

Independent administrative authorities and the standard of judicial review

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Introduction

Recent developments in European competition and electronic communications law have led to an increased focus on, and importance of, independent² administrative authorities. The enforcement of both fields of law underwent major changes in 2002–2003. In competition law, the adoption of Regulation 1/2003³ meant the abolition of the Commission's monopoly over the application of Article 81(3) EC and a move away from a system of prior authorization to one of legal exception. As regards electronic communications, the entry into force of the 2003 Directives⁴ effected significant changes in the substantive law. The scope of the regulatory framework was extended beyond telecommunications to cover all networks and services used to convey 'electronic communications', thereby including for instance broadcasting infrastructures. Undoubtedly the most significant change concerned the core of regulation, namely the heavier obligations imposed on undertakings possessing Significant Market Power (SMP). There, the concept and its application were re-defined along competition law methodologies.

On the institutional side, national competition or regulatory authorities respectively have emerged as the main authorities in charge of the application and enforcement of the law. The competences available to these authorities are often wide-ranging, at times encompassing elements of all three of Montesquieu's powers. These competences typically embody a considerable degree of discretion to allow the balancing of the – opposing – interests of various groups of stakeholders, such as consumers, competitors and manufacturers. This institutional set-up raises two fundamental issues. First, how should we ensure that despite their discretion the actions of the various authorities are consistent with one another and in line with European law? Second, how should we ensure that the independence of administrative authorities is counterbalanced by a certain degree of accountability for their actions? The first issue is addressed by Regulation 1/2003 and the 2003 Directives alike through the introduction of a number of administrative mechanisms to coordinate and control national authorities. Most notable among these are the creation of the

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2 While these authorities can behave to an appreciable extent independently from both parliament and government in the implementation and application of substantive regulations and policies, they must still heed general government policy, cf. L. Hancher, P. Larouche and S. Lavrijssen 'Principles of Good Market Governance', 2004 *Journal of Network Industries*, no. 4, pp. 355-389, and A.W. Heringa and L. Verhey, 'Independent agencies and political control', in: L. Verhey and T. Zwart (eds), *Agencies in European and comparative perspective*, Antwerp 2003, pp. 156-157.

3 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, *OJ* 2003 L 1/1.

4 See the most important directives: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive'), *OJ* 2002 L 108/33, and Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ('Access Directive'), *OJ* 2002 L 108/7.

European Competition Network (ECN)⁵ in competition law and the European Regulators Group (ERG)⁶ in electronic communications as well as the competence for the Commission to censure national draft decisions in extreme cases.⁷ The second issue is also partially addressed by the administrative mechanisms as cooperation *inter se* and with the Commission as well, as control by the latter obviously ensures some degree of accountability.⁸ This administrative accountability is to be complemented by *judicial* accountability through judicial control exercised by national courts over decisions taken by administrative authorities.⁹

Intensity of review: a sliding scale

The aim of the present article is to review how three Member States – the Netherlands, the United Kingdom and France – have shaped the judicial accountability of independent administrative authorities through an analysis of a number of interesting cases per jurisdiction.^{10/11} The determinant that will be used in this respect is the standard, or intensity of review. In Europe, intensity of judicial review is best thought of as a sliding scale, ranging from a very marginal, restrained test to very intensive review, between which there is a large middle area.¹² It is commonly not attempted to have a strict division in different levels of intensity to further divide the large middle area.¹³ This article will accordingly also refrain from doing so and instead adhere to the sliding scale approach. We identify four different ‘phases’ on this sliding scale.¹⁴ First, there is the extremely marginal test where the court will only intervene in the most outrageous of cases. The red-hair example adduced by Lord Greene in the UK case of *Wednesbury*¹⁵ – in the example, the court would intervene and quash a decision such as that by an English headmaster to fire all teachers with red hair solely because he does not appreciate that hair colour – serves as a nice illustration of this phase. The court thus limits its intervention to blatantly unreasonable deci-

5 Commission Notice on cooperation within the Network of Competition Authorities, 2004/C 101/03, *OJ* 2004 C 101/43, and Recital 15 of Regulation 1/2003, *supra* note 3.

6 Decision 2002/627/EC establishing the European Regulators Group for Electronic Communications Networks and Services, *OJ* 2002 L 200/38, amended by Decision 2004/641/EC, *OJ* 2004 L 293/30.

7 Art. 11(6) of Regulation 1/2003, *supra* note 3, and Art. 7(4) of the Framework Directive, *supra* note 4, respectively.

8 In addition, there are a number of ‘softer’ instruments such as transparency requirements, consultation of stakeholders and benchmarking. These instruments have commonly been endorsed, and supplemented, by the national authorities themselves. See for example the United Kingdom’s Communications Act 2003, Section 3, Para. 3, which requires the Office for Communications to respect the good governance principles ‘Transparency, accountability, effectiveness, proportionality and consistency’ and best regulatory practice in carrying out its tasks.

9 This is often perceived as particularly necessary in the case of administrative authorities as these are sometimes seen to straddle the distinction between rule-application and rule-making. This has caused unease in Continental Member States who perceive such authorities as potentially contravening the primacy of politics, denoting that all decisions are to be taken by or under the direction of elected officials.

10 For another overview of the standard of review applied in Germany, the Netherlands, France and the UK: F. Stroink, ‘Judicial control of the administration’s discretionary powers (le bilan executive-juge-administratif)’, in: R. Bakker, A.W. Heringa, F. Stroink (eds.), *Judicial control, comparative essays on judicial review*, Anwerp-Apeldoorn 1995, pp. 81-99.

11 Of course, it is not just the Member States that have influenced the intensity of review; in addition, EC law and the ECHR – notably Arts. 6 and 13 thereof – have also exerted considerable influence as will be discussed in more detail in Section 4.

12 See for an overview of the standard of review applied in Germany, the Netherlands, France and the UK: F. Stroink, ‘Judicial control of the administration’s discretionary powers (le bilan executive-juge-administratif)’, in: R. Bakker, A.W. Heringa, F. Stroink (eds.), *Judicial control, comparative essays on judicial review*, Anwerp-Apeldoorn 1995, pp. 81-99. See for an analysis of the standard of review applied in equal treatment cases: J.H. Gerards, ‘Intensity of judicial review in equal treatment cases’, 2004 *Netherlands International Law Review*, pp. 135-183.

13 Note however the division in French law between ‘contrôle restraint’, or ‘contrôle minimum’, ‘contrôle normale’ and ‘contrôle maximum’.

14 These ‘phases’ should not be thought of as neatly separated pigeon-holes; rather, it can at times be difficult to draw the line between any two phases.

15 Ruling of the Court of Appeal of 7 – 10 November 1947, *Associated Provincial Picture Houses Ltd Wednesbury Corp* (1948) 1 KB 223, 233-234, CA. Under the *Wednesbury* test a court would only quash a decision if it was so unreasonable that no reasonable decision maker could have adopted it. The *Wednesbury* test is often justified with reference to the constitutional doctrines of parliamentary sovereignty and the separation of powers. Cf. P. Craig, ‘Grounds for judicial review: substantive control over discretion’, in: D. Feldman (ed.), *English Public Law*, Oxford 2004a, pp. 831-834, and C. Hilson, ‘The Europeanization of English Administrative law: Judicial review and convergence’, 2003 *European Public Law*, no. 1, pp 125-145.

sions. Second, there is the marginal test, where the court will review the legality of the challenged decision. Examples are judicial review in the United Kingdom,¹⁶ *recours pour excès de pouvoir* in France¹⁷ and the legality control that may be pursued by the ECJ on the basis of Article 230 of the EC Treaty. As noted by Advocate General Tizzano in *Tetra Laval v. Commission*, in such cases the court limits itself to ‘verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.’¹⁸ The legal test here is thus not so much whether the decision is unreasonable – as under the extremely marginal phase – but rather whether the decision is reasonable.¹⁹ Third, there is intense review, where the court will fully review the merits of the case. It will assess whether all relevant facts were taken into account and whether the assessment of these facts and the application of the law to these facts has been done correctly. There is no longer any need for a manifest error on the part of the decision maker to warrant court intervention; any error will suffice to have the decision annulled. Fourth, there is extremely intense review, where the court can substitute its own decision for that of the authority, simply because it believes its own decision would have been better or more suitable. In this case, the court functions as a *de facto* second regulator. The best example is the doctrine of *le bilan couts avantages* developed by the French Conseil d’Etat in *Ville Nouvelle est* where the court held that it could check the ‘balance sheet’ of advantages and disadvantages concerning a proposed expropriation of a number of houses to allow for the development of a new city adjacent to the university campus.²⁰ Another example is the unlimited jurisdiction of the Community Courts as regards fines.²¹

In order to facilitate the drawing out of commonalities and differences in the approaches taken by national courts in the Netherlands, the United Kingdom and France, we will classify the cases discussed according to one of the four phases just identified. In each of these cases we will however not explicitly refer to these phases but rather the terms used will correspond with this broader framework.

Structure

This article examines the state of law as regards judicial review in three EU Member States: the Netherlands, the United Kingdom and France. As such, the first three sections concern each of these Member States in the listed order. To appreciate the issue within its context, each section commences with a brief introduction of the courts that have jurisdiction to review the decisions of the national competition or regulatory authority/ies. In Section 4 we turn to the European level

16 Lord Diplock in *Council of Civil Service Unions and others v. Minister for the Civil Service* (*‘GCHQ’*) [1984] 3 All ER 935 GCHQ classified the broad grounds of judicial review under three main headings: illegality (unlawfulness); irrationality (unreasonableness); and procedural impropriety (unfairness). See on this: Brian Jones and Katharine Thompson ‘Administrative Law in the United Kingdom’, in: R. Seerden and F. Stroink (eds); *Administrative law of the European Union, its Member States and the United States – A Comparative Analysis*, Antwerp 2002, p. 239.

17 This is akin to what English law calls judicial review. It is a proceeding which has two main features: firstly, it only challenges the legality of the decision it criticizes: it claims that the decision does not respect one or several of the various rules to which the administration must conform; secondly, if it succeeds, the court will quash the decision, and might order an injunction, but it could not grant compensation. See on this: Jean-Bernard Auby, ‘Administrative law in France’, in: R. Seerden and F. Stroink (eds); *Administrative law of the European Union, its Member States and the United States – A Comparative Analysis*, Antwerp 2002, p. 59 onwards.

18 Case C-12/03 P, *Tetra Laval II*, Para. 83 of the Opinion, referring to Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others/Commission*, [2004] ECR I-0000, Para. 279.

19 Craig 2004a, *supra* note 15, p. 833.

20 Conseil d’État, Ass., 28 mai 1971, *Rec.*, p. 409. This balancing had previously already been used in matters concerning the field of police, e.g. Conseil d’État, 19 mai 1933 *Benjamin*, *Rec.*, p. 541.

21 Art. 229 EC.

to ascertain the influence of EC law and the European Convention on Human Rights, notably Articles 6 and 13 thereof, on the standard of review. The next section examines the impact, if any, of the new European cooperation and harmonizing mechanisms, introduced under Regulation 1/2003 and the 2003 Directives, on the intensity of judicial review. Section 6 contains some concluding observations.

A number of the cases mentioned in the discussion below have been decided under the 1998 telecommunications framework or before the entry into force of Regulation 1/2003. They nevertheless provide a good illustration of the developments in judicial review.

