Effective review of energy regulation in the Netherlands

HOW SHOULD THE LEGAL REVIEW OF ENERGY REGULATION BY THE CBB BE ASSESSED IN LIGHT OF THE RIGHT TO EFFECTIVE LEGAL PROTECTION? A COMPARATIVE STUDY OF THE STANDARD AND INTENSITY OF REVIEW APPLIED BY THE CBB IN COMPETITION CASES AND THE UK SYSTEM OF LEGAL REVIEW OF ENERGY REGULATION.

MASTER'S THESIS

J.M. Eijkens
April 2015
Prof. dr. S.A.C.M. Lavrijssen
Tilburg University

ABSTRACT

Since the implementation of the Third Energy Package, NRAs have gained broad discretionary powers to balance different interests in their decision-making. At the same time, the Third Package establishes far-reaching requirements of independency to ensure independent decision-making. In order to protect the interest of consumers in energy regulation, legal review is crucial to supervise the NRAs' decision-making. However, legal accountability cannot be achieved without respecting the right to effective legal protection. This right aims at securing that EU-citizens can actually effectuate their rights derived from EU law at national courts. The right to effective legal protection comprises several elements. This thesis addresses one of them: the duty to provide effective review. EU law leaves leeway on how national courts should review decisions of energy regulators to ensure effective legal protection. As a consequence, the interpretation of effective review differs amongst Member States and different sectors. It is generally assumed that the procedural aspects of the case should be subject to intensive review. However, it is unclear how the substance of the NRA's decision should be reviewed. This is particularly the case for the part of the decision in which the NRA exercises its discretion. The ECJ's case-law is not binding on national courts. Nevertheless, it can be argued that ECJ's interpretation of the legality review of Article 263 TFEU in *Tetra Laval* provides a useful and desirable interpretation of effective review. Therefore, the *Tetra Laval* is taken as starting point for this thesis.

A study of case law demonstrates that in the period 2002-2013, the CBB's review of energy decisions could not be considered to ensure effective legal protection. In particular, the CBB seemed to review the substance in such a marginal way that it is questionable whether energy consumers could actually effectuate their rights. However, two recent cases show a more full and intensive review. Therefore, the question arises how the CBB's standard and intensity of review in energy cases should be assessed in the light of effective legal protection. A legal comparison of the CBB's review in the field of competition and the UK's Administrative Court in the field of energy regulation is carried out. Maybe the CBB can learn something with regard to what works – and works not – to ensure effective review?

The conclusion can be drawn that the CBB should preserve its approach in most recent case law to ensure effective legal protection. This standard of review would correspond more to the standard of review in the field of competition. It seems desirable to limit the review as much as possible to respect the division of powers and to ensure efficiency. However, the CBB's marginal review in 2002-2013 demonstrates that a too restrained review does not provide an effective review. Therefore, a midway must be reached. The *Tetra Laval* standard indeed provides here a guiding standard. This standard balances discretion and effective supervision of competition and regulatory enforcement. In addition, this standard suits the importance of complex economic assessments in energy decisions. Hence, the CBB should fully review the procedural aspects, the interpretation of the law, and the establishment of the facts and the reasonableness of the facts assessment. In more recent case law, the CBB seems to have chosen this direction. If the CBB chooses to follow this path, its review will be more likely ensure effective legal protection.

ACKNOWLEDGMENTS

In front of you lies my Master's thesis, the crown on 5.5 years of studying. It is the result of some hard work, but also of help of others. Therefore, I would like to give a word of appreciation. First, I must thank Saskia Lavrijssen for advising me and pointing out aspects of interest to involve in my thesis. She has given me the opportunity to cooperate in the research on the CBB's review in April-August 2014, on which this thesis further develops. Without this experience I would not have had the knowledge about energy regulation and legal review I have today. Second, a thanks is appropriate for all the people who did not understand why I was so excited about independent regulators and administrative case law, but did make the past years unforgettable. My parents, who have supported me in any way possible to enjoy my student life to the fullest, the girls of Nontemba who made my student time less about studying and more about developing myself, the friends who were there when I needed a coffee-break, and last but not least Job, for the comforting relativism and encouragement.

TABLE OF CONTENTS

1. INTRODUCTION

Since its liberalization, the Dutch energy market is subject to economic regulation. This regulation aims at safeguarding reliable energy supply and fair prices for consumers.[1] Recent years, harmonization of energy regulation has taken place by means of European Union (hereafter: EU) directives.[2] The application of these directives in national energy markets lies for a great extend in the hands of National Regulatory Authorities (hereafter: NRAs).[3] Directives need to be implemented in national law in order to be effective. This may entail divergence between legal orders. To ensure that harmonization results in actual convergence, the Commission provides instruments of soft law, such as guidelines, recommendations and letters providing implementation rules.[4]

Since the enforcement of the Third Energy Package in 2009, NRAs have gained broader competencies.[5] However, at the same time, the Third Package established more far-reaching independency requirements. These requirements demand complete independency from market parties and – to lesser extent – politics (parliament and minister).[6] NRAs are never absolutely independent from government policy, because ministers are allowed to provide general policy directions. However, explicit instructions with regard to a particular case are prohibited.[7] In order to exercise their regulatory task independently,

[1] *Kamerstukken II* 2008/09, 31901, no. 1-2; the liberalization of the energy market took place at different times in different Member States. The United Kingdom was a forerunner in 1980, while the Dutch energy market is liberalized since 2004.
[2] It follows from article 4 TFEU that the EU and Member States have shared competences in the area of energy (*and* consumer protection); Harmonization arises under Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity; Directive 2009/73/EC of the European Parliament and of the Council of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas; Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity; Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks; Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for Cooperation of Energy Regulators.
[3] NRAs have often created a special section for the supervision of the different regulated markets. See for a detailed enumeration of all NRA's on Energy the website of the European Network of System Operators for Gas. Available at: www.entsog.eu/national-regulatory-authorities-nras
[4] Directive 2009/72/EC, para. 65; S. Lavrijssen & M. De Visser, 'Independent administrative authorities and the standard of judicial review', Utrecht Law Review, Volume 2, Issue 1, June 2006, p. 133; These instruments of soft law do not have a formally binding effect on the Member-States. Nevertheless, it follows form the principle of sincere cooperation of Article 4 TEU that NRAs and national courts must take the Commission's guidance into consideration.
[5] Directive 72/2009/EC (*electricity*) and 73/2009/EC (*gas*). The extended powers are provided by Articles 36 and 37 of the Electricity Directive and article 40 and 41 of the Gas Directive. For independency requirements see article 35 respectively article 39.
[6] OECD, Regulatory reform in The Netherlands, Regulatory reform in the Electricity industry, 1999, p. 35; L. Hancher and P. Larouche, 'The coming age of EU regulation of network industries and services of general economic interest', in P. Craig and G. de Búrca (eds.), The evolution of EU law, 2nd edn., Oxford, Oxford University Press, 2011, pp. 743-782; The requirement of independency is of particular importance with regard to markets which have previously been state-owned, such as the energy market. These sectors are originally strongly intertwined with political and market actors. Moreover, it is still not uncommon that a State is owner of a stake in one of the market players. See L. Hancher, P. Larouche and S. Lavrijssen, 'Principles of good market governance', *Journal of Network Industries*, Volume 4 (2003), No. 4., p. 361-362
[7] In 2009, the Dutch State was rapped over the knuckles for infringing the discretion of the ACM by adopting a policy rule specifically instructing the ACM to adapt en certain method for evaluating the assets of the national gas system operator, GTS. See case CBB 29 June 2010, ECLI:NL:CBB:2010:BM9470

