of the Framework Directive.
[62] CERRE ibid. p.12.
[63] Hence under Swedish law the competent appeal court is required to deal with such appeals "promptly", though no timescale is stated at law (section 23 of the Swedish Electronic Communications Act). Danish law goes a bit further by stating that decisions by the Telecommunications Complaints Board, which is the competent appeal body, 'as far as possible' should be given no later than three months after the date when the appeal was submitted to the Board (section 70 of the Danish Electronic Communications Networks and Services Act).
[64] A case in point was with the former Electronic Communications Appeals Panel (ECAP) in Ireland where though the ECAP was given a guideline timescale of four months to give decisions, the ECAP observed that complying with such a guideline was difficult to achieve except perhaps in the simplest of cases. See Irish Consultation Paper 2006 at p.37.

the market players and of end-users in general.

The imposition of timescales should be considered only in those circumstances where it is reasonable for the appeal body to intervene and regulate the pace of proceedings or where the situation is entirely within the control of the appeal body. Hence it is expected that the appeal body will intervene if it results that a party is manifestly delaying proceedings to the detriment of the other party to the proceedings.[65] In this regard the approach taken under Maltese law is worth examining. Maltese law in dealing with timescales distinguishes between on the one hand the time by when ideally a case should be determined by ART, stating that ART should "endeavour" to determine an appeal within one hundred and twenty days from the lapse of the period when the MCA may file its reply to an appeal, and on the other hand by establishing a 'mandatory' timescale on ART when a final decision should be given, requiring that ART delivers its final decision not later than sixty days from when the parties to the appeal declare that they have concluded with their evidence and final submissions.[66] This distinction is relevant since ART is tied to a precise maximum timescale to give a final decision only at a juncture when the parties have concluding with their case and when therefore the time to be taken to issue a final decision is exclusively dependant on ART.

In the case of the UK, whilst no timescales are imposed as to when a final decision should be given, CAT is empowered to provide for timescales to regulate different aspects of the proceedings before it, including setting out a timetable for the oral hearing.[67] Having at the onset of a new appeal a time table with approximate timescales can if not solve at least mitigate the issue of the length of appeal proceedings. The UK Government in a consultation it launched earlier this year is proposing to go even further in its endeavours to minimise the length of appeals before CAT.[68] The measures being proposed include: agreement with the parties on specific timetables for proceedings; a target timescale for 'straightforward' cases of six months; empowering CAT to limit the amount of evidence and expert witnesses; and a presumption that matters should be resolved on the papers wherever this is possible and conversely that oral hearings are kept to a minimum.[69] The adoption of some, if not all of these measures should be actively considered for appeal bodies in other Member States, introducing more discipline as to how proceedings are conducted and thereby minimising delay in the conduct of the appeal.

[65] One consideration is that since invariably the respondent to such appeals is the NRA who issued the decision being contested, the NRA being a public regulatory authority is generally reluctant to resorting to delaying tactics. Conversely undertakings contesting a regulatory decision, given that the decision stands for the duration of an appeal, in normal circumstances, have an interest to ensure that appeals are determined in short order.
[66] Article 40(1) of the MCA Act.
[67] Regulation 21 of the Competition Appeal Tribunal Rules 2003.
[68] UK Government consultation issued on 19 June 2013.
[69] Ibid. p.66 et seq.

The one issue to which there is no obvious easy solution is what measures can be taken if despite mandatory timescales at law, the appeal body in circumstances within its control, fails to give a final decision within a prescribed timescale.[70] A few Member States in their procedural Codes envisage disciplinary sanctions towards the responsible adjudicators in some circumstances.[71] In practice however such measures are rarely if ever resorted to and do not address the issue of delay.

CERRE commenting on the time taken for judgements to be given, observes that the time taken is "probably unavoidable" because of the legal, technical and economic complexity of the subject matter of the appeals, stating that there is no realistic hope in having the length of the appeal proceedings substantially reduced. CERRE does remark that a possible measure would be for the EU to establish a maximum length, but adds that such a measure may not be defensible from the point of view of subsidiarity.[72]

3.4 Form of and resources available to the appeal body

The Framework Directive in dealing with the form of the appeal body requires that the appeal body is independent of the parties to the appeal and that the body, which may be a court, "has the appropriate expertise to enable it to carry out its functions effectively". The Directive further states that if the appeal body is not judicial in character then written reasons are to be given for its decision and that the decision must be subject to review by a court or tribunal. Otherwise the Directive does not elaborate any further on the form of the appeal body.