1. The Netherlands

1.1. Competent courts

The decisions of both the Dutch competition authority – the *Nederlandse Mededingingsautoriteit* (NMa) – and the Dutch regulatory authority – the OPTA – are reviewed exclusively by the specialized Rotterdam District Court.²² The District Court is part of the administrative court structure. Appeals lie to the specialized *College van Beroep voor het Bedrijfsleven* (CBB).²³ To speed up legal proceedings the revised Telecommunications Act stipulates that the most important regulatory decisions taken by the OPTA can only be appealed to the CBB – no further appeal being possible.²⁴ As regards decisions imposing sanctions, the normal procedure applies, *i.e.* the Rotterdam District Court decides in first instance and appeal lies to the CBB.²⁵

According to Dutch administrative law terminology independent authorities can have competences that provide the authority with a degree of discretion in policy making (*'beleidsvrijheid'*)²⁶ and competences that provide a degree of discretion in interpretation (*'beoordelingsvrijheid'*).²⁷ Decisions taken under the former type of competence are reviewed marginally,²⁸ decisions taken under the latter type of competence are in principle reviewed intensively. However, if the law allows for a wide margin of discretion in interpretation – often evidenced in the phrase *'in the opinion of'* – the legislator can require courts to apply marginal review.²⁹

22 This in deviation from Art. 8:7 Awb [General Administrative Law Act]. There used to be a mandatory internal review procedure before the matter could be brought before the court. This procedure no longer needs to be followed for the majority of the OPTA's decisions. In competition cases it is possible to bypass the internal review procedure with the consent of the NMa and all interested persons (Art. 7:1a Awb). The NMa has indicated that in cases involving sanctioning decisions pursuant to competition law, it will in principle grant a request to pass over the internal revision procedure. In all other cases, the internal revision procedure seems appropriate if for instance, the facts or viewpoints of the parties are not clear; if it is still possible to resolve the dispute; if there are defects that can easily be remedied during the internal revision phase. There will be a case-by-case assessment of whether a direct appeal is suitable, cf. *Staatscourant* 2 September 2004, no. 168/19.

23 Art. 93 Mw [Dutch Competition Act].

24 Art. 17.1. (1) Tw [Dutch Telecommunications Act], referring to decisions taken pursuant to Chapter 6 [interoperability of services], Chapter 6A [obligations for SMP operators], Chapter 6B [Arts. 6 and 7 Framework Directive procedure], Chapter 12 [dispute settlement] or Chapter 15 [enforcement], with the exception of decisions pursuant to Art. 15.2.a [preventing an operator from offering electronic communications services or networks] and 15.4 [fines and periodic penalty payments].

25 Art. 17.1(2) Tw. This provision applies in deviation of Art. 8:7. Awb.

26 Policy discretion means that the relevant legislation does not prescribe what kind of decision the authority should take, if the legal conditions of a power are fulfilled. H.D. van Wijk, W. Konijnenbelt and R.M. van Male, *Hoofdstukken van Bestuursrecht*, The Hague 2005, pp. 141-151.

27 In the case of discretion in interpretation it is up to the judgment of the administration to determine whether the legal requirements for the exercise of powers have been met in the case at hand, Van Wijk Konijnenbelt and Van Male 2005, *supra* note 26, pp. 141-151, and Stroink 1995, *supra* note 10, p. 86.

28 L.F.M. Verhey and N. Verheij: 'De macht van de marktmeesters, markttoezichthouders in constitutioneel toezicht', in: *Toezicht, Handelingen Nederlandse Juristen-Vereniging*, 2005, no. 1, p. 313. See also C.A.J.M. Kortmann, *Constitutioneel recht*, Deventer 2005, p. 65.

29 Verhey en Verheij 2005, *supra* note 28, p. 313.

1.2. Judicial control of decisions by the OPTA

Competence issues under the Telecommunications Act 1998

The judgments regarding decisions by the OPTA taken pursuant to the Telecommunications Act 1998 (old) mainly concerned the determination of the scope of its competences under the Telecommunications Act.³⁰ According to Ottow, the case law indicates that the intensity of review applied by the courts has swung from marginal to intensive and vice versa in this respect.³¹ It should be noted that courts in general intensively review whether national authorities have respected the limits of their powers, although courts may differ on how to interpret the scope of the powers at issue. It is notable that in a number of instances, the exercise of competences by the OPTA was reviewed more thoroughly by the District Court than by the CBB. Good examples are offered by the *Dutchtone* case and the *MTA* case.

The *Dutchtone* case concerned the OPTA's competences for dispute settlement. According to the Telecommunications Act 1998 (old), the OPTA could only entertain a request for dispute resolution if the undertakings concerned had made a 'reasonable attempt' to resolve the matter themselves. The issue before the courts centred on how to determine whether an attempt had been 'reasonable'. The CBB employed a marginal test where the District Court had intensely reviewed the same decision.³² The CBB held that, as a specialist administrative authority, the OPTA should be accorded a certain degree of discretion in deciding whether an attempt had indeed been 'reasonable'. This was necessary, it said, because the OPTA needed discretion to allow it to achieve the objectives of the Telecommunications Act.³³

The subsequent case of *MTA (Mobile Terminating Access Tariffs)* concerned the issue of whether the OPTA could regulate mobile terminating access tariffs³⁴ on an ex ante basis. A strict reading of the Telecommunications Act 1998 (old) suggested that it could not,³⁵ allowing intervention only on an ex post basis, at the request of market parties seeking a settlement of interconnection disputes.³⁶ In such cases, the OPTA would have to formulate 'reasonable' tariffs and conditions. The OPTA subsequently published general policy rules setting out how it would determine such tariffs and conditions.³⁷ On the basis of these policy rules, it set maximum tariffs with the ultimate goal that all mobile operators would make their MTA tariffs cost-oriented by July

30 Under the old Telecommunications Act, the competences given to the OPTA were phrased in very restrictive terms, spread over a number of limited categories of possible situations as opposed to covering all activities that might arise in the telecommunications markets that would require regulation. The approach under the new Telecommunications Act, implementing the 2002 Directives, shows some improvement in this respect.

31 A.T. Ottow, 'Het verschil tussen Duivenhokken en telecommunicatie – De bestuurs(proces)rechtelijke obstakels bij het toezicht op de telecommunicatiemarkt', in: B.M.J. van der Meulen and A.T. Ottow (eds.), *Toezicht op Markten*, VAR-reeks, 130, The Hague 2003, pp. 212-222.

32 District Court of Rotterdam, judgment of 13 September 2000 *KPN v. OPTA*, *Telec* 99/2715-RIP, *Telec* 99/2781-RIP, *LJN* AA7093.

33 CBB, judgment of 25 April 2001 *KPN v. OPTA and Dutchtone*, annotation by A.T. Ottow, *Mediaforum*, 2001 no. 6, pp. 212-220. See also District Court of Rotterdam, judgment of 16 February 2001, VTELECOM 00/2530-SIMO – judgment after preliminary judgment in proceedings between KPN and the OPTA, with MCI Worldcom as third party, *LJN* AB0027.

34 Under the current technological set-up, each number 'belongs' to an operator, meaning that the customer who uses that particular number can only be reached through the network of this operator. Accordingly, each operator is placed in a dominant position *vis-à-vis* other operators, since calls made to its subscribers, from wherever they may originate, must be terminated over its network, at the tariff set by the operator in question.

35 The Telecommunications Act 1998 implemented the old ONP directives. According to these directives operators could only be designated as SMP operators in case they had a market share of at least 25% on a market that was defined in the Directives. Since the market of mobile termination was not defined as a relevant market within the ONP directives, the mobile operators could not be designated as SMP operators.

36 Network operators are under the obligation to negotiate and conclude interconnection agreements with each other.

37 According to Art. 4:84 Awb [General Administrative Law Act] an administrative body is required to act in accordance with its guidelines, unless this would lead to unacceptable consequences in the particular case under consideration. The MTA policy guidelines were adopted after consultation with both the Dutch competition authority and interested parties.

2003.³⁸ In other words, the OPTA could be said to have engaged in ex ante regulation of the MTA tariffs. This was the viewpoint of the mobile operators and they accordingly brought proceedings against the decisions adopted by the OPTA pursuant to these policy rules, claiming lack of competence.³⁹ The problem that the District Court of Rotterdam faced in this case was that the networks of the mobile operators were not directly connected. They were merely *indirectly* connected, through the fixed telephone network of KPN, the former incumbent. Using this distinction between direct and indirect interconnection, the Court ruled that the OPTA in any event did not have the competence to settle disputes between the mobile operators as the Telecommunications Act only allowed for dispute settlement as regards *direct* interconnection disputes.⁴⁰ By using this formalistic approach, the District Court – conveniently – managed to avoid addressing the more contentious issue of the legality of the policy rules.⁴¹ The District Court here intensively reviewed the limits of the competence of the OPTA, which is normal practice where competence issues are at stake.

Review on the merits of OPTA decisions

Since many of the OPTA's decisions have been annulled for formal reasons – read: lack of competence due to restrictive drafting of the Telecommunications Act 1998 (old) – the courts have only rarely had the opportunity to engage in a review of the merits of the case at hand. However, the few judgments that did address the merits of a case indicate that the District Court of Rotterdam and the CBB do not shy away from a thorough review of decisions that concern complex legal and economic assessments.⁴² The District Court generally applies an intense standard of review, whereas the CBB applies a standard of review that holds between marginal and intense, depending on the circumstances of the case. For example, in cases concerning the designation of market parties as having Significant Market Power (SMP) both courts intensively scrutinize the market analysis carried out by the OPTA as well as the reasoning adduced in support of the OPTA's findings and remedies.⁴³

38 2002 *Staatscourant*, no. 65, p. 22, as amended by 2002 *Staatscourant*, no. 142, p. 21. Although the Dutch competition authority (NMa) at the time used the principle of cost-orientation as a determinant in assessing whether dominant firms had engaged in abusive pricing practices, it was heavily debated whether the competition authority could impose cost-orientation as a remedy subsequent to a finding of abuse of dominance. See on this: E.H. Pijnacker Hordijk and Y. de Vries, 'Onbillijk hoge prijzen als vorm van misbruik van een economische machtspositie onder het Europese en het Nederlandse mededingingsrecht', 2002 *SEW*, no. 12, pp. 430-446.

39 It should be noted that under Dutch law no appeals are possible against policy rules: Art. 8:2 Awb. However, the market parties can appeal against (individual) final decisions based on these policy rules and ask the court to disapply the policy rules in their individual case.

40 District Court of Rotterdam, judgment of 25 April 2003, *O2 v. OPTA*, TELECOM 02/2156 GERR, *LJN* AF8131, annotation by A.T. Ottow, 2003 *Mediaforum*, no. 9, pp. 309-312. Indeed, in accordance with the Telecommunications Act, the OPTA had granted the mobile operators an exemption from the legal obligation to connect their networks directly. However, the OPTA had granted that exemption in response to the first provisional ruling by the District Court of Rotterdam in the same case. In that ruling the Court had indicated that the OPTA had to grant an exemption as a pre-condition for it to have jurisdiction over disputes concerning indirect interconnection: preliminary judgment by the District Court of Rotterdam, judgment of 1 May 2002 *Telfort v. OPTA* VTELEC 02/900 RIP, *LJN* AE2382. It is ironic that the same Court one year later used the exception to preclude the OPTA from settling indirect interconnection disputes. It can be argued that, in the light of the text of Arts. 6.3 and 6.1 Tw 1998 (old) and the rationale behind the grant of competence for dispute settlement – safeguarding the interoperability of networks – the approach taken by the District Court of Rotterdam was too restrictive. Since indirect interconnection disputes can be as damaging for interoperability as direct interconnection disputes, there would have been good reason to support an interpretation of the Tw that would hold that the OPTA did indeed have the competence to also settle disputes as regards indirect interconnection. The new Telecommunications Act now confers upon the OPTA the competence to also settle indirect interconnection disputes.