NRAs need flexible and broad powers to balance the different interests at stake in their decision-making and easily adapt to new developments in fast evolving markets.[8]

As a result of the extensive competencies and far-reaching independency requirements of NRAs, the power of NRAs has increased, while the political supervision of these authorities has declined. Therefore, the instrument of legal review of NRA-decisions by national courts has gained importance as means to ensure accountability of NRAs. Although there are other means of accountability – such as (increased limited) political control and consultation of stakeholders during the decision-making procedure – the instrument of legal review is the only way to correct wrongful decision-making afterwards. Nevertheless, legal review can only effectuate actual accountability if the right to effective legal protection is respected. The right to effective legal protection originates from the principle of effectiveness. This EU-principle requires that it must be possible for EU citizens to actually effectuate the rights from EU law. EU-law is directly applicable in the national legal order. Therefore, national courts play an essential role in the effectuation of EU rights of individuals.[9] For that reason, EU-law provides prerequisites for national procedural rules to ensure effective legal protection. Hereby, the EU derogates from the principle of procedural autonomy of Member States. This principle means that Member States are allowed to establish the legal procedures within their legal orders themselves, autonomously from the EU, *unless provided otherwise by EU law.*[10] Moreover, the principle of equivalence requires that the national procedural rules for the application of EU rights must be similar to – or at least not less favourable for citizen than – procedural rules for applying national rights.[11]In this way, the right to effective legal protection puts demands on national procedural rules. Moreover, it follows from the principle of sincere cooperation as stipulated by Article 4(3) TEU that the national courts should explain national procedural rules in a way that the right to effective legal protection as laid down in Article 19(1) TEU can be realized.[12]

Thus, the purpose of effective legal protection is twofold. First, justice is pursued for parties involved such as consumers. Second, effective legal protection realizes actual supervision of NRAs. This is crucial in the field of energy regulation. Regulatory decisions frequently have a profound impact on the market at issue, affecting not only the position of market parties and individuals, but also business confidence within a legal order.[13] Economic regulation can make or break the stable circumstances which are needed for

[8] Case studies demonstrate that inflexible powers force NRAs to exceed their mandated powers in order to do what is necessary in the market. See Hancher, Larouche and Lavrijssen 2003, p. 372

[9] H. Jans et al., Europeanisation of Public Law, Groningen: European Law Publishing, 2007, p. 35-60; for example in ECJ, 29 March 2007, Case C-347/04 (*Rewe-Zentralfinanz*), par. 5.

[10] H. Jans et al., Europeanisation of Public Law, Groningen: European Law Publishing, 2007, p. 35-60

[11]A. Gerbrandy, *Convergentie in het mededingingsrecht*, Den Haag: Boom Juridische Uitgevers 2009, p. 28

[12] Though, it is debatable whether this actually implies duties for Member States, since this provision does not necessarily intend to create new –additional– national remedies, as long as the national legal system guarantees sufficient remedies. See K. Lenaerts, 'Effective Judicial protection in the EU', 2013, available at http://ec.europa.eu/justice/ events/assises-justice-2013/files/interventions/koenlenarts.pdf, p. 2 and Gerven, van, W. 'Of rights, remedies and procedures', *Common Market Law Review* 2000, no. 3, pp. 501-536

[13] For example S. Lavrijssen, 'More intensive judicial review in competition law and economic regulation in the Netherlands, vice or virtue?' in O. Essens, A. Gerbrandy and S. Lavrijssen (Eds.), National Courts and the Standard of Review in competition Law and Economic Regulation. Groningen: Europa Law Publishing 2009, p. 175

long-term investment.[14] At the same time, the position of consumers generally considered rather weak in this regard. Consumers often lack the means, knowledge and awareness to promote their interests in economic regulation.

In order to effectuate effective legal protection, Member States should comply with several obligations. One of these obligations is the duty to provide effective review. The duty to provide effective review requires the court to review both the procedure and substance of the case in an effective way. It depends on the standard and intensity of review applied by the court whether the decision of the NRA is assessed in an intrusive or cautious way. In general, it is assumed that an intensive review of all aspects of the decision creates a higher level of legal protection than a restrained review.[15] However, at EU-level no detailed interpretation is given on how review of energy regulation should take place in order to be 'effective'. Indeed, both general and sector specific EU-law keeps silence. Consequently, Member States and national courts are free to determine the substance of the applicable national procedural rules, as long the principles of effectiveness and equivalence are taken into account. As will be elaborated below, this entails that there are considerable differences between the interpretations of 'effective review' in several Member States and also within particular sectors. Of course, it is questionable whether all these different interpretations of effective review provide actual effective review. Indeed, it follows from the research of Lavrijssen et al. on effective review in the Dutch energy sector that the applied review – in particular with regard to the substance of the decision – cannot always be considered 'effective'.[16] However, more recent case-law show a different approach. The Dutch Appeals Tribunal for Trade and Industry (hereafter: CBB)'s legal review of energy regulation will be the starting point of this thesis.