The approach taken in dealing with the review of regulatory decisions varies in the different Member States. One approach is to refer such appeals to the 'ordinary courts' being the judicial bodies which regularly deal with different non-sector specific cases. This is the approach taken in many Member States. A second approach is to refer such appeals to specialised courts or tribunals which are focused on the review of regulatory decisions taken by public authorities which deal with specific areas of judicial review.[73] A third approach is to have such appeals determined by specialised appeal bodies focused exclusively on the review of regulatory decisions in the electronic communications sector.[74] In the latter

[70] Hence in Malta in the case of the former Communications Appeals Board various appeals were adjourned sine die for that Board's final decision with no decisions being given within the prescribed timescales.
[71] See for example the Belgian Judicial Code article 770 of which provides that the Cour d'appell de Bruxelles shall give its decision within the month subsequent to the conclusion of the oral submissions and whereby breach of this requirement can lead to disciplinary proceedings against the judges concerned.
[72] CERRE p.108 et seq. CERRE in this study considered also the appeal procedures in other sectors including electricity and gas, and railway transport.
[73] THE ARTunder Maltese law and CAT under UK law are two such instances.
[74] Denmark is one of the few Member States which has opted for such a specialised appeal body. Appeals from regulatory decisions may be submitted before the Telecommunications Appeals Board whose final decision in

instance decisions by such appeal bodies are subject to review before a court or tribunal in line with the requirements of the Framework Directive.[75]

In the case of Malta until June 2012 appeals were determined by the Communications Appeals Board a 'specialized' appeal body. The members of this body were appointed by the Prime Minister for a fixed renewable term of three years and consisted of a chairman who had to be an advocate with at least seven years experience in the profession, and two other members chosen from a panel the members of which had to have "such commercial, technical, or financial experience" in the various communications sectors regulated by the MCA.[76] Subsequently the determination of such appeals was transferred to ART which body is presided by a person who is or was a judge or a magistrate assisted by "two assistants" appointed by the President of Malta acting on the advice of the Prime Minister. The assistants are chosen from amongst persons who in the opinion of the Prime Minister "have previous experience and special qualifications in a particular field of expertise falling with the competence of the Administrative Review Tribunal", the President being empowered to appoint panels of such assistants depending on the subject matter of the dispute, with the Secretary of ART then selecting two assistants from each panel for each case.[77]

The Irish experience in establishing an appeal body to determine regulatory appeals reveals if anything the difficulties involved and the possible solutions to have in place an appeal body which is suitably resourced to given informed decisions. Under Irish law until July 2003 a review of a regulatory decision by Comreg was possible either through an application requesting judicial review by the High Court or by appeal to the High Court on a point of law.[78] Subsequently the appeal system was changed, and until 2007 appeals from Comreg decisions could be made before the Electronic Communications Appeals Panel (ECAP) in addition to judicial review by the High Court. The ECAP was appointed by the Minister responsible for communications and consisted of three members one of whom had to be a barrister or solicitor with at least seven years experience, whereas the other members had to have "such commercial technical, economic, regulatory or financial experience as the Minister considers appropriate." The Minister was empowered to appoint a panel to hear each appeal and a different panel could be appointed to hear other appeals.[79] It should be pointed out that there was no standing panel and that the Minister appointed a panel for each new appeal.[80] The ECAP did not however prove to be efficient in determining

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turn may be appealed before the Danish Courts. See article 69 et seq. of the Danish Electronic Communications Networks and Services Act.

[75] Article 4 para 2 of the Framework Directive.

[76] See former article 36 of the MCA Act, which was substituted in June 2012 when the jurisdiction of the determination of such appeals was transferred to ART.

[77] Article 10 Administrative Justice Act.

[78] Irish Consultation Paper on Regulatory Appeals 2006, p.14.

[79] See reg.5 of the European Communities (Electronic Communications Networks and Services)(Framework) Regulations, 2003 – S.I. No. 307/2003.

[80] It was however possible for the Minister to appoint the same panel to determine different appeals.

appeals.[81] In 2007 the appeals system was changed and the determination of appeals were thereafter provided for by way of application to the High Court. Before undertaking such a step the Irish Government undertook a public consultation issuing a consultative paper on regulatory appeals. A measure suggested in this report referred to a procedure used during competition law cases whereby the presiding judge can appoint experts to assist the Court in understanding complex and technical issues especially where differing and conflicting information is provided by the parties to the case.[82]

3.5 Powers of the appeal body to rule on regulatory issues

The EU Regulatory Framework limits itself to stating that Member States must ensure that there are effective mechanisms whereby any user or undertaking can appeal a regulatory decision and that the merits of the case are duly taken into account. The EU Regulatory Framework fails to state to what extent an appeal body may modify a regulatory decision. Is the role of an appeal body that of reviewing a regulatory decision and if it disagrees, remitting the case to the NRA for a new decision, or can the appeal body actually replace the regulatory decision with its own conclusions? What are the standards of review that an appeal body may adopt? These issues are not dealt with sufficient clarity in the EU Regulatory Framework, and the need for better EU direction is imperative more so when one considers that is no unequivocal uniform standard of review applicable in the Member States.