41 Note that Art. 4 of the Framework Directive, *supra* note 4, – requiring national review bodies to duly take into account the merits of the case before it – aims to counter such excessive judicial formalism.

42 See A.T. Ottow, 'De bewijspositie van de NMa en de rechterlijke toetsing van besluiten inzake aanmerkelijke marktmacht', 2005 *Mediaforum*, no. 6, 2005, pp. 227-228, and S.A.C.M. Lavrijsen, 'De rol van de Nederlandse administratieve rechter bij het toezicht op de mededinging', 2004 *SEW*, no. 1, pp. 34-35.

43 Art. 1.3(4) of the Telecommunications Act now requires the OPTA to demonstrate with reference to both qualitative and quantitative indicators that any measures which have a significant impact on the relevant market are necessary for achieving the objectives of the Telecommunications Act as well as proportionate to achieve those objectives. In the light of the current – rather intensive – standard of review, it is doubtful whether this Article will exert much impact.

The District Court of Rotterdam ruled in a case concerning a decision by the OPTA designating Libertel as SMP operator that the OPTA had only correctly applied its competences concerning SMP designations contained in Article 6.4. Tw 1998 (old) if it had conducted an adequate market analysis.⁴⁴ In order for an analysis to be considered adequate, it had to identify the positions of the relevant market operators and comment on marked developments as well as on the position of any potential SMP-operators in the market. If this analysis led the OPTA to conclude that an operator could not be considered to have SMP, despite the existence of relatively high market shares, it was duty-bound not to designate such an operator as SMP operator. In the case at hand, the market analysis did not comply with these stipulations and the District Court accordingly annulled the resultant decision.

An example of the intensity of review applied by the CBB is the judgment partially upholding the annulment by the District Court of Rotterdam of the decision by the OPTA designating KPN as SMP operator on the market for rental lines.⁴⁵ The District Court had annulled the decision because the OPTA had failed to perform an adequate market analysis as regards the possible differentiation of the PVC (Permanent Virtual Circuits) market. The OPTA had moreover failed to determine the precise geographical scope of the PVC market (national, regional, or local) because it considered that KPN's market share was so large that it could in any case be said to have SMP for the whole of the national territory. The CBB considered that the OPTA was indeed not justified in abstaining from differentiating the PVC market, since the identification of one or more smaller markets would have impact on the market power of KPN. Further, the CBB considered that KPN's market share on the national PVC market was not so large as to justify the OPTA's refusal to precisely identify the geographic boundaries of the PVC market.

It should finally be mentioned that case law indicates that the courts demand more by way of justification and reasoning if the OPTA is called upon to interpret and apply 'open norms'. In this respect the CBB takes into account whether the OPTA has organized public consultation procedures involving stakeholders and to what extent, if any, the OPTA has used the outcomes of such procedures in interpreting and applying open norms.⁴⁶

1.3. Judicial control of decisions by the NMa

Articles 81 and 82 EC (Articles 6 and 24 Competition Act 1998)

The District Court of Rotterdam and the CBB commonly engage in an intense review of decisions by the NMa concerning the application of Articles 81 and 82 EC and their Dutch equiva-

44 District Court of Rotterdam, judgment of 23 December 1999, *Libertel v. OPTA*, VTELEC 99/2547-SIMO, with annotation by E. Loozen and K. Mortelmans, 2000 *Mediaforum*, no. 2, pp. 67-70. By virtue of Art. 6.4. of the Telecommunications Act 1998 (old) the OPTA had less discretion in evaluating which market parties had SMP than under the new Telecommunications Act. Under the old Telecommunications Act the OPTA could only designate an undertaking as having SMP, if this undertaking was active on a market predefined by the law and if this undertaking had a market share of at least 25%. However, in addition to the determination of the market shares the OPTA still had to conduct a market analysis to evaluate whether the economic conditions in a market pointed to the presence of SMP. According to the court the OPTA had some discretion in performing the market analysis. However, if the results of the market analysis led to the conclusion that despite the fact that an undertaking had a market share of 25% or above 25% it did not have SMP, the OPTA was under an obligation not to designate the undertaking as SMP. Conversely, if the market analysis led to the conclusion that an undertaking with a market share below 25% had SMP, the OPTA had to designate the market operator as an SMP undertaking.

45 CBB, judgment of 8 September 2004, AWB 04/45 and 04/49, judgment on appeals by the OPTA and KPN against the judgment of 9 December 2003 by the District Court of Rotterdam, with annotation by W. Knibbeler and P.J. Kreijger, 2005 *Mediaforum*, no. 1, pp. 28-35.

46 CBB, judgment of 3 December 2003, AWB 03/0406, 03/418, 03/425, judgment on appeal against the judgment of 26 February 2003 by the District Court of Rotterdam, with annotation by GC, *AB* 2004/189. See also CBB, judgment of 6 April 2004, AWB 05/83, 05/85, 05/86, 05/88OPTA, KPN, Tele2 a.o., judgment on appeal against the judgment by the District Court of Rotterdam of 23 December 2004, *LJN* AV8782.

lents, Articles 6 and 24 of the Competition Act 1998.⁴⁷ In case there is no other decision possible, the courts may substitute the NMa's judgment with their own.⁴⁸ Both courts review extremely intensively decisions that impose fines.⁴⁹ The courts have however marginally reviewed the application of the criteria for an exemption of the cartel prohibition, since this necessarily entails a balancing exercise for which wider discretion is deemed appropriate.⁵⁰

A recent case which confirms that the CBB is prepared to intensively review the reasoning provided and the economic analysis conducted by the NMa is the case of *Modint v. NMa*⁵¹ which concerned the cartel prohibition contained in Article 6 of the Dutch Competition Act. Modint was a business association active in the fields of fashion, interior and textiles. It promotes reasonable resell, supply and payment conditions in the form of general conditions for the participating businesses. These general conditions addressed such matters as maximum payment reductions, a compensation for buyers that had their payments done via a central system or had them guaranteed by a purchasing combination and a turnover subsidy that had to be paid by the suppliers to the purchasing combination as a compensation for additional measures to expand the supplier's turnover. Modint's predecessors had notified the general conditions to the NMa to obtain an exemption from the cartel prohibition.⁵² According to the NMa the general conditions amounted to horizontal agreements between the Modint members and were aimed at restricting competition within the meaning of Article 6 of the Competition Act 1998 at the market for the supply of fashion and textiles. They accordingly could not benefit from an exemption. The District Court sanctioned the NMa's decision.⁵³ On appeal the CBB ruled that the NMa had not carried out an adequate market analysis in accordance with the case law of the Court of Justice which required the NMa to assess the effects of an agreement within the economic context in which it is applied.⁵⁴ When carrying out a market analysis the NMa should take into consideration the intent of the market parties and the way they actually operate in the market, the products and services to which the agreement relates, the structure of the market concerned and the actual functioning of the market. The CBB agreed with the appellants that the compensation and the turnover subsidy related to the compensation for services that were delivered to the suppliers by retail service organizations and which the suppliers centrally purchased from Modint. In other

47 For an extensive analysis of the standard of judicial review regarding the different types of decisions by the Dutch competition authority, consult Lavrijssen 2004, *supra* note 42, pp. 18-37. For instance District Court of Rotterdam, 26 November 2002, Case 00/1002 Meded, *NEA BV v. DG NMa*, *LJN* AF1111. On appeal the CBB endorsed the substantive findings by the District Court but lowered the fine imposed on the basis of a very intense review: CBB, judgment of 28 May 2004, AWB 03/76, *NEA v. DG NMa*, with annotation by GC, *AB* 2004/449. See also District Court of Rotterdam, judgment of 11 March 2003 *Carglass and Glasgarage v. DG NMa* MEDED 01/2674-RIP, MEDED 01/2629-RIP, *LJN* AF8902, appealed to the CBB who endorsed the judgment by the District Court to the extent that it found that the NMa had failed to properly examine a discount offered by Carglass and had failed to offer adequate reasoning in support of its decision: CBB, judgment of 17 November 2004, AWB 03/614, 03/621 and 03/659, *Glasgarage Rotterdam and Carglass v. DG NMa*, with annotation by GC, *AB* 2005/81.

48 See CBB, judgment of 15 July 2004, AWB 03/132, *NOS v. NMa*, judgment on appeal against the judgment by the District Court of Rotterdam of 11 December 2002, *LJN* AQ1727.

49 District Court of Rotterdam, 26 November 2002, Case 00/1002 Meded, *NEA BV v. DG NMa*, *LJN* AF1111; CBB, judgment of 28 May 2004, AWB 03/76, *NEA v. DG NMa*, with annotation by GC, *AB* 2004/449; District Court of Rotterdam, judgment of 18 June 2003, Case 01/621 MEDED, *X v. DG NMa*, *LJN* AH9702; and CBB, judgment of 12 March 2004, AWB 03/916 and 03/946, with annotation by GC, *AB* 2004/170.

50 On the review of exemption decisions, the consequences of the adoption of Regulation 1/2003 and the direct effect of Art. 81(3) EC, see Lavrijssen 2004, *supra* note 42, pp 26-27.

51 CBB, 28 October 2005, AWB 04/794, AWB 04/829, *Modint*, *LJN* AU5316 with annotation by J.J.A. Coumans, 2006 *Markt en Mededinging*, no. 2, pp. 47-54.

52 It should be noted that after the entry into force of Regulation 1/2003 the Dutch system has been brought into line with the European system, meaning that the exception to the cartel prohibition has become directly applicable (Wet modernisering EG-mededingingsrecht, 2004 *Staatsblad*, no. 345).

53 District Court of Rotterdam, 17 August 2004, 02/1087 RIP and 02/1468 RIP, *LJN* AR4213.

54 Case C-56/65 *Société Technique Minière/Machinenbau*, [1966] ECR 392, and Case C-399/93 *Oude Luttikhuis e.a./Verenigde Coöperatieve Melkindustrie Coberco*, [1995] ECR I-4515.

words, they did not relate to the selling price. Although these conditions were in principle laid down in agreements between the suppliers and the retail service organizations, Modint and the buyers' association negotiated about the actual level of the compensations on behalf of their members. It moreover appeared that the level of the selling price is determined on the basis of negotiations between individual suppliers and buyers and that the suppliers did not only compete on the basis of the selling price, but also on the basis of factors such as quality and delivery time. Although the purchase of retail services was related to the market for the supply of textiles and fashion, the CBB held that it could clearly be distinguished from the latter market. The compensation that was paid by the suppliers for the services of the retail organizations, could be qualified as costs that the suppliers made for securing payment risks, for organizing a good debtor administration and for measures to expand the turnover. On the basis of an analysis of the actual economic context within which the agreements on the compensation and the turnover subsidies functioned, the CBB concluded that the District Court had erred in holding that the NMa had correctly decided that the decision had the object of preventing or restricting competition in the market within the meaning of Article 6 of the Competition Act 1998.