Therefore, the following research question arises: *How can the legal review by the CBB in energy cases be assessed in the light of the right to effective legal protection?* In order to answer this question, seven subparts can be distinguished. First, in chapter 2 the right to effective legal protection (including all its elements) is briefly addressed to provide a background of the duty to provide effective review. Subsequently, chapter 3 focuses on the interpretation of the duty to provide effective review provided by EU-legislation and case-law. Though the European Court of Justice's (hereafter: ECJ) case-law is not binding on national courts, it may give some directions on the interpretation of effective review. Chapter 4 addresses the CBB's review practice in the Dutch energy sector. To that end, the findings of the research of Lavrijssen et al. are explained.[17] Moreover, the points of criticism formulated on the basis of this research – in particular the critical conclusion that the restrained review of the substance of the decision by the CBB in energy cases cannot be considered 'efficient' review– are borne in mind in the development of this thesis to provide recommendations for the CBB's review in the energy sector in order to live up to the duty to provide effective legal protection. To that end, the boundaries of the Dutch energy sector are trespassed in Chapter 5 and 6. Chapter 5 investigates what standard of review the CBB

[14] Hancher, Larouche & Lavrijssen, 2003, p. 355; S. Berg, 'Infrastructure regulation - Risk, return and performance', *Global Utilities*, 2001, p. 3-10.
[15] S. Lavrijssen, J. Eijkens, & M. Rijkers, 'The Role of the Highest Administrative Court and the Protection of the Interests of the Energy Consumers in the Netherlands' September 1, 2014, TILEC Discussion Paper No. 2014-032, p. 13
[16] Lavrijssen, Eijkens & Rijkers, 2014, p. 72
[17] Lavrijssen Eijkens & Rijkers 2014

applies to competition decisions. Landmark cases from both the community courts and the Dutch administrative courts are inquired to demonstrate to what extent the CBB's and the Rotterdam District Court's interpretation of effective review differs in energy and competition cases. Are there good reasons to approach these categories of decisions differently, or can the court learn something from its own standard and intensity of review in competition cases? Subsequently, chapter 6 addresses the standard and intensity of review applied by the Administrative Court (Division of the High Court) with regard to UK energy regulation. The discussion on the standard of review for regulatory decision is currently subject of a consultation procedure, the so called *Streamlining of regulatory and competition appeals* (hereafter: the *Streamlining*). The *Streamlining* proposes the substitution of (the more intensive) review on the merits of price controls and license decisions by (the more restrained) judicial review.[18] The UK system of review in the energy sector (the current system, the practical consequences as derived from case law and the proposed Streamlining) and the CBB's competition review can function as a critical mirror for the review of the CBB in energy cases.

Finally, chapter 7 provides a balancing of the advantages and disadvantages of different standards of review as derived from the case-studies. By taking into account the critical view of Lavrijssen et al. with regard to the effectuation of the duty to provide effective legal protection by the CBB in the field of energy, chapter 7 elaborates on the question whether – and if so how – the CBB can learn something from review applied in the UK and its own review provided in the field of competition to ensure effective legal protection. In this way, ideas are provided with regard to what works, and what works not, when aiming at effective review of regulatory decisions.

2. THE RIGHT TO EFFECTIVE LEGAL PROTECTION

Every individual whose rights are affected, must have the possibilities to challenge an action affecting these rights. Otherwise, the rights conferred to the individual would be illusionary.[19] In other words, every person should be secured in his right to effective legal protection. This right enjoys a broad basis in national legal orders[20], the EU (See Chapter 3) and other leading institutions.[21] The right to effective legal protection guarantees access to justice. In order to achieve effective legal protection, several elements should be met. These elements can be formulated as rights of EU citizens and – the other way around – duties resting on Member States. Although the exact content of the right to effective legal protection is

[18] HM Government, Department for Business, Innovation and Skills, Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform, 19 June 2013. Available at https://www.gov.uk

[19] Cappalletti, G. & Garth, B. (Eds.) Access to Justice. A World Survey. Vol. 1, Alphen aan de Rijn/Milan: Sijthoff and Noordhoff 1978, p. 419

[20] The right to effective legal protection is an EU general principle of law and finds a legal basis in article 47 of the Charter of Fundamental Rights of the EU (see further chapter 3). Moreover, it is recognized by the majority of national legal orders. See the comparative research in Cappalletti 1978.

[21] For example, the council of Europe provides that: *'Effective judicial review of administrative acts to protect the rights and interests of individuals is an essential; element of protection of human rights'.* See Rec(2004)20, *the Judicial Review of Administartive Acts* (Strasbourg 2005), p. 5

not exhaustively put in words in any official document, literature offers guidance.[22] According to Lavrijssen et al. there can be distinguished eight elements of effective legal protection, namely 1) legal standing; 2) the duty to state reasons; 3) appropriate expertise of the judges; 4) effective review; 5) the independence of the NRAs; 6) effective remedies; 7) reasonable period of time and 8) the duty to pose preliminary questions to the ECJ. This thesis focuses on effective review. However, for the purpose of completeness, this chapter provides a brief elaboration on all 8 elements is provided below. The elements are discussed in the themes as provided by Lavrijssen et al. which are formulated as duties resting on Member States.[23]

2.1. THE ELEMENTS OF EFFECTIVE LEGAL PROTECTION

(i) The duty to provide access to Court

In order to challenge an NRA-decision before the administrative court, a party needs to enjoy access to court.[24] Access to court can only be effectuated if the party has legal standing (*locus standi*) and the decision under appeal is admissible for legal action. Although these aspects are typically subject to national procedural autonomy, the ECJ has provided limitations of the principle of admissibility[25] and several EU directives have stipulated who should enjoy legal standing.[26] In addition, it follows from ECJ case-law that if a national measure affects the EU rights of an individual, a person should be allowed to challenge the lawfulness of this national measure.[27]

[22] There can be found several examples. See amongst others Widdershoven, who mentions (1) Access to the court, (2) the quality of the process before the court and (3) the remedies available to the parties. See R.J.G.M. Widdershoven,. *'Het beginsel van effectieve rechtsbescherming'*, Europa Instituut Utrecht, volume 1, 2011.); Eliantonio identified (1) access to court, (2) time limits to challenge deciison, (3) Review: assessing applicable (EU) law and establishment of the facts and (4) interim relief. See Eliantonio, M., Europeanisation of Administrative Justice? The influence of the ECJ's Case Law in Italy, Germany and England. Groningen: Europa Law Publishing, 2009, p. 13; Another source of relevance is the Recommendation of the Council of Europe, stipulating that (1) All administrative acts should be subject to judicial review, (2) Review should proceed within reasonable period of time, (3) the court should be able to assess legal and factual aspects of the case and (4) there should be the possibility of provisional relief, see Rec(2004)20, *the Judicial Review of Administrative Acts* (Strasbourg 2005); Gerbrandy 2009, p. 27

[23] See more extensively Lavrijssen et al. 2014, p. 8-22

[24] The ECtHR acknowledges that the fair trial guarantees of Article 6 ECHR comprise the right to access to court to be a fundamental element of fair trial. See ECtHR, 21 February 1975 , Case 4451/70 (*Golder v. United Kingdom*)