In the case of Malta ART is required to take into account the merits of appeal and may in whole or in part confirm or annul the decision appealed from. In doing so ART is required to give its reasons.[83] Under Irish law the High Court in determining an appeal from a regulatory decision is empowered to make "such orders as it considers appropriate" which orders may include affirming or setting aside the whole or any part of the NRA decision, or remitting the case to the NRA for reconsideration by the NRA either with or without the hearing of further evidence in accordance with the direction of the High Court.[84] Under UK law, CAT is required to decide appeals from regulatory decisions taken by Ofcom "on the merits and by reference to the grounds of appeal set out in the notice of appeal" and to determine what if any is the appropriate action for Ofcom to take in relation to the subject matter of the decision under appeal. In giving its decision CAT is required to give such directions as it considers appropriate for giving effect to its decision.[85] It is interesting to note that CAT considers that it is a specialist court designed in such a manner so as to be able to scrutinise regulatory decisions. However CAT does not consider that it is there to usurp the decision

[81] Irish Consultation Paper on Regulatory Appeals 2006, p.14 and p.37.
[82] Ibid. p.35.
[83] Article 40 MCA Act.
[84] S.I. No. 333 of 2011, section 6.
[85] Communications Act 2003, section 195.

making role of Ofcom and to make a fresh determination, but only to review whether Ofcom committed errors of fact or of law and, or the wrong exercise of discretion alleged in the notice of appeal.[86] This matter is being discussed at some length in the context of a consultation process undertaken by the UK Government, whereby it is being contended that the applicable UK legislation gives rise to the interpretation that a full rehearing of the appeal may be required, with the UK Government arguing that an appeal "on merits" goes beyond what is required by Article 4 of the Framework Directive since the appeal body only needs to ensure that the merits of the case are duly taken into account.[87]

The general approach adopted is that whilst the appeal body is empowered to review errors of law and of fact, it does not review the exercise of discretion by the NRA and cannot substitute a regulatory decision taken by the NRA. The reasoning for this approach is that whilst NRAs are specialist authorities, appeal bodies are not equipped to reconstruct the exercise of regulatory powers and substitute their discretion for that of the NRA.[88] The UK experience in the light of the current debate of the extent of the powers of review exercised by CAT is in some ways unique. The UK Government is contending that if an appeal is not heard on a judicial review basis, then the standard of review should be determined by clear grounds of appeal which are focused on identifying material errors or unreasonable decisions taken by the NRA. The UK Government is arguing that the use of the term 'merits review' can result in different levels of scrutiny and therefore having more well-defined grounds of appeal will provide greater clarity and certainty up front. [89] It will be interesting to see what changes if any will be introduced by the UK Government in the light of its views on the review role of CAT.

4.1 Conclusion

Enforcement should be a primary focus not only for individual Member States, but also for the EU. Directions from the EU on enforcement should not be restricted to the use of generic provisions requiring that Member States have "dissuasive" penalties in place. More robust and decisive intervention is required from the EU to ensure that there is a uniform and consistent approach throughout the EU in dealing with the enforcement of regulatory decisions. The issue of effective enforcement, if anything, is bound to increase in importance with more undertakings operating from one Member State and offering services

[86] [2010] CAT 17 (8 July) paras 76 & 77.

[87] Proposals by the UK Government entitled "Implementing the revised EU Electronic Communications Framework – Appeals" issued in August 2011, p.14 et seq. More recently in June 2013 the UK Government issued yet another consultation entitled "Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform". A main feature of this consultation is precisely the standard of review to be adopted at p. 26 et seq.

[88] CERRE p. 136 et seq.

[89] Ibid., UK consultation issued on the 19 June 2013. This consultation closes on the 12th September 2013 and the UK Government is proposing to issue a consultation response within the following three months.

in another. There is a pressing need to evaluate the effectiveness enforcement measures in a cross-border context where a NRA in one Member State, in order to regulate undertakings operating in its jurisdiction, is dependent on the active and swift co-operation of a counter-part NRA in other Member State.