Merger decisions

Due to the complex prospective analyses⁵⁵ that must be undertaken in merger cases, the standard of review applied can differ from that applied in cases concerning the cartel prohibition and the prohibition on abuse of a dominant position. In the Netherlands, the case law shows a divergence of opinion in this respect between the District Court of Rotterdam and the CBB. For instance, in *Wegener/VNU* the District Court intensely reviewed the contested NMa decision, justifying itself by referring to – unspecified – case law of the ECJ and CFI.⁵⁶ According to the District Court, this case law did not require national courts to review merger decisions only marginally. On appeal the CBB indicated that it would apply a standard of review which was more marginal, an approach which it confirmed in the subsequent case of *Essent v. NMa*.⁵⁷ According to the CBB, the NMa should be seen to have a certain amount of discretion in merger cases – notably as regards the assessment of the economic facts and circumstances at issue – which justifies a standard of review that holds between marginal and intense. The CBB indicated that this standard would require an examination of whether or not the NMa had sufficiently substantiated its findings of whether a proposed merger was likely to raise competition concerns. The CBB required that for the NMa to justify the refusal of approval, or approval subject to conditions, of a proposed merger, it had to show that competition problems were 'sufficiently likely' to arise if the merger were given the green light.

After the *Tetra Laval*⁵⁸ judgment of the ECJ, the District Court of Rotterdam in *Nuon/Reliant* has confirmed that it applies an intense standard of review for analyzing merger decisions by the NMa. In *Nuon v. NMa*⁵⁹ the District Court states that Article 41 Mw implies that it should be shown, with a high degree of certainty, that the conditions for the refusal of approval or the

55 Prospective analyses refer to analyses that do not entail the examination of past or current events, but rather a prediction of events which are more or less likely to occur in the future depending on whether or not a certain administrative decision is taken, as well as the contents of that decision.

56 District Court of Rotterdam, Judgment of 20 September 2000, MEDED 00/874-SIMO and MEDED 00/875-SIMO, *Wegener v. d-g NMa*, with annotation by F.J. Leeftang and K.J.M. Mortelmans, 2001 *Mediaforum*, no. 1, pp. 20-33.

57 CBB, Judgment of 5 December 2001, AWB 00/867 and 00/870 9500, *Wegener v. d-g NMa*, with annotation by M.R. Mok, 2002 *SEW*, no. 11, p. 422, and by F.J. Leeftang and K.J.M. Mortelmans 2002 *Mediaforum*, no. 4, p. 131. See also: CBB, Judgment of 27 September 2002, AWB/01/633, *Essent v. d-g NMa*, with annotation by F.J. Leeftang, 2002 *Actualiteiten Mededingingsrecht*, no. 9, pp. 171-176.

58 See further Section 4.2. of this article.

59 District Court of Rotterdam, Judgment of 31 May 2005, *NUON v. NMa*, MEDED 04/135-WILD, *LJN* AT6440, with annotation by H.S.J. Albers, 2005 *Nederlands Tijdschrift voor Energierecht*, no. 4, pp. 169-173.

approval subject to conditions of a proposed merger have been met. In the case at hand, the proposed merger did not lead to any problems from a structural viewpoint, given the modest market shares of the undertakings concerned. However, the problem was that in the electricity sector market shares can vary greatly depending on the time of day. Typically, at times when demand for electricity is high, the so-called flexible power stations are used in last resort, because these power stations are able to quickly supply the electricity demanded. Even if an undertaking possesses a modest market share, they can still drive up the price for electricity by refusing to use the capacity of flexible power stations they possess. The decision by the NMa was based to a large extent on a quantitative analysis linked with economic principles related to game theory, which demonstrated according to the NMa that the merger would create greater possibilities for the merged entity to engage in such strategic anti-competitive behaviour due to wider access to flexible electricity capacity. However, the time, nature and extent of such behaviour and the effects of the merger on these were uncertain and difficult to demonstrate. Partly based on these considerations, the District Court held that the NMa had failed to justify why a traditional competition law-based analysis would be insufficient to prove the effects of the proposed merger. In addition, the quantitative analysis used were based on the assumption that the undertakings concerned would actually engage in strategic behaviour. The NMa had however failed to prove that such behaviour had occurred in the past. The NMa has since appealed the judgment to the CBB.⁶⁰

2. The United Kingdom

2.1. Competent courts, *Wednesbury* and appeal on the merits

The structure for judicial review in the United Kingdom is comparable to that in the Netherlands. The decisions by both the OFT (Office of Fair Trading) – the principal competition authority⁶¹ – and the OFCOM (Office of Communications)⁶² – the regulatory authority – are appealed to the same court, namely to the Competition Appeal Tribunal (CAT).⁶³ A further appeal from decisions of the CAT on a point of law lies to the Court of Appeal. Leave by either the CAT or the Court of Appeal is required for such a further appeal.⁶⁴

Historically, in reviewing the legality of government decisions under judicial review, courts in the United Kingdom have applied what is called the *Wednesbury* test as the standard of review.⁶⁵

60 See for a critical comment on the standard of review applied in the *NUON/Reliant* case by the President of the Board of the NMa: P. Kalbfleisch, *Intensiteit van rechterlijke toetsing van besluiten van marktautoriteiten*, speech on the occasion of the fiftieth anniversary of the CBB, <http://www.nmanet.nl>.

61 In addition, all the sectoral regulators that bear responsibility for one particular sector of the economy are granted competence to enforce the European and national competition prohibitions within their respective sector. These are: OFCOM, Ofgem, Ofwat, Ofreg NI, ORR and CAA, cf. Art. 3 of the Competition Act 1998 and other enactments (Amendment) Regulations 2004.

62 Section 8 of the Communications Act 2003 lists a number of decisions that cannot be appealed to the CAT. These are principally either decisions that do not have an immediate effect on a person, but are of a legislative or quasi-legislative nature or decisions on matters which fall outside the scope of the 2002 Electronic communications Directives, such as decisions to institute criminal or civil proceedings. In cases raising issues of price regulation, the CAT must refer the matter to the Competition Commission and must follow the latter's opinion.

63 Sections 46 and 47 of the Competition Act 1998. The CAT was established pursuant to Section 12 and Schedule 2 of the Enterprise Act which came into force on 1 April 2003. In addition to reviewing OFT and OFCOM decisions, the CAT is competent to hear actions for damages and other monetary claims under the Competition Act 1998 and to review decisions made by the Secretary of State, the OFT and the Competition Commission in respect of merger and market references or possible references under the Enterprise Act 2002, Sections 120 and 179. The decisions relating to merger and market references are reviewed pursuant to traditional judicial review principles and not on the basis of appeal on the merits.

64 Leave will only be given where the court considers that the appeal would have a real prospect of success or where there is some other compelling reason why the appeal should be heard, Civil Procedure Rules Part 52.

65 Ruling of the Court of Appeal of 7 – 10 November 1947, *Associated Provincial Picture Houses Ltd Wednesbury Corp* (1948) 1 KB 223, 233-234, CA. The *Wednesbury* test is often justified with reference to the constitutional doctrines of parliamentary sovereignty and the separation of powers. Cf. Craig 2004a, *supra* note 15, pp. 831-834, and Hilson 2003, *supra* note 15, pp. 125-145.

Under this test, the court will limit itself to ascertaining whether the procedural rules have been complied with and whether the decision is lawful; it will only annul the decision on substantive grounds if the decision is so unreasonable that no reasonable decision maker could have adopted it. It is commonly accepted that it is extremely difficult for an applicant to succeed in demonstrating *Wednesbury* unreasonableness. Using the categorization proposed in the introduction to this article, the *Wednesbury* test is a marginal or extremely marginal standard of review, depending on the circumstances.⁶⁶

The entry into force of the Human Rights Act 1998, which incorporates most of the contents of the ECHR into English law, coupled with the influence of EC law, have led to a more searching standard of review in judicial review proceedings concerning human rights and/or Community law rights.⁶⁷ In both types of cases, courts are called upon to use the principle of proportionality as their standard of review, which is – at least in human rights and EC law cases – interpreted to amount to an intense standard of review.⁶⁸

The traditional judicial review procedures typically do not apply to the review of decisions of the economic regulators, such as the OFT and the OFCOM.⁶⁹ Their decisions are subject to a statutory appeal on the merits before the CAT. Under statutory appeal, the competences available to the reviewing instance are typically more extensive than those available to courts under judicial review and the intensity of review is also deeper. The CAT can strictly control the determination and assessment of the facts and the application of the law and evaluate and reconsider detailed economic, factual and legal analyses contained in the decision under appeal. In practice its judgments contain detailed legal and economic analyses of the regulators' decisions and are extensively reasoned.⁷⁰ The CAT may confirm⁷¹ or set aside all or part of the decision or remit the matter to the OFT or regulator. In addition, the CAT can give such directions as the OFT or regulator could have taken or make any other decision which the OFT or regulator could have made. In the phraseology of this article, the standard of review employed by the CAT ranges from intense – where the matter is quashed but remitted to the OFT or the OFCOM – to extremely intense – where the CAT decides the matter itself.

2.2. Judicial control of decisions by the OFT and the OFCOM: appeal on the merits

The practice of the CAT confirms that the standard of review it applies is indeed intense. For example, in *Freeserve*, the undertaking appealed to the CAT against the refusal by the Director General of Telecommunications – the predecessor to the OFCOM – to withdraw or vary his

66 In sensitive or political cases, the standard is likely to be extremely marginal.

67 See on this T. Prosser, 'The place of appeals in regulation-continuity and change', in: P. Vass (ed.), *Regulatory Review 2004/2005*, (Bath CRI 2005), pp. 195-211.

68 See for a relevant case: *R (on the application of Daly) v. Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532. See on this case P. Craig, 'Fundamental principles of administrative law', in: D. Feldman (ed.), *English Public Law*, Oxford 2004b, pp. 709-713. Basing themselves on considerations of equality, simplicity and the difficulty of separating EC and national elements in a case, a number of authors have argued in favour of replacing *Wednesbury* with a proportionality test. Lord Slynn considered in the *Alconbury* case, that it is time to recognize that the proportionality principle forms part of British administrative law. According to him, the distinction between the *Wednesbury* test for national cases and the proportionality test for European cases is unnecessary and confusing, *R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2001] All ER 229, Para. 51, see on this Hilson 2003, *supra* note 15, p. 142.

69 The combined influences of the Human Rights Act 1998, EC law and the sanctioning competences of these authorities has led the British legislature to create special appeals procedures against the decisions of the OFT, the OFCOM and other economic regulators. See on this Prosser 2005, *supra* note 67.

70 See for instance Case 1047/3/3/04, *Hutchison 3G (UK) Limited and the OFCOM* [2005] CAT 39 and *Napp Pharmaceuticals v. Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13.