[25] ECJ 18 March 2010, Joint cases C-317-320/08 (*Alassini*), par. 63

[26] For example Article 37 of Directive 2009/72/EC and Electronic Telecommunications Directive, Article 4 of Directive 2002/21/EC

[27] ECJ 15 May 1986, Case 222/84 (Johnston), par. 17

(ii) The Duty to provide effective review

According to Lavrijssen and De Visser, the intensity of review can be pictured as a sliding scale (see figure 1: Standard of review, a sliding scale).[28] At the outermost points, there is extremely marginal review on the one hand and a very intensive review on the other hand. The former constitutes very limited intervention by the court; only when the administrative decision appears to be 'simply unreasonable', the court will quash the decision. The latter is a very thorough review. The court considers all aspects of the decision as if it was to make the decision itself. Not only the facts, the interpretation of the law and the reasonableness of the decision is taken into account, but also whether the court would have taken the same decision when it would have been the NRA. Between these extremes, there lie several variations limited by soft borders. In case of marginal review, the court assesses the legality of the decision. In other words, the court reviews whether the substance of the decision is reasonable. There still needs to be a very evident error of the NRA for the Court to quash the decision. The marginal review is a legality review. For example, Article 263 TFEU provides that the ECJ should apply a legality review on the decision of the Commission. However, as will be discussed below, the *Tetra Laval* judgment of the ECJ demonstrates that its review constitutes more than a purely marginal review.[29] This shows how the scale may be sliding towards a more intensive review. In case of a review on the merits, an intensive review is applied on the establishment and assessment of the facts where the decision is based upon (even when this includes considerations of economic nature) and whether the application of the law to these facts has been executed correctly by the NRA. Therefore, unlike the legality review, the scope of review reaches far enough for the court to substitute the assessment of the NRA by its own. Moreover, there is no need for manifest error. Any error can lead to annulment of decision.

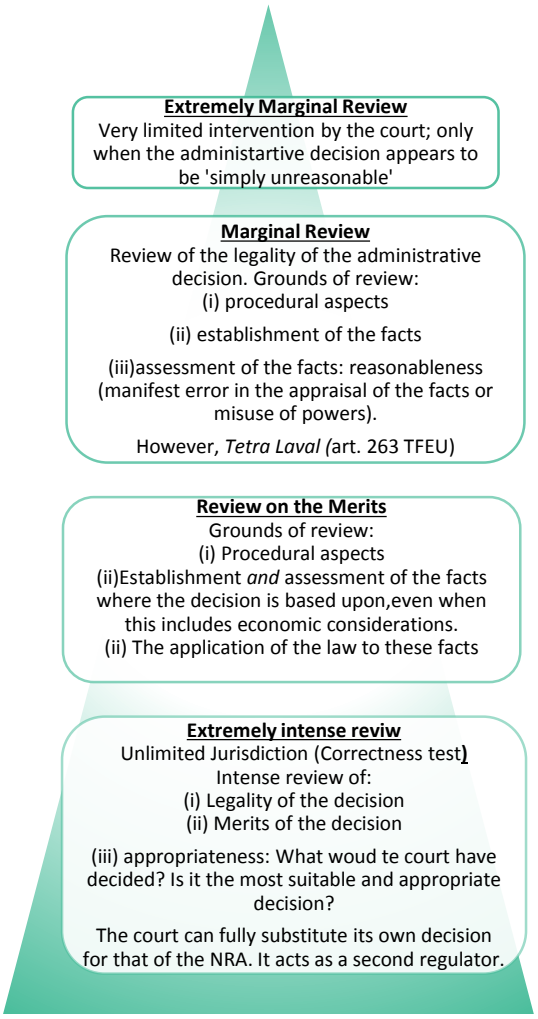


FIGURE 1 STANDARD OF REVIEW, A SLIDING SCALE

The manner in which the review takes place depends on the applicable standard and intensity of review that is exercised by the courts. For the purpose of effective legal protection, it is considered desirable that the court can take an in depth look at the establishment and interpretation of the facts and how the law has been interpreted and applied.[30]

[28] Based on S. Lavrijssen and M. De Visser, 'Independent Administrative Authorities and the Standard of Judicial Review', *Utrecht Law Review*, no. 1, 2006, pp. 112-114.
[29] ECJ 15 February 2005, *Commission v. Tetra Laval*, C-12/03 P, par. 39, See also Lavrijssen & De Visser 2006, p. 130
[30] Lavrijssen, Eijkens & Rijkers 2014, p. 17

(iii) The duty to state reasons of the Court: appropriate expertise and the duty to state reasons

In order to provide effective legal protection, the dispute should be decided by a court which is able to make a well informed decision. Therefore, the court should possess, or at least have access to, appropriate expertise. Particularly in the area of energy and other regulated markets specific knowledge is required, because regulation generally comprises technical issues. Furthermore, the court is obliged to give reasons for its decision. At this point, discretion is awarded to the Member States as well. Nevertheless, the case law of the ECtHR demonstrates that article 6 ECHR should be interpreted as comprising the duty to state reasons.[31] By providing reasons for a decision, not only a sense of justice is served, but a kind of control mechanism is created as well and a precedent is provide.

(iv) The duty to provide an effective judgment: effective remedies and reasonable period of time

Even when parties have been able to start a case before the administrative court, and this process has taken place in a way respecting the right to effective legal protection, the effective legal protection is only guaranteed when the remedies imposed to restore justice can be considered effective. Effective remedies include (amongst others) interim relief,[32] setting aside national measures and monetary relief.[33] Furthermore, the effectiveness of a judgment would be undermined if the verdict takes too long, or as Cappalleti for example puts it in words: *Justice delayed is justice denied'*.[34] Therefore, a judgment should be provided within a 'reasonable period of time'. This principle is stipulated by Article 6 ECHR and 47 of the EU Charter of Fundamental Rights (hereafter: the Charter). How long a period of time should be in order to be reasonable is unclear, although it may not be excessively long. Naturally, an exact period is difficult to determine, as this depends on the complicity of the facts of the case.[35]

(v) The duty to ask a preliminary question to the ECJ

Article 267 TFEU provides that in case the interpretation or validity of an EU principle is at stake, a national court should ask a preliminary question at the ECJ, provided that the preliminary ruling is necessary to conclude a judgment.[36] In this way, fragmentation of the interpretation of EU law is prevented. It lies in the hands of the national court whether to ask the preliminary question, although the parties to the procedure may request a preliminary question. In principle, the national court should refer the question and otherwise it is obliged to explain why it refuses to do so.[37]

---

[31] ECtHR 16 December 1992, Case 12945/87 (*Hadjianastassiou v. Greece*), par. 33 and ECtHR 19 April 1994, Case 16034/90 (*Van de Hurk v. The Netherlands*), par. 61.