The feasibility of other innovative enforcement measures should be considered. To date the measures used if there is non-compliance with regulatory decisions, are the imposition of administrative fines, and in extreme cases the suspension or withdrawal of the authorisation to operate. One tool which barely features in the regulation of electronic communications services is the use of name and shame whether by giving publicity in the media to infringements committed by repeat offenders, or by issuing corrective statements at the expense of non-compliant undertakings to eliminate the continuing effects of an infringement, measures incidentally that the EU has introduced in a different context.[90] Bad publicity, especially in a small country like Malta, has proved to be an extremely useful tool in eliminating persistent non-compliance in different sectors, and non-compliant undertakings have in many instances by their reaction, shown that publicity at times is the most effective of enforcement tools.[91]

The review of regulatory decisions requires more direction by the EU to ensure that appeals are dealt with more efficiently and quickly. The question is to what extent and in relation to which aspects should the EU intervene? The experience of Malta and of other Member States illustrates that more attention needs to be given to the various issues that underlie the effectiveness of the appeals process. As discussed three major issues stand out: the length of proceedings, the nature of the appeal body and the standards of review applied.

The length of proceedings is possibly the most difficult to address more so when one considers that some appeals may be extremely complex to determine. The UK Government as we have seen is proposing various interesting measures to tackle this issue.[92] Clearly Member States perhaps acting on EU direction, must consider introducing measures to have in place more discipline as to the conduct of appeals. One measure is to establish a timescale by when the appeal body should give its decision once the parties have concluded with their submissions. In establishing these timescales there should in all instances be some degree of accountability by the appeal body if the timescales are then not adhered. The timescales should be realistic and reasonable. If they are not adhered then plausible reasons should be given and a new date stating when the decision will be given, communicated to the interested parties. One should not exclude in extreme cases requiring

[90] See for example Article 2(b) of Directive 2009/22/EC on injunctions for the protection of consumers' interests.

[91] Until a few years ago one popular Maltese Sunday newspaper carried a consumer column which regularly named non-compliant businesses. This column proved to be extremely effective as demonstrated by the various measures that businesses given negative publicity took including lawsuits against the columnist and threats to desist from advertising in that newspaper.

[92] Supra at p.14.

the appeal body to give a reasoned explanation either to the competent authority which appointed the members of the appeal body or to an independent body responsible for overseeing the proper functioning of adjudicative bodies. Regrettably there have been instances where appeals were adjourned sine die for a final decision, and a decision not given in good time. In a dynamic sector like electronic communication this is simply not acceptable and is detrimental to the proper regulation of the sector.

The nature of the appeal body and the standards of review to be adopted are intertwined and should not be discussed in isolation. The principal points of discussion about the nature of the appeal body concern its composition and whether it is should be or should not be a specialist forum. Dealing with these points in turn depends on the standards of review that the appeal body is required to follow. Specifically is the appeal body required to limit its intervention to a full review of the issues of law and, or of fact, or else should it go further and be empowered to review the discretion used by the NRA in the giving of regulatory decisions. If the latter approach is to be taken then it is imperative that in appeals involving technical and economic issues specific to the sector, the appeal body must include amongst its members, persons with a profound knowledge of the technical and economic aspects of the sector. This in turn strongly militates in favour of having specialised appeals body rather than leaving such appeals to be decided by the general courts.

CERRE in its review of various appeal bodies in selected Member States, notes that although there are some differences between the standards of review of various appeal bodies, there is a "broad tendency" towards a distinction between a full review of errors of law, a broad review of errors of fact and what it describes as "a marginal review of the exercise of discretion by the NRA".[93] CERRE concludes by stating that once the NRAs are specialist authorities and most appeal bodies are not equipped to reconstruct the exercise of regulatory powers in an efficient way, then the review of NRA decisions should not go beyond.

There is then especially in the case of the smaller Member States, Malta being a case in point, the practical consideration that a full review would per force necessitate the dedication of expert resources to the appeal body adding to the costs involved and time needed to properly evaluate and determine appeals from NRA decisions where these involve also technical or economic considerations. It is important that the role of the appeal body is properly understood. As observed by CERRE the appeal body is not there to substitute its discretion for that of the NRA because the appeals body does not – and conceivably in practical terms will never – have the in depth expertise to review NRA decisions and substitute such decisions with its own conclusions. The role of the appeal body is to review and correct where it perceives that is a wrong interpretation of the law or of the facts as applied to the decision under review.

[93] CERRE ibid. p. 137.

The argument in favour of having a specialised appeal body which has access to expert opinion remains, even if the role of the appeal body is 'limited' to that of reviewing the application of the law and of the facts to the decision under review. A flexible system should be considered whereby the presiding adjudicator of the appeal body in the first instance analyses the issues involved and then determines whether in the hearing and determination of the appeal, he needs the assistance of experts versed in specific aspects relating to the appeal. Some appeals may involve clear cut issues relating to an interpretation of the law involving for example contractual rights of end-users whereby the input of experts may not necessary. Conversely there may be other appeals where there are complex technical issues where the appeal body would certainly require the input of experts on the subject.