71 If the CAT confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.

rejection of Freeserve's complaint to the Director.⁷² That complaint alleged that British Telecom was conducting 'an orchestrated campaign of anti-competitive behaviour, aimed at achieving dominance by the incumbent in the market for retail ADSL services' and was in breach of the prohibition of abuse of a dominant position imposed by Section 18 of the Competition Act 1998. Freeserve asked the Tribunal to set aside the Director's decisions and remit the matter to the Director to be reconsidered pursuant to Paragraph 3(2)(a) of Schedule 8 of the 1998 Act. In support of that contention Freeserve submitted that the reasons given by the Director were inadequate, and or erroneous in law, and that the Director's investigation of Freeserve's complaint fell short of the standard required. Before deciding the appeal the CAT clarified the standard of review it applies in reviewing different decisions, including the decision to reject a complaint.⁷³ It considered that:

'It seems to us that the reference to an appeal 'on the merits' in paragraph 3(1) of Schedule 8 (of the Competition Act 1998: SL/MdV), means first that the Tribunal's function is not limited to the judicial review of administrative action applied in the civil courts of the United Kingdom (...). Nor is the Tribunal limited to the heads of review set out in Article 230 of the EC Treaty, which are applicable to the Court of First Instance (...).

In appeals where there has been a finding of infringement, it is clear that the Tribunal has a full jurisdiction to find facts, make its own appraisals of economic issues, apply the law to those facts and appraisals, and determine the amount of any penalty. (...)

The 1998 Act does not distinguish between an 'infringement' and a 'non-infringement' decision (...). To give one example, even where the Director has taken a decision of 'non-infringement', it may be open to the tribunal in an appropriate case to substitute a decision of 'infringement', rather than remit the matter to the Director, provided that the Tribunal has all the necessary material before it, and the rights to be heard of all parties have been fully respected: that was the course followed by the Tribunal in *IIB and ABTA v. Director General of Fair Trading ('the GISC case')* [2001] CAT 4, [2001] CompAR 62. (...)

It follows in our view, that whether it is an infringement or a non-infringement decision, the tribunal has, in principle, to hear an appeal on the merits, that is to say to decide whether the Director has made an error of fact or law, or an error of appraisal or of procedure, or whether the matter has been sufficiently investigated (...).

However, the way in which the Tribunal exercises its jurisdiction is, in our view, likely to be affected by the particular circumstances (...) Thus *Both Aberdeen* and *Bettercare* take the view that were the Tribunal would risk converting itself from an appellate tribunal to a court of first instance, the appropriate course of action may well be to remit the matter to the Director, although of course the Tribunal retains a discretion not to do so (...).'

After these general remarks the CAT intensively scrutinized whether the Director had provided adequate reasoning and had performed an adequate investigation in the case at hand. Although the CAT rejected the appeal for most parts, it agreed with the applicant on the treatment of the complaint regarding the alleged predatory pricing practices by BT. According to the CAT at this point the Director's decision lacked analytical rigour and suffered from poor reasoning. The Director had concluded that since it had been decided under the Telecommunications Act that

⁷² Case 1007/2/3/02, *Freeserve.com plc v. Director General of Telecommunications* [2003] CAT 5, with annotation by K Jones, 'Wide jurisdiction for Appeals, OFTEL overturned but no easy ride for complaints', 2003 *Utilities Law Review*, no. 2, pp. 49-55.

⁷³ Paras. 101-114.

the practices of British Telecom did not amount to cross-subsidies or margin squeeze, these practices by the same token also could not qualify as predatory pricing behaviour in violation of the Competition Act 1998. The CAT held that this proposition should have been explained more clearly. It also stated that the Director should have specified on which economic principles he had relied in scrutinizing the behaviour of British Telecom. Finally, the Director had failed to make a clear distinction between the concepts of cross subsidy and predatory pricing, and had not justified why the test for cross subsidies also applied to allegations of predatory pricing. In the view of the CAT, it was far from clear that the tests for abusive predatory pricing, an abusive margin squeeze or an abusive cross subsidy were the same either under the Competition Act 1998 or in Community law.

More recently the CAT annulled a decision by the OFCOM concerning the designation of Hutchison 3G (UK) as a party having Significant Market Power at the wholesale market for the termination of mobile calls, despite the fact that this decision was approved by the European Commission in accordance with Article 7 of Directive 2002/21/EC. The CAT rejected the appellant's submission that as a consequence of the ECJ judgment in *Tetra Laval* the standard of proof for prospective analysis had become higher, in the sense that the OFCOM had to prove with a 'high degree of probability' as opposed to 'on the balance of probabilities' that an undertaking should be considered to have SMP. Nevertheless, the CAT recalled that *Tetra Laval* demonstrates that there is a need to be particularly thorough as regards analyses relating to future conduct. Furthermore, the CAT agreed with the following considerations of the Irish Electronic Communications Appeals Panel ('ECAP'):

(...) 'Rather the panel is merely asserting the common sense proposition that when one is making a finding of significant market power on the basis of a prospective market analysis (as opposed to an ex post analysis) then it is necessary that this analysis be sufficiently rigorous and thorough so that a clear link can be drawn between existing circumstances and likely future behaviour. To put it in another way, because the likelihood of error is greater in a prospective analysis, the prospective analysis must be proportionately more rigorous to account for this possibility'.⁷⁴

Subsequently the CAT intensely reviewed the legal and economic analysis conducted by the OFCOM. It concluded that the OFCOM erred in its determination as to the existence of Significant Market Power because it had failed to assess the extent to which British Telecom had countervailing buyer power which could negate the finding of SMP on the part of Hutchison.

2.3. Judicial control of decisions by the OFT and OFTEL: judicial review

In a limited number of instances decisions of the OFT are reviewed on the basis of traditional judicial review principles. The principal example is formed by the decisions of the OFT and Competition Commission⁷⁵ relating to the reference and approval of mergers.⁷⁶ Despite the application of traditional judicial review principles, the standard of review in scrutinizing the substantive aspects of a case is typically not extremely marginal. In accordance with the practice

⁷⁴ Case 1047/3/3/04, *Hutchison 3G (UK) Limited and the OFCOM* [2005] CAT 39, Paras. 29-34.

⁷⁵ The Competition Commission is charged with conducting in-depth inquiries into mergers, markets and the regulation of major regulated industries, in response to a reference made to it by the OFT, the Secretary of State or a sectoral regulator.

⁷⁶ These used to be reviewed by the Administrative Division of the High Court under judicial review procedure. Following the entry into force of the Enterprise Act 2002, these decisions are now appealable to the CAT which decides the case by application of traditional judicial review principles.

of the Community Courts, the CAT and the common law courts have shown a willingness to review certain aspects of merger cases more intensely.⁷⁷

The Administrative High Court considered in the *Interbrew* case that the Competition Commission should respect the proportionality principle on the basis of EC law and the ECHR where it imposes remedies on market parties to deal with the perceived anti-competitive effects of mergers that were referred to the Competition Commission by the European Commission by virtue of Article 9 of Regulation 4064/89/EG (old).⁷⁸ This was the first time that the High Court quashed a decision by the Competition Commission on the grounds that the latter had failed to hear the parties on possible remedies to counter the perceived anti-competitive effects that would result from the takeover of Bass by Interbrew. Although the Court reviewed the merits of the case marginally, both the annulment of the decision on the basis of a procedural irregularity and the reference to the proportionality principle indicated a willingness of the court to have a more intense look at the way the Competition Commission did its job.⁷⁹

The *IBA-Health Limited* case concerned a review of a decision by the OFT not to make a reference to the CC under Section 33(1) of the Enterprise Act 2002 of an anticipated acquisition by iSOFT Group plc of Torex. By virtue of Art. 33(1) of the Act the OFT has to make a reference to the Competition Commission if the OFT believes that it is or may be the case that the proposed merger may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or for services.⁸⁰ The appeal was lodged by *IBA-Health*, a competitor of iSoft and Torex. IBA-Health submitted that it was self-evident that ‘it is or may be the case’ that the proposed iSoft/Torex merger could be expected to result in a substantial lessening of competition within the UK. Both companies were direct competitors in the supply of software applications to hospitals and they were the two largest companies active in the sector. In its preliminary ‘issues letter’ (comparable to the Statement of Objections by the European Commission) the OFT indicates a number of competition concerns raised by the proposed merger. In its final decision, the OFT stated that iSOFT and Torex had been the two leading suppliers of IT software to the healthcare sector in the United Kingdom. However, while such a strong legacy base could in theory give the parties the opportunity to detrimentally affect the state of competition in the market, it was unlikely, in and of itself, to confer significant market power in view of the changes to the Nation Programme for IT (‘NPfIT’) – a public procurement programme for IT software. Speaking on the standard of review to be applied in judicial review cases the CAT held that:

‘ (...) a particular feature of the specific context of section 120 (of the Enterprise Act 2002; SL/MdV) is that Parliament has created the Tribunal as a specialised tribunal. That is in

77 J. Swift, *Judicial control of competition decisions in the UK and the EU*, lecture given by the UK Competition Commission, 21 September 2004, available at http://www.competition-commission.org.uk/our_role/cc_lectures/index.htm.

78 High Court, *R (on the application of Interbrew SA and Interbrew UK Holding LTD) v. the Competition Commission and the Secretary of State for Trade and Industry* [2001] EWHC Admin 367, [2002] LLR 109. The Court considered that ‘Since Article 9 (8) (of Regulation 4064/89/EG) imposes a requirement only to take those measures which are strictly necessary to safeguard or restore effective competition; it is plain that the Commission and the Secretary of State are under a duty to act in a proportionate manner. Such an obligation is reinforced by the provisions of Article 1 of the First Protocol to the European Conventions on Human Rights’.

79 High Court, *R (on the application of Interbrew SA and Interbrew UK Holding LTD) v. the Competition Commission and the Secretary of State for Trade and Industry* [2001] EWHC Admin 367, [2002] LLR 109.

80 The Competition Commission is charged with conducting in-depth inquiries into mergers, markets and the regulation of major regulated industries, in response to a reference made to it by the OFT, the Secretary of State or a sectoral regulator. It can adopt remedies to deal with any competition problems identified in its inquiries.

contrast to the more normal situation where a non-specialised court is called upon to review the decision of a specialised decision maker.’⁸¹

The CAT also addressed the question of whether the OFT had any discretion in deciding whether or not to refer a proposed merger to the Competition Commission and held that it had not. According to the CAT, a referral is mandatory if the OFT believes that the proposed merger would lead to a (significant) lessening of competition in the market concerned.⁸² Although the OFT had some margin of appreciation in applying the legal norms of the Enterprise Act 2002, the CAT apparently thought that this was not the kind of discretion that would justify a very marginal standard of review. On the basis of the nature of the powers at issue the CAT justified the standard of review applied by stating that it was not reviewing whether the decision under appeal was *Wednesbury* unreasonable. It rather asked itself whether the decision by the OFT was not erroneous in law, and was one which was reasonably open to the OFT to take, giving the word ‘reasonably’ its ordinary and natural meaning.⁸³ Subsequently it applied this test in the case at hand. The CAT found that there was an alternative view to which the OFT could reasonably have come. This alternative view was contained in the ‘issues letter’. The CAT indicated that it had expected to find in the final decision a detailed point-by-point rebuttal of the concerns set out in the issues letter to demonstrate that the alternative view could not reasonably be held. The CAT was also not able to ascertain what evidence the OFT had relied upon to support its decision and if that evidence was indeed capable of supporting that decision. The CAT therefore quashed the decision.