[32] Interim relief is considered to be an essential remedy to effectuate effective legal protection, because rights should also be protected pending the case settlement. ECJ 13 March 2007, Case C-432/05 (*Unibet*); ECJ 19 November 1991, joint cases C-6/90 and C-9/90 (*Francovich*); ECJ 5 March 1996, joint cases C-46/93 en C-48/93 (*Brasserie du Pêcheur).*

[33] W. van Gerven, 'Substantive Remedies for the private Enforcement of EC Antitrust Rules before National Courts', in C. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: effective private enforcement of EC antitrust Law,* Oxford-Portland Oregon, Hart Publishing, 2003, pp.53-94 and W. van Gerven, 'Of rights, remedies and procedures', *Common Market Law Review,* no. 3, 2000, pp. 501-536.; see also Lenaerts 2013, p. 1.

[34] Cappalletti 1978 , p. 433

[35] ECJ 26 November 2013, Case C-50/12 P (*Kendrion v. Commission*), par. 96

[36] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012, C338/01), par. 11 and 15;

[37] ECtHR, 8 April 2014, Case (*Dhabi v. Italy*)

2.2.SYNTHESIS

It follows from the study of Lavrijssen et al. that effective legal protection depends on safeguarding its several aspects. To that end, Member States should ensure access to court, the national courts should state reasons and therefore have (access to) sufficient expertise, the national courts should provide appropriate remedies in a reasonable period of time and ask a preliminary question to the ECJ if the interpretation or validity of an EU principle is at stake. Lastly, the national court should live up to its duty to provide effective review. The sliding scale approach of Lavrijssen and De Visser demonstrates that although there are no clearly delimited standards of review, four standards can be distinguished. The borders between these standards are fluid. The following chapter discusses how the right to effective review is interpreted under EU-law. Therefore, it is investigated what guidance can be derived from both primary and secondary sources of EU law and case law of the ECJ with respect to the requirements relating to the standard of review in light of effective legal protection.

3. THE DUTY TO PROVIDE EFFECTIVE REVIEW IN THE EU

In principle, EU harmonization may not go beyond the national procedural autonomy, provided that the principles of effectiveness and equivalence are met.[38] Therefore, Member States may establish their own procedural rules. As long as these rules enable citizens to invoke EU rights. In addition, the national procedural rules for the appliance of rights derived from EU-law must not be less favourable for citizens than the procedural rules for applying national law.[39] In addition to the prerequisites of effectiveness and equivalence, EU law can restrict national procedural rules further. This chapter covers the framework provided at EU level with respect to the prerequisites of the right to effective legal protection. Where EU law leaves leeway to the Member States with regard to the interpretation of effective review, national procedural autonomy prevails. Further interpretation provided by the community courts does not detract from that, because the ECJ's case law is not binding on Member States and their courts. However, one may argue that the ECJ's case-law provides guidance on the question how review should look like to be considered effective review in the light of effective legal protection.

3.1.THE EMBEDDING OF EFFECTIVE REVIEW IN EU-LAW

The right to effective legal protection is a general principle of European law.[40] Furthermore, it follows from Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) and Articles 6 and 13 of the European Convention of Human Rights (ECHR) that it is a fundamental right. Moreover, the right is established in Article 19 paragraph 1 of the Treaty on the European Union. This Article states that *"Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".* Hence, Member States are required to ensure that national courts are able to take the

[38] S. Lavrijssen and A. Ottow, 'The Legality of Independent Regulatory Authorities', in: L. Besselink, F. Pennings and A. Prechal (eds.), *The Eclipse of Legality*, Alphen aan den Rijn, Kluwer Law International, 2011, p. 74.
[39] Lenaerts 2013, p. 2
[40] Lavrijssen, Eijkens & rijkers 2014, p. 8

measures needed to enforce EU law.[41] However, no explicit guidance is provided on how courts should review to ensure effective legal protection.

In addition, there can be found sector specific rules with regard to effective legal protection in Directives. Articles 37 paragraph 17 of Directive 2009/72/EC with regard to Electricity and 41 of Directive 2009/73/EC on Gas stipulate that "*Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government."*[42] In contrast with the Framework Directive on Telecommunications, the Electricity and Gas Directives remain silent on what standard of review the national courts should apply when reviewing energy. The Framework Directive specifies that *"Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism".* It is questionable whether this standard of review stated by the Telecommunications Directive should be considered guiding for review in the field of energy as well.[43] Because the EU principle of effective legal protection merely provides some minimum guarantees and the Commission's Directive omits to provide the standard of review, national procedural autonomy applies. Thus, it is up to the Member States and their courts to specify the elements of effective legal protection by means of national procedural law. As a consequence, the actual effectuation of the right to effective legal protection may differ between Member States.[44] Therefore, the question arises how national courts should review regulatory and competition decisions in order to live up to their duty to provide effective legal protection.

3.2.THE ECJ'S ON EFFECTIVE REVIEW: THE *TETRA LAVAL*-STANDARD OF REVIEW

Because EU-law leaves leeway on the interpretation of the duty to provide effective review, the ECJ has provided further clarification.[45] In principle, the interpretation formulated in the community case-law only applies to the community courts, and not to national courts. Nevertheless, national courts are free to apply the ECJ's and CFI's case-law if they wish to. Despite the fact that the ECJ's case law is not binding on Member States, some argue that the interpretation by the community court should be used as a direction for effective review for national courts as well. Amongst them are Schimmel and Widdershoven. They express the opinion that the ECJ's ruling in *Tetra Laval* offers a usable and satisfying direction for the

[41] Lenaerts,2013, p. 1

[42] In the Netherlands, article 37(17) of the Directive was considered already implemented by article 82 Electricity Act the GALA. The same applies to article 41, which was implemented in article 61 of the Gas Act. *Kamerstukken II* 2010/11 32814, nr. 3, p. 60 and 67; In the UK, a similar approach was used. See 'Annex Third Package Transition Note', available at: https://www.gov.uk

[43] In Dutch, review of the merits of the case is translated as 'facts are taken into account', which is less intensive review.

[44] M. Safjan, A Union of Effective Judicial Protection. Addressing a multi-level challenge through the lens of Article 47 CFREU. King's College London, February 2014, p. 2 and Eliantonio, 2009, p. 12.