On appeal the Court of Appeal agreed with the standard of review applied by the CAT, in the sense that the *Wednesbury* test was not applicable in this case. The Court of Appeal confirmed that the decision by the OFT could not be upheld since it was not based on adequate evidence and lacked adequate reasoning.⁸⁴

The same standard of review can also be discerned in cases concerning licence modification procedures that were followed on the basis of the old Telecommunications Act 1984.⁸⁵ As a consequence of the broad discretion seemingly inherent in decisions modifying licences, the courts traditionally adopted an extremely marginal standard of review.⁸⁶ However, in a judgment concerning the OFTEL’s (Office of Telecommunications: predecessor to the OFCOM) decision to regulate the mobile terminating access tariffs of mobile operators, confirmed on appeal by the Competition Commission,⁸⁷ the Administrative High Court showed its willingness to subject the

81 *IBA Health Limited v. OFT* [2003] CAT 28 and [2003] 27, Para. 220.

82 Section 33 of the Enterprise Act 2002.

83 Paras. 223-225.

84 *OFT v. IBA Health Limited* [2004] EWCA Civ 142. See E. Harwick, ‘The Court of Appeal’s IBA Health ruling: Victory for the OFT?’, 2004 *Utilities Law Review*, no. 5, pp. 153-159.

85 With the entry into force of the Communications Act 2003, that implemented the 2003 Directives, this procedure has been abolished. Appeals that relate to the application of the 2003 Directives are now dealt with by the CAT (see section 2.1.). The licence modification procedure is still applicable in other utilities sectors, such as the energy sector.

86 See on this T. Prosser, ‘The powers and accountability of agencies and regulators’, in: D. Feldman (ed.), *English Public Law*, Oxford 2004, pp. 296-298. On the basis of these procedures the regulators may change the rules that are applicable to the behaviour that falls within the realm of the licences.

87 The licence modification procedure has a two-tier structure. In first instance the regulator attempts to agree with the regulated market parties on the amendments to the licences. If no consensus can be reached, the regulator has the responsibility to refer the case to the Competition Commission. At the Competition Commission the second stage of the licence modification procedure commences. The Competition Commission can fully review the licence modifications as proposed by the regulator and give binding directions to the regulator. On the basis of the report of the Competition Commission the regulator makes its final decision which is subject to judicial review. See for more information on the appeals procedure at the Competition Commission: P.A. Geroski, ‘Appealing to the UK Competition Commission’, 2004 *Utilities policy*, no. 12, pp. 77-81.

decisions of the regulator to a more searching judicial review.⁸⁸ The case centred on the determination of the meaning of the phrase ‘all reasonable demands’ found in Article 3 of the Telecommunications Act 1984. Referring to previous case law,⁸⁹ the judge considered that the question whether a decision was in accordance with ‘all reasonable demands’ could be assessed against objective criteria and that the court was therefore well-placed to answer this question. The court however recognized that it was not an easy task to judge whether the regulator had complied with objective criteria. A range of different criteria could be taken into account in deciding the question of whether a decision satisfied ‘all reasonable demands’. Reasonably acting decision makers could very well differ on the weight that should be given to each of these criteria. On the basis of the preceding considerations the court concluded that OFTEL was justified in applying a broad interpretation of the words ‘all reasonable demands’ and that it could take into account the element of fairness as well. Moreover, the court was of the opinion that OFTEL and the Competition Commission had indeed taken into account all relevant circumstances in this case.⁹⁰

3. France

3.1. Competent courts

France operates a dual enforcement structure in competition law, comprising a government department, the DGCCRF, and an independent administrative authority, the *Conseil de la Concurrence*. This has resulted in a differentiated structure as regards the types of court that control competition decisions. Decisions taken by the DGCCRF are subject to review under the administrative court structure by the *Conseil d’État*. Appeals from decisions by the *Conseil de la Concurrence* are taken to the Paris *Cour d’Appel*, which is part of the civil court structure.⁹¹ A further appeal on points of law lies to the *Cour de Cassation*.

A division of jurisdiction between the civil and administrative courts is also evident as regards the types of court that control decisions taken by the French regulatory authority, the ARCEP. The Paris *Cour d’Appel* – a civil court – deals with appeals against dispute resolution decisions by the ARCEP.⁹² The judgments of the Paris *Cour d’Appel* are themselves subject to appeal before the *Cour de Cassation*.⁹³ The *Cour de Cassation* re-examines points of law and may quash a judgment. All other decisions by the ARCEP, including those imposing sanctions, must be appealed to the *Conseil d’État*.⁹⁴

In terms of the standard of review, French civil courts have *pleine juridiction* to review decisions, meaning that they review the entire case file *de novo*. The standard of review is thus typically extremely intense. Administrative courts are competent to pronounce the *annulation* of a decision

88 High Court, Queens Bench Division (admin court), *R (on the application of T-mobile (UK) Ltd and others) v. Competition Commission and others*, [2003] EWHC 1555 (Admin). On this case, see Swift 2004, *supra* note 77.

89 High Court, Queens Bench Division, *R v. Director General Telecommunications, Ex Parte, Cellcom Ltd* [1999] E.C.C. 314.

90 High Court, Queens Bench Division (admin court), *R (on the application of T-mobile (UK) Ltd and others) v. Competition Commission and others*, [2003] EWHC 1555 (Admin).

91 Art. L.464-8 Code de la Commerce [French Competition Act] and Décret no. 87-849 du 19 octobre 1987 relatif au recours exercé devant la Cour d’appel de Paris contre les décisions du Conseil de la concurrence.

92 Art. L.36-8(IV) Code des Postes et des Communications Electroniques [French Electronic Communications and Postal Act]. See also Decision no. 96-378 D.C., dated 23 July 1996, Journal Officiel 27 July 1996, 11400. Dispute settlement decisions are considered as closely linked with private disputes, hence the jurisdiction of the ordinary civil courts, as opposed to administrative courts.

93 According to the loi de simplification de droit du 9 décembre 2004, the Minister of Economics can go into cassation, even if he has not been a party to the initial appeal before the Paris Cour d’appel.

94 Art. L.36-11 (IV) Code des postes et des communications électroniques.

– quashing order – or the *réformation* – amend the decision under scrutiny.⁹⁵ In French competition law, the result is a hybrid construction: a civil court has jurisdiction to review decisions of the *Conseil de la Concurrence*, but it has to use the standard of review applied by administrative courts. Using the four phases identified in the introduction to this article, we can classify the control carried out as regards decisions by the *Conseil de la Concurrence* and the ARCEP as intense, and in certain cases where the court avails itself of *réformation*, as extremely intense. An analysis of the case law of the courts confirms adherence to this theoretical framework.⁹⁶

3.2. Judicial control of decisions by the *Conseil de la Concurrence* and the ARCEP

The clearest expression regarding the role of the court and concomitantly regarding the intensity of review can be found in *SA Bouygues*⁹⁷ concerning fines imposed by the *Conseil de la Concurrence* on a number of undertakings for participating in a cartel in the construction sector. There, the *Cour d'appel* held that:

‘the court has the power to amend decisions [*réformation*], examine the facts de novo – whereby it has the competence to re-qualify and differently appreciate the facts insofar as the proportionality of sanctions is concerned – and it can control the reasoning of the decision of the *Conseil de la Concurrence*’ (own translation).

A case in which we can see an application of that approach, in particular a thorough re-examination of the facts, is *SA Lyonnaise des eaux*.⁹⁸ The *Conseil de la Concurrence* had found the existence of a cartel amongst a number of water suppliers, based on *inter alia* the practice of the cartel members of participating in only a limited number of tenders per year so that members would never be in direct competition with each other for the same contract; and the practice of setting up ad hoc groups composed of several cartel members who would then submit a tender offer as a group rather than individually. The *Cour d'appel* intensely scrutinized the facts adduced by the *Conseil* to support the imposition of fines on the alleged cartel members and came to a diametrically opposite conclusion. As regards the first element, it held that this practice did not indicate in and of itself that the cartel members were indeed the most competitive undertakings active in the field. The evidence indicated, or so the *Cour* held, that the differences between the winning and the second best offer were typically limited, meaning that there was competition between the undertakings active on the market as regards the great majority of contracts. Further, also non-cartel members adopted the practice of limiting the number of tender offers to only a few per year. The parallelism of behaviour found by the *Conseil* could thus be explained by the functioning of the market, where all undertakings in fact ended up adopting the same type of behaviour. In respect of the second element, the *Cour d'appel* found that the practice of submitting offers by ad hoc groups was inspired by the wish on the part of the individual undertakings to establish themselves on the market and to obtain greater efficiency and

95 Under recours pour excès de pouvoir, which encompasses the following five grounds: incompétence, vice de forme, détournement de pouvoir, illégalité relative à l'objet de l'acte and illégalité relative à ses motifs. The latter category comprises three grounds, viz. erreur de droit, erreur de fait and erreur dans la qualification juridique des faits.

96 It should be noted that relatively few decisions by the *Conseil de la Concurrence* and the ARCEP are appealed against; for instance, between 1998 and 2006 only fifteen of the ARCEP's decisions were appealed against. The endorsement rate of those decisions that are appealed against is moreover very high, around 60 to 70% for decisions by the *Conseil de la Concurrence* and around 80% for decisions by the ARCEP.

97 Judgment of 14 January 2003, recours contre la décision no. 95-D-76 du Conseil de la concurrence du 29 novembre 1995.

98 Judgment by the *Cour d'appel* of 18 February 2003, recours en réformation contra la décision de Conseil de la Concurrence no. 02-D-43.

thereby attract larger contracts. There was accordingly no evidence of any anti-competitive object inherent in the practice. The *Cour* thereupon annulled the contested decision.⁹⁹

In the area of electronic communications a first case of interest is *SA France Télécom v. SA Iliad*.¹⁰⁰ The case revolved around a dispute between France Télécom and Iliad concerning the payments the latter had to make in order to obtain a list of subscribers to the fixed telephone network of France Télécom. After negotiations failed, both parties turned to the ARCEP for a decision to settle the matter. Dissatisfied with the ARCEP's settlement decision, France Télécom brought the matter before the Paris *Cour d'appel*. The latter annulled the contested decision, finding an infringement of a procedural requirement, namely the principle of adversarial proceedings.¹⁰¹ The *Cour* then went on to state that, after annulment of the contested decision, it could dispose of the matter itself.¹⁰² In doing so, the *Cour d'appel* settled the dispute in a manner that in certain respects went further than the annulled decision.¹⁰³

The intense control of administrative decisions also comes to the fore in the judgment by the *Conseil d'État* in the matter of *Scout-France et Fonecta*.¹⁰⁴ In France, information services by telephone – such as retrieving someone's phone number – were offered by the operators of communications networks as well as by other providers. The ARCEP¹⁰⁵ had issued a decision according to which the first category was to make use of the number '12' which was the number traditionally associated with information services by telephone. Operators did not have to pay a fee for the use of the number '12'. Conversely, other providers had to make use of a four-digit number which was the same for all providers. They were also charged for the use of this number. The *Conseil* first decided that the decision infringed the principle of equality, by treating differently undertakings that from the viewpoint of consumers offered the same service. The *Conseil d'État* secondly held that the ARCEP had misunderstood the objective of effective and loyal competition between operators of communications networks and other providers of information services by telephone. Since both the operators and the other providers were offering a service that was substitutable from a consumer perspective, they were accordingly active in the same relevant market. By determining that only network operators could use the traditional number '12', the contested decision in fact endorsed the existing dominant position of network operators in the market for information services by telephone. This, the *Conseil d'État* held, was clearly in defiance of the objective of effective competition. It accordingly annulled the decision and gave the ARCEP six months to adopt the appropriate measures.

99 *Réformation* was no longer necessary, or possible, since the undertakings concerned were acquitted.

100 Judgment of 6 April 2004, recours en annulation contra la décision no. 03-1038.

101 The *Conseil de la Concurrence* had adopted a decision on a related matter, which was subsequently transmitted to the parties to enable them to submit observations. France Télécom refused to take advantage of this opportunity, but Iliad did. The ARCEP failed to send Iliad's submissions to France Télécom and thereby deprived the latter of the opportunity to comment.

102 Interestingly, the text of Art. L36-8 Code des postes et des communications électroniques does not mention that the court can indeed do so. Also, it should be noted that the procedure followed was that of *annulation*, not *réformation*.

103 Where the ARCEP had contented itself with imposing certain obligations on France Télécom, such as non-discrimination and cost orientation, the *Cour d'appel* carefully scrutinized whether the offer proposed by France Télécom indeed respected those principles. As regards the principle of non-discrimination, France Télécom distinguished between three different categories of usage, with accompanying differences in price, which the *Cour* found violated the principle of non-discrimination since this distinction was not linked to cost considerations. As regards the principle of cost-orientation, the *Cour* scrutinized the documents submitted by France Télécom and heard the submissions of a court-commissioned expert and found that there was a manifest imbalance between the revenues received for providing the service (around 17 million Euro) and the cost incurred for providing the service (8.78 million Euro). The offer was accordingly not considered compatible with the principle of cost-orientation.

104 Judgment of 11 June 2004, recours en annulation, no. 249300-249722.

105 In fact, the decision was taken by the ARCEP's predecessor, the ART, but for the sake of convenience we will here refer to the ARCEP throughout.

4. Judicial review and ECJ case law

4.1. National procedural autonomy

The European Treaties, as well as secondary legislation, in principle contain only substantive rules to achieve the lofty objectives set out in Article 2 EC and the preamble of the Treaty on European Union. They do not in principle concern themselves with the procedural framework within which Community rules are to be enforced. Devising this framework is deemed to fall within the realm of the constituent Member States, primarily because the EC has only very limited competences to influence national administrative structures¹⁰⁶ and the Member States have very strong national traditions in this field. This division of powers between the EC – creator of rights and obligations – and the Member States – creators of procedures and remedies – is commonly captured in the doctrine of national procedural autonomy. As stated by the ECJ in one of its most oft cited judgments on the topic:

‘Accordingly, in the absence of Community rules on this subject [limitation periods for legal actions], it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law’¹⁰⁷

National procedural autonomy also applies to the determination of the standard of review applied by national courts in reviewing administrative decisions. Historically, this has resulted in diverging standards – ranging from traditional *Wednesbury* in the United Kingdom to substitution in France.

However, while the doctrine leaves a substantial degree of discretion to the Member States, there are limitations. National procedural autonomy is subject to two conditions, also drawn up by ECJ case law. First, the principle of effectiveness requiring that the exercise of Community rights is not made excessively difficult or impossible. Second, the principle of equivalence requiring that procedures governing the exercise of Community rights are not to be less favourable, *i.e.* by imposing stricter requirements, than those applicable to similar claims in national law.¹⁰⁸ Moreover, it should be noted that the Court reasoned that the doctrine of national procedural autonomy only holds to the extent that Community law is silent on these issues. Over time case law¹⁰⁹ and secondary legislation¹¹⁰ have made ever more inroads into the applicability of the

106 J. Schwarze, ‘The Europeanization of National Administrative Law’, in: J. Schwarze (ed.) *Administrative Law under European Influence: On the convergence of the administrative laws of the EU Member States*, Baden-Baden 1996, p. 800.

107 Case 33/76, *Rewe-Zentralfinanz AG and Rewe-Zentral AG/Landwirtschaftskammer für das Saarland*, [1976] ECR 1989. For an assessment: J. Schwarze ‘Judicial Review in EC Law – Some Reflections on the Origins and the Actual Legal Situation’, 2002 *International Comparative Law Quarterly*, p. 17. Reaffirmed in the telecommunications area in Case C-462/99, *Connect Austria Gesellschaft für Telekommunikation GmbH/Telekom-Control-Kommission, and Mobilkom Austria AG*, [2003] ECR I-5197, Para. 35.

108 Failure to adhere to either of these case-law based principles is incompatible with the legal obligation incumbent on the Member States under Art. 10 EC to take all appropriate measures, whether general or particular, to fulfil their Community obligations.

109 Notably in the line of case law on state liability, initiated in Cases C-6 and 9/90, *Francovich and Bonifac/Italy*, [1991] ECR I-5357, culminating in Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA/Germany and R/ Secretary of State for Transport, ex p Factortame Ltd and others*, [1996] ECR I-1029, and Case C-453/99, *Courage Ltd./Crehan*, [2001] ECR I-6297.

110 Directive 2004/17 of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6; Council Resolution of 16 June 1994 on the development of administrative cooperation in the implementation and enforcement of Community legislation in the internal market, OJ 1994 C 179/1; Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market,

doctrine. An example of the former is the recognition by the Court in its case law that individuals have a right to effective legal protection, partly derived from Articles 6 and 13 of the ECHR. There is an important connection between the principle of effective legal protection and Article 234 EC in this respect.¹¹¹ The principle of effective legal protection not only requires access to an independent court, but also the possibility for the national judge to judge the merits of the case and to refer preliminary questions to the ECJ.¹¹² Therefore, it is submitted that the right to effective legal protection prevents a court from exercising marginal judicial control in reviewing national decisions in which the authority concerned applies and enforces EC law. In EC electronic communications law, this viewpoint is communicated through the introduction of Article 4(1) of the Framework Directive, stipulating that:

‘Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. (...) Member States shall ensure that *the merits of the case are duly taken into account and that there is an effective appeal mechanism.* (...)’

4.2. ECJ case law: marginal in form, intense in substance

According to Article 230 EC, the Community Courts are only competent to review the legality of EC acts, or, in other words, to engage in marginal review.¹¹³ In recent judgments in competition law cases by the ECJ but especially the CFI both Courts have, while formally adhering to this legality control, in fact engaged in intense review of the case concerned.¹¹⁴ In its *Tetra Laval* judgment, the Court of Justice held that:

‘Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether the evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.’¹¹⁵

Using this test, the ECJ condoned the CFI’s annulment of the Commission prohibition of the merger between Tetra Laval and Sidel. It underlined that the CFI could look closely at the

OJ 1995 C 188/1; Council Resolution of 8 July 1996 on cooperation between the administrations for the enforcement of legislation on the internal market, *OJ* 1996 C 224/3.

111 Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS/Belgian State*, [1995] *ECR* I-04599, Para. 13. See on this S. Prechal, ‘Community law in national courts: The lessons from Van Schijndel’, 1998 *CMLrev* 1998, pp. 693-695.

112 It should be noted that both the CFI and the ECJ at times use marginal review when assessing whether the Commission’s analysis of the relevant market and the behaviour of the undertakings therein is sustainable in economic terms, see e.g. Case T-30/89, *Hilti AG/Commission*, [1991] *ECR* II-1439, and Case C-53/92 P, *Hilti AG/Commission*, [1994] *ECR* I-667. A similar preference for marginal review could be discerned in merger cases, e.g. Case C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l’azote (SCPA) and Entreprise minière et chimique (EMC)/ Commission [Kali]*, [1998] *ECR* I-1375, although this is now changed in the light of the judgment in Case C-12/03 P, *Commission/Tetra Laval [Tetra Laval II]*, [2005] *ECR* I-987.

113 With regard to penalties, intense review is warranted in the light of the need to ensure a greater protection for the rights of the parties, cf. Art. 229 EC.

114 On the standard of review before Community Courts in competition law matters, see D. Bailly ‘Standard of proof in EC merger proceedings: a common law perspective’, 2003 *CMLRev*, pp. 845-888.

115 Para. 39.

Commission's assessment of information of an economic nature. As noted by Bay and Calzado, this is particularly relevant in the light of the increasing use of sophisticated economic theories in competition law.¹¹⁶ The only limit to the intensity of review carried out at EC level is that the Community Courts cannot substitute their own economic assessment for that of the Commission. It should finally be noted that the ECJ held that the need for effective judicial review is *all the more* pressing where prospective analyses, such as in merger cases, are concerned. It is submitted that this should be taken to mean that there is *always* a need for effective judicial review of competition law-based analyses. The effects of the judgment thus extend beyond review of decisions relating to conglomerate mergers, the type of merger at issue in the case.¹¹⁷ In the latest judgment on the issue so far, on the banned merger between the American undertakings *General Electrics (GE)* and *Honeywell*, the CFI considered that:

'It must be observed first that the Community has a margin of assessment with regard to economic matters (...). It follows that the Community judicature's power of review is restricted to verifying that the facts relied on are accurate and that there has been no manifest error of assessment. (...) As to the nature of the Community judicature's power of review, it is necessary to draw attention to the essential difference between factual matters and findings, on the one hand, which may be found to be inaccurate by the Court in the light of the arguments and evidence before it, and, on the other hand, appraisals of an economic nature.'¹¹⁸

The CFI thus spoke of having to apply a marginal standard of review to a Commission decision. However, if one takes a closer look at the CFI's judgment, it turns out that the verification of the factual findings and the assessment of the facts are interwoven and that the CFI closely scrutinized the economic and legal assessment of the Commission, up to the point of deciding which economic experts it believed to be more convincing.¹¹⁹ To link back to the heading of this section, the CFI framed the entire discussion in terms of finding 'manifest errors' committed by the Commission, denoting marginal review. Yet at the same time it closely scrutinized the Commission's analysis and evidence for any error, not just those of a manifest nature, which were then accumulated and re-phrased as 'manifest errors', which in practice would seem to amount to intense review.

This brings us to the relevant question for present purposes: how does all this affect national courts? Put simply, prospective analyses are not only carried out by the Commission under merger control, but also by national competition authorities when they assess mergers and by national regulatory authorities under the Significant Market Power (SMP) procedure outlined in the Framework Directive. Accordingly, it would seem that when called upon to review national decisions involving such analyses, national courts cannot merely apply marginal review either.¹²⁰ If national courts would not heed the case law of the Community Courts¹²¹ where relevant, this could ultimately be interpreted as an infringement of the loyalty obligation contained in Article

116 M.F. Bay and J.R. Calzado 'Tetra Laval II – The Coming of Age of the Judicial Review of Merger Decisions', 2005 *World Competition*, pp. 433-440.

117 This was also confirmed by the CFI in *GE/Honeywell*, Case T-210/01, 14 December 2005, not yet recorded, Para. 64. See also Bay and Calzado 2005, *supra* note 116, pp 433-440.

118 Case T-210/01, *supra* note 117, Paras. 60 and 62.

119 See *e.g.* Paras. 407-473.

120 See on this Ottow 2005, *supra* note 42, pp. 221-229.

121 The case law of the Community Courts is of special importance for national courts due to doctrines such as direct effect and supremacy. Some Member States have even gone so far as to include in their national competition laws provisions known as consistency provisions, requiring national courts to interpret national legislation in accordance with European case law, *e.g.* Section 60 of the United Kingdom Competition Act 1998.