[45] It is up to the ECJ to interpret both article 47 of the Charter and 19TEU. See Safjan 2014, p. 2; For example ECJ, 15 May 1986, Case C-222/84 (*Johnston*), and later cases ECJ 7 May 1991, Case C-340/89 (*Irene Vlassopoulou v. Ministerium fur Justiz Bundes- und Europaangelegenheiten Baden-Wurttenberg*); ECJ 7 May 1992,Case C-104/91 (*Colegio Oficial de Agentes e la propriedaad Inmobiliaria v. Jose Luis Aguirre Borell and others*) and ECJ 31 March 1993, Case C-19/92 (*Dieter Kraus* v. *Land Baden-Wurttenberg*) para. 40; Parret stipulates that the principle of effective legal protection increasingly emerges in the case law of the ECJ, in all jurisdictions, see L.Y.M. Parret, 'Effectieve rechtsbescherming: eindeloos potentieel, ongeleid projectiel?', *NtER* 2012-5, p. 157-168

standard of review under the Energy Directive.[46] Indeed, the *Tetra Laval* rules provides a standard of review which allows stakeholders to effectuate their rights before court. This paragraph addresses the *Tetra Laval*-judgement. First, the *Tetra Laval* standard of review is addressed. Second, the suitability of this standard for national courts for reviewing energy decisions is discussed.

3.2.1. THE JUDGMENT OF THE ECJ

For a long time, it was assumed that the ECJ's legality review of article 236 TFEU constitutes a marginal review.[47] Such a marginal review comprises a rather limited review of the NRA's procedural requirements and the reasonableness of the substance of the decision. However, in *Tetra Laval* the ECJ explained that Article 236 TFEU should be interpreted differently. A full review of the substance of the decision should be applied in order to effectively review a decision. It follows from the *Tetra Laval*-standard that the following elements of the *substance of the case* should be fully reviewed:[48]

(i) Whether the facts are factually accurate, reliable and consistent;
(ii) Whether the facts are complete. Does the evidence contain all the information which must be taken into account in order to assess a complex situation?
(iii) Whether the law was interpreted correctly; and
(iv) Whether it is capable of substantiating the conclusions drawn from it. In the case of discretion, the Court should review whether a reasonable legal assessment of the facts has been executed by the NRA. In other words: has NRA has exercised its discretion in a reasonable or rational way? The fact that the substance of the case involves complex economic assessments, does not change this

In addition, with regard to *procedural* elements, it should be fully reviewed

(i) Whether the correct procedures have been followed; and
(ii) Whether the administrative decisions comply with the principles of good administration.

Thus, the ECJ fully assesses whether the Commission has lived up to its procedural duties by following the right procedures and respecting the principles of good administration. With regard to substance of the decision, the ECJ goes beyond the 'manifest error' standard. In this respect, a distinction can be drawn between the establishment of the facts and the assessment of the facts. It is assumed that the establishment of the facts and interpretation of the law should be subject to full review. This also follows from the *Tetra Laval*-ruling. The ECJ examines whether the evidence where the Commission relies on for its decision-making is accurate, reliable and consistent and whether it contains all information needed to decide a particular situation.[49] With regard to the assessment of the facts, the Commission has a margin

[46] M. Schimmel & R. Widdershoven, 'Judicial Review after Tetra Laval: Some Observations from a European Administrative Law Point of View', in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation,* Groningen, Europa Law Publishing, 2009, p. 73.
[47] ECJ 21 January 1999 Case C-120/97 (*Upjohn*)
[48] ECJ 15 February 2005, *Commission v. Tetra Laval*, C-12/03 P, par. 39
[49] See also O. Essens, A. Gerbrandy and S. Lavrijssen (Eds.), 'National Courts and the Standard of review in competition law and economic regulation.' Groningen: Europa Law Publishing 2009, p. 3

of discretion.[50] The Commission has to go beyond a mechanical application of the law to establish that certain conditions of the legal provision are met. For instance, to proof the effect of the conduct. It follows from *Tetra Laval* that the Commission should prove that the merger under discussion would restrict the competition.[51] To that end, the effects of the proposed merger should be demonstrated by means of convincing evidence that the circumstance of the case cause these restricting effects. The Commission needs to execute an analysis of the complex economic facts. The Commission has discretion to consider all established facts and draw the conclusion whether the conditions of the legal provision are met. The assessment of an intended merger on the market is of prospective nature. This makes the assessment even more complex. Such a prospective analysis is also used for the possible effect of regulatory decisions. In addition, complex economic analyses are used to meet the effect-requirement in cartel-cases. In fact, the importance of the use of economic theories in the field of competition is increasing in practice (see par. 5.4.2).[52]

Because the Commission has a margin of discretion with regard to the assessment of the economic facts to prove the effect of the allegedly violating conduct, the court should review the assessment of the facts in a restrained way. However, according to the ECJ this restrained review is broader than the legality review presumes. The fact that the authority possesses discretion with regard to economic matters does not entail that the ECJ is not allowed to assess how the Commission has interpreted information with an economic character.[53] The ECJ reviews whether the assessment of the facts has been executed reasonably by the Commission.[54] In other words, could the authority reasonably have come to the decision, considered the facts at stake? This goes beyond the 'manifest error' standard of the legality review. Nevertheless, because the assessment of the facts is not substituted, it still remains within the borders of legality review.

3.2.2. THE VALUE OF *TETRA LAVAL* IN PRACTICE

Schimmel and Widdershoven argue that the *Tetra Laval* standard of review is *"slowly but surely developing into a general standard of judicial review of administrative decisions on EU level".*[55] In addition to that, *Tetra Laval* seems to constitute a useful interpretation of effective legal protection of Article 37 of Directive 2009/72/EC for national courts as well.[56] The *Tetra Laval*-standard provides a meaningful and desirable interpretation of the right to effective legal protection. This standard of review offers the possibility to adequately review the substance of the case, without interfering with the Regulatory Authority's discretion. Therefore, consumer interests can be taken into account in reviewing the decision-making. Assumingly, this is also why several national courts seem to follow the *Tetra Laval* standard. There can be found several examples of case law in which national courts refer to *Tetra Laval* (explicitly or

[50] Stijnen 2012, p. 122
[51] See also Ottow 2009, p. 44-45
[52] M.F. Bay & J.R. Calzado, 'Tetra Laval II – the coming of age of judicial review of merger decisions' 2005 *world Competition*, pp. 433-440; Ottow 2009, p. 42
[53] *Tetra Laval,* par. 39
[54] Lavrijssen 2009, p. 180
[55] Schimmel & Widdershoven 2009, p. 72
[56] Lavrijssen, Eijkens & Rijkers 2014, p. 17; see also Schimmel & Widdershoven 2009, p. 72

implicitly). Amongst them are the CBB in merger cases,[57] and the CAT from the UK in telecommunication regulation.[58] Furthermore, there are authors who argue that the principle of sincere cooperation as provided by Article 4(3) TEU is violated if the national courts derogate from the ECJ's case law. The principle of sincere cooperation requires that the national courts should explain national procedural rules in a way that the right to effective legal protection as laid down in Article 19(1) TEU can be realized. Nonetheless, it is debatable whether this actually implies duties for Member States. For example, the principle of sincere cooperation does not necessarily intend to create new –additional– national remedies, as long as the national legal system guarantees sufficient remedies.[59]

Thus, the *Tetra Laval*-ruling extends the legality review to a more intensive review of the assessment of complex economic facts of the decision. The complex assessment of facts of economic nature involved in merger decisions such as *Tetra Laval* is also at stake in economic regulation.[60] Therefore, a similar review of the substance for energy regulation decisions is defensible. Despite the fact that national courts are not obliged to follow *Tetra Laval*, it can be argued that national courts should review the NRA's assessment of the facts in regulatory and competition decisions more intensive too to ensure effective legal protection. At least – for the reasons stated above – this thesis takes the *Tetra Laval* standard as starting point for assessing the standard and intensity of review in different Member States and different sectors.

3.3.SYNTHESIS

The right to effective legal protection is universally recognized and embedded in EU law. It aims at safeguarding that national procedural rules enable EU citizens to actually exercise the rights derived from EU law. Therefore, it *inter alia* imposes a duty on Member States to provide effective review. Nonetheless, Article 19 TFEU and the energy directives remain silence with regard to interpretation of effective review. Therefore, national procedural autonomy prevails. Member States are free to interpret effective review themselves. However, it can be argued that the standard of review provided in the *Tetra Laval* case provides guidance to ensure effective review. This standard of review comprises a more intensive review of the substance of the decision than the legality review of Article 263 TFEU suggests. Although courts are not obliged to follow this interpretation, one may argue that it is a useful interpretation of effective review. It provides an interpretation of legal review to ensure effective legal protection. This conclusion is also underpinned by the fact that the *Tetra Laval*-standard is adopted by several national courts in practice. However – because of the non-binding character of the ECJ's guiding case-law – this European framework needs further interpretation by national courts. The next chapter will address how this interpretation has taken place so far in the Dutch energy sector.

[57] CBB 28 November 2006, ECLI:NL:CBB:2006:AZ3274*;* Lavrijssen 2009, p. 189.
[58] C. Graham, 'Judicial review of the decisions of the competition authorities and economic regulators in the UK, in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation,* Groningen, Europa Law Publishing, 2009, p. 243
[59] Lenaerts 2013, p. 2 and Gerven 2000, pp. 501-536
[60] Lavrijssen, Eijkens & Rijkers 2014, p. 18

4. THE DUTY TO PROVIDE EFFECTIVE REVIEW IN THE ENERGY SECTOR IN THE NETHERLANDS

The EU-framework leaves leeway to the Member States and national courts with regard to the interpretation of effective review in domestic administrative law. This chapter addresses how the legal review of regulatory decisions in the field of energy takes place in the Netherlands. How should the review practice of the Dutch Administrative Courts be evaluated in light of effective legal protection? To that end, first a brief background of the Dutch system of economic regulation in the field of energy is provided. Subsequently, the findings of Lavrijssen et al. resulting from the study of 83 key cases of the CBB are discussed.[61] The conclusions of this study will serve as a starting point to further draw on the question how the CBB should review regulatory decisions to ensure the right of effective legal protection.

4.1. THE DUTCH SYSTEM OF ECONOMIC REGULATION

In the Netherlands, the Authority for Consumers and Markets (hereafter: ACM) is responsible for economic regulation of the energy market.[62] The ACM may establish different kinds of decisions to realize an efficient market. The ACM can take x-factor-decisions; tariff decisions; method decisions and code decisions.[63] The EU directive 2009/72/EG stipulates that NRAs should stimulate the system to be as efficient as possible and for that purpose create incentives.[64] Nevertheless, EU law leaves the Member States leeway with respect to how regulation exactly should take place.[65] For the purpose of this research, the decision-making procedure will not be fully elaborated. Nevertheless, it must be noted that the ACM needs to cooperate with the (joint) system operators and stakeholders, including representative organizations, by means of consultation to create a broad support base.[66]

4.2. THE DUTY TO PROVIDE EFFECTIVE REVIEW

In case an interested party disagrees with the ACM's decision it can challenge the decision before the CBB.[67] The CBB plays a crucial role. It offers appeal in first and *only* instance. Hence, the decision of the

[61] This Chapter is based on Lavrijssen, Eijkens & Rijkers 2014; A case was considered a 'key case' when the dispute discussed one of the elements of effective legal protection and involved consumer interests (indications: appeal by consumer organizations, the challenged ACM-decision had impact on energy prices or on the reliability/security of the energy supply and a fundamental rule was created with respect to the role, indecency and powers of the ACM. See Lavrijssen, Eijkens & Rijkers, 2014, p. 31-32

[62] Until 1 April 2012, he ACM was named the NMa (Nederlandse Mededingingsautoriteit). However, this thesis will refer to the ACM, even when the particular case was dealt with prior to this date.

[63] Extensively explained in Lavrijssen, Eijkens & Rijkers, par. 3.2

[64] Article 36(f) Directive 2009/72/EC.

[65] Article 35(5) of Directive 2009/72/EC EG and Article 39(5) Directive 2009/73/EC. Nevertheless, condition is that the regulation fulfils the requirements of being non-discriminatory and transparent. In the Netherlands, regulation is realized by so called benchmark regulation. Articles 41b and 41c of the Electricity Act and Article 12f of the Gas Act; see also P. Meulmeester, 'Lange termijn investeringen in elektriciteitsnetwerken niet gegarandeerd' *TPEdigitaal*, vol. 2, no. 2, 2008, pp. 93-113; see also R. Hakvoort, et al., *De Tariefsystematiek van het elektriciteitsnet*, Zwolle, D-cision, ECN and TU Delft, 2013, p. 5

[66] *Evaluatie Elektriciteitswet 1998 en Gaswet Eindverslag* (evaluation of April 2012, ACM), Den Haag, ACM, 2012, p. 44; However, Lavrijssen et al. state that the position of stakeholders in this process is still uncertain. See Lavrijssen et al.. 2014, p, 28

[67] Article 4 of Appendix 2 of the GALA. It follows from art. 7:1 Gala that in principle, decisions first need to be objected before the ACM. Subsequently, the decision on objection can be subject to legal review before the court. See for these procedural aspects Lavrijssen, Eijkens & Rijkers 2014, p. 31-32

CBB is conclusive.[68] Therefore, the CBB's legal review is decisive to safeguard legal accountability of the ACM and provide effective legal protection for energy consumers. On the basis of the GALA, the CBB applies a legality review.[69]

4.2.1. Effective review of the procedure in practice

The review of the procedural aspects of the decision involves the questions whether the ACM has followed the right procedures, whether it has lived up to the principles of good administration and whether the independency of the ACM has been regarded. To start, in the period 2002-2013, the CBB reviewed in quite a restrained way whether the ACM has complied with the procedural requirements, more particular the duty to consult stakeholders.[70] Repeatedly, the CBB referred to the ACM's discretion. Thereby, it refrained to provide under what conditions the duty to consult interested parties is fulfilled.[71] In one of its rulings, the CBB quashed a decision because the duty to consult the joint system operators was violated. However, the CBB upheld the legal consequences of the quashed decision. The CBB argued that the joint system operators had already provided their view during the procedure and it deemed unlikely that this view would effectuate a consensus.[72]

Second, a more divergent approach is distinguished with regard to the review of the general principles of good administration. These principles include *inter alia* the principles of due care, legality, legal certainty and the duty to state reasons. In particular the duty to state reasons is a regularly used ground of appeal. Lavrijssen et al. illustrate this conclusion by giving examples of both intensive and restraint review. For example, in the *Gas Transport Guidelines* cases appellants argue that the ACM failed to live up to its duty to state reasons why it derogated from the Guidelines. The CBB ruled – without actually explaining why – that the ACM's reasons were sufficient and it was within the discretion of the ACM to derogate from the Gas Transport Guidelines.[73] In particular, critical remarks can be placed at the use of a report provided by one of the parties. The ACM uses the report to provide reasons, but without discussing the reliability and independency of the report. Nevertheless, the CBB finds this sufficient for the ACM to comply to the duty to state reasons. Again, the CBB refers to the discretion of the ACM, without explaining why the ACM's

[68] Nevertheless, in case an administrative fine is imposed, higher appeal is indeed possible. This is in line with Article 14 paragraph 5 ICCPR, see further par. 5.2. Fines are not common in the field of energy regulation. In the period 2002-2015, only two fines have been provided on basis of the Electricity or Gas Act. See CBB, 13 January 2015, ECLI:NL:CBB:2015:5; CBB 4 September 2014, ECLI:NL:CBB:2014:318.

[69] A. Meij, 'Judicial Review in the EC courts: Tetra Lava land Beyond', in O. Essens, A. Gerbrandy, S. Lavrijssen (eds.) National Courts and the Standard of Review in Competition Law and Economic Regulation, Groningen, Europa Law Publishing, 2009, pp. 9-21.

[70] The Gas and Electricity Act provide additional procedural requirements to the GALA, in particular duties to consulate stakeholders. For code decisions, art. 33 E-Act and 12d Gas Act stipulate that joint system operators should consult representative organizations in a 'User Platform Electricity and Gas system Consultation. For method decisions, article 41 E-act and 81 Gas Act provide that the ACM consults joint system operators and representative organizations (Uniform Public Preparatory Procedure). See further Lavrijssen, Eijkens and Rijkers, 2014, p. 44

[71] Code decisions: CBB, 2 August 2002, ECLI:NL:CBB:2002:AE6323, CBB 2 August 2002, ECLI:NL:CBB:2002AE7300 and CBB, 2 August 2002, ECLI:NL:CBB:2002:AE7302; CBB, 4 September 2002, ECLI:NL:CBB:2002:AE8317; Method decisions:

[72] CBB, 3 November 2009, ECLI:NL:CBB:2009:BK1790

[73] CBB 10 September 2004, ECLI:NL:CBB:2004:AR2366; and CBB 24 April 2004, ECLI:NL:CBB:2004:AO9530; See for similar cases with regard to the reasoning on the duty to state reasons CBB 14 January 2005, ECLI:NL:CBB:2005:AS5818 and CBB 28 June 2005, ECLI:NL:CBB:2005:AT8919; See Lavrijssen, Eijkens and Rijkers, p. 47

reasoning is adequate.[74] Therefore, the CBB reviewed whether the ACM had actually lived up to the duty to provide reasons in a quite restrained way.[75] Nevertheless, there are also cases in which the CBB reviewed the duty of the ACM to state reasons in a more intensive way.[76] Remarkably, the CBB seems to apply a restrained review when an appeal on grounds of the duty to state reasons fails. At the same time, the review of the duty to state reasons is more intensive in cases where the duty to state reasons was considered violated.[77] This seems to confirm the assumption that an intensive review is more likely to result in a successful appeal on the basis of general principles of good administration. However, it can also be argued that the CBB only gives more extensive reasons to explain why the ACM has not respected the duty to state reasons, than it gives reasons to state that it did.[78] Lastly, with regard to the independency of the ACM, the CBB appears to provide a more intensive review. The Minister of Economic affairs may give general directions. Nevertheless, he must refrain from giving specific instructions in particular cases. In its judgment of 29 June 2010, the CBB annulled an ACM-decision because it was based on a Minister's policy rule which included an instruction with regard to an individual case.[79] By doing this, the minister infringed the ACM's independency. Accordingly, the CBB established clear limits of political interference.[80]

4.2.2. Effective review of the substance of the case

The substance of the decision covers the establishment of the facts, the assessment of the facts and the interpretation of the law. Lavrijssen et al. have distinguished four (clusters of) cases in this respect. This case-law demonstrates that there seems to be a development of a rather restrained review of the substance in the period 2002-2013 towards a more intensive review in more recent cases. However, it may be presumptuous to draw this conclusion already.

Regulation of the national transmission network

To start, the CBB's rulings regarding the national transmission net regulation.[81] In these cases, the CBB upheld the ACM's decisions establishing several methods to determine values for the calculation of tariffs of the national transmission net. First, appellants challenged the calculation method of the starting costs for regulation. Appellant argued that instead of the real network costs of the previous year, the efficient costs should have been used as starting point. The CBB did not agree and explained that appellant failed to demonstrate that the used costs were not efficient and which other yardstick should have been used for establishing the efficient costs. Hence, the CBB did not assess whether the costs chosen by the ACM

[74] See for another case dealing with the use of a report CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307: By merely referring to a report, the CBB disagreed with the appeal of appellants that no sufficient reasons were stated for the choice of the used measurement groups.
[75] In fact, the CBB argued that the ACM was allowed to deviate from the Gas Transport Guidelines because the Guidelines could not be considered a decision under article 1:3 GALA.
[76] CBB 29 October 2003, ECLI:NL:CBB:003:AO0898 and CBB 