10 EC and of the principle of effectiveness. Community law however does not require Member States to establish procedures for judicial control that would result in a more extensive and intensive review than that carried out by the Community Courts in similar cases.¹²² Moreover, there are limits to how intensely prospective analyses ought to be controlled. In *Tetra Laval* the ECJ also recognized that the Commission must remain able to discharge its functions and responsibilities in an effective manner.¹²³ A similar balancing exercise – between the need for judicial accountability on the one hand and the need for discretion and effective law enforcement on the other hand – needs to be undertaken by national courts, on a case-by-case basis.

4.3. The European Convention on Human Rights

The intensity of control applied by national court is not only influenced by developments within EC law. The European Convention on Human Rights, and notably Articles 6 and 13 thereof, have also exerted influence. These Articles require that as regards the determination of civil rights and obligations, or the determination of any criminal charge, everyone is entitled to an effective remedy before an independent and impartial tribunal. The European Court of Human Rights has further added that the competent court or tribunal should have full jurisdiction to review the facts and the application of the law.¹²⁴ Turning to the relevance of the ECHR for present purposes, the notion ‘civil rights and obligations’ has been interpreted widely by the Court to cover the great majority, if not all, of decisions taken by administrative authorities.¹²⁵ Furthermore, sanctions imposed by administrative authorities can, under certain conditions, qualify as a ‘criminal charge’ within the meaning of Article 6. National courts are called upon to control intensively whether there is a proportional relationship between the offence committed and the sanction imposed.

5. Judicial review and European harmonization and coordinating bodies

One of the effects of Regulation 1/2003 and the 2002 Directives is that European law will exert an ever greater influence on national proceedings, both in a procedural and in a substantive way. The relationship between the Commission and national competition authorities or regulatory authorities respectively has been strengthened. The Commission guides the actions of the authorities in question through the publication of soft law instruments, such as guidelines, recommendations and letters. In addition, the mandatory communication of proposed national actions to the Commission provides the latter with the opportunity to comment on these and where necessary, censure them.¹²⁶

122 Case C-120/97, *Upjohn*, [1999] ECR I-233, Paras. 34-36.

123 *Tetra Laval II*, *supra* note 112, Paras. 74-77. The Court considered that: ‘It would run counter to the Merger Regulation’s purpose of prevention to require the Commission to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. Such an assessment would make it necessary to carry out an exhaustive and detailed examination of the rules of the various legal orders which might be applicable and of the enforcement policy practices in them. Moreover, such an assessment would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur.’

124 ECHR 23 June 1981, *Le Compte, Van Leuven and De Meyere/Belgium*, NJ 1982, 602. See on this Verhey and Verheij 2005, *supra* note 28, pp. 181-182.

125 Verhey and Verheij 2005, *supra* note 28, pp. 181-182.

126 Art. 11, notably Para. 6 of Regulation 1/2003, *supra* note 3, and Arts. 7(3) and (4) of the Framework Directive, *supra* note 4.

Although these guidelines, recommendations and comments are not formally binding, a national court cannot ignore them either.¹²⁷ It can be deduced from European case law on Article 10 EC that a national court must ‘take into consideration’ such guiding instruments from the Commission in deciding the case before it.¹²⁸ Furthermore, the courts should take into account that Regulation 1/2003 and the Framework Directive specify how the Commission and the national authorities should co-operate and how the latter should take into account directions by the former.¹²⁹ However, due to their non-binding status¹³⁰ the legal effects of these guiding instruments do not go so far that the national court should directly apply soft law instruments or that it should apply the doctrine of consistent interpretation to these instruments.¹³¹ Moreover, it should be remembered that courts are not in a subordinate position *vis-à-vis* the Commission. National courts have an autonomous position in interpreting and applying European law. If necessary for the clarification of EC law or for a judgment on the validity of a Commission decision, the courts should not hesitate to refer preliminary questions to the ECJ pursuant to Article 234 EC.

The increased influence of the Commission on the decision-making practice of national authorities is likely, by the same token, to also affect the intensity of judicial review applied by national courts when they are called upon to review decisions taken by the national competition or regulatory authority respectively. If, for instance, the Commission has approved a draft national measure which is subsequently adopted in the same form by the national authority, a challenge to the national measure before the national courts is less likely to succeed. The national authority can use the Commission’s approval to establish that the decision under appeal meets the conditions set out in Articles 81 and 82 EC or in national telecommunications laws respectively.¹³² If the court before which the action is brought is moreover a non-specialist body, the chances of a successful appeal are diminished even further. In light of the considerable expertise residing within the Commission, contrasted with the more basic knowledge of the national court, the latter will be more likely to accord respect to the actions and opinions of the Commission, even if formally non-binding.

A further factor likely to influence the impact accorded to Commission statements is their detail, or the absence thereof. A specific and detailed statement that is focused on the individual circumstances of the case at hand, which has been adopted following a thorough investigation, will be considered more influential than a very general statement, supported by scant reasoning. This approach was followed by the CAT in *Hutchinson 3G UK Ltd v. OFCOM*.¹³³ In its judgment

127 These Commission acts may themselves directly affect the legal positions of the market parties and may raise complicated questions as regards the possibilities for legal protection under Art. 230 EC as a consequence of their formally non-binding status. See on this issue L. Parret, ‘Judicial protection after modernisation of competition law’, 2005 *Legal Issues of European Integration*, no. 32, pp. 339-368.

128 In general it is of relevance that the ECJ ruled in Case C-322/88, *Grimaldi*, [1989] ECR I-4407, that national courts should take into consideration Commission recommendations that clarify or supplement EC law in order to decide disputes submitted to them. See on this case L.A.J. Senden, *Soft law in European Community law and its relationship to legislation*, Nijmegen 2003, pp. 403-414. Moreover, the ECJ has confirmed the policy-making role of the Commission concerning the application of the European competition rules in: Case 14/68, *Walt Wilhelm and Others/Bundeskartellamt*, [1969] ECR I; Case C-344/98, *Masterfoods Ltd and HB Ice Cream Ltd*, [2000] ECR I-11369, with annotation by *inter alia* K.J.M. Mortelmans and M.G. Wezenbeek-Geuke, 2002 *SEW*, no. 3, pp. 107-110.

129 See Arts. 11, 15 and 16 of Regulation 1/2003, *supra* note 3, and Arts. 7, 14 and 15 of the Framework Directive, *supra* note 4. See on the relevance of specific cooperation stipulations for the possible legal effects of soft law: Senden 2003, *supra* note 128, pp. 452-455. See also ABRS, 10 April 2001, *HMG v. CvdM*, 2001 *Mediaforum*, no. 6, pp. 209-211. It follows from this judgment that on the basis of Art. 10 EC national authorities in cases with European aspects should make effective use of coordinating mechanisms that have been established on the basis of European law. See J. van de Gronden and K. Mortelmans, ‘Holland Media Groep of Luxemburg Media Groep: de trouvaille van de Raad van State’, 2001 *Mediaforum*, no. 6, pp. 191-200.

130 Which also means that they have no primacy over contrary national law or direct effect within the national legal order.

131 Cf. Senden 2003, *supra* note 128, pp. 402-409 and p. 476.

132 Ottow 2005, *supra* note 42, pp. 228-229.

133 CAT, 29 November, *Hutchinson 3G UK Limited v. OFCOM*, [2005] CAT 39. The Irish Electronic Communications Appeals Panel has followed a similar approach, see Decision no. 03/05 in respect of Appeal no. ECAP6/2005/03,04,05 *Vodafone, O2 and Meteor v. Comreg*.

the CAT quashed a decision by the OFCOM on the grounds of a defective investigation and poor reasoning, despite the fact that the Commission had approved the selfsame decision.

In sum, it can be expected that well-reasoned Commission decisions or statements can result in a more marginal review of national decisions that have been the subject of such Commission decisions or statements. Conversely, where a national decision deviates from Commission guidelines or recommendations or has received negative comments from the Commission, the national court is likely – and rightly so – to fully review that national decision.

Concluding observations

Three welcome developments can be noted. Across the three Member States discussed in this article, the structure within which decisions by national authorities are reviewed is largely similar.

With the exception of France, review is concentrated exclusively within administrative courts. The competent courts are often specialized and in most cases review the decisions of both the national competition and regulatory authorities. This helps to promote expertise, knowledge and a consistent application of competition law and regulation concepts, which in turn engenders courts confident in applying intense review of the decisions challenged before them, wherever the nature of the decision and the competences of the authority merit thorough control. It is to be hoped that these elements – expertise, combined jurisdiction for national competition and regulatory authorities – are used as benchmarks by the Commission to assess the structure and performance of other Member States against.

Second, there is convergence in the standard of review across Member States, and at Member State and Community level. In the majority of cases, national courts in the Netherlands, the United Kingdom and France use an intense standard of review when reviewing the national competition authorities' decisions concerning the application of the European and/or national competition rules or when reviewing decisions applying the national telecommunications legislation by regulatory telecommunications authorities.¹³⁴ Admittedly, courts may not always explicitly indicate that this is indeed the intensity that they are applying, but what is key is not the legal standard formally used, but the way in which it is applied. The trend of intense judicial review in the Member States can be explained by the influences of EC law, and especially the right to effective legal protection, and the influence of Articles 6 and 13 ECHR.

A similar intense approach can be seen at Community level as the thorough scrutiny of Commission assessments and evidence in the judgments in *Tetra Laval* and *GE/Honeywell* show. This convergence can result in cross-fertilization between the Member State and the Community level in this respect.¹³⁵ Trends in judicial control at national level can be used by the Community Courts as inspiration in further developing the standard of review to be used when reviewing Commission decisions in the area of competition law. In turn, the case law of the Community Courts can be, and is, cited in national courts as support for more intense judicial review of

¹³⁴ Note that all jurisdictions, including at EC level, apply an extremely intense standard of review when reviewing decisions that impose fines. Although courts in the United Kingdom and France have the possibility of applying an extremely intense standard of review, they have hardly availed themselves of this possibility in practice. This reluctance can arguably be explained with reference to the principle of separation of powers.

¹³⁵ See for a good analysis of the process of interaction and convergence between European and national law principles: W. van Gerven, 'Naar een Europees gemeen recht van algemene rechtsbeginselen?', 1995 *RM Themis*, no. 5, pp. 233-243. For another good example of cross-fertilization between Community law and national law, consider the principle of proportionality. As a principle of German origin, it was taken over by the ECJ early on in the EC's existence and has ever since influenced the way in which national courts judge cases involving Community law rights and obligations.

decisions by national administrative authorities. Again, the best example to date is the *Tetra Laval* judgment to which courts in the United Kingdom have explicitly referred – and the ones in the Netherlands *sub silentio*. This potential mutual reinforcement helps to create some form of soft harmonization across Europe, thereby addressing at least in part the consistency concerns regarding the practices of the national authorities and the standard of review voiced before and immediately after the introduction of Regulation 1/2003 and the 2003 Directives. These developments should be positively evaluated and encouraged.

Thirdly, the trend of more stringent review of administrative decisions taken by independent authorities can be assessed positively from a Rule of Law perspective. Stringent review amounts to an effective control of the decisions taken by such authorities and ensures that they will exercise their regulatory powers in a good way. Judicial control can compensate for the diminished political control of independent administrative authorities and prevents the authorities in question from becoming uncontrolled state bodies. However, at the same time, judicial review cannot become too intensive, with the undesirable outcome that a national authority is deprived of discretion and flexibility in decision-making, two features that are of particular importance in areas as dynamic as competition law and electronic communications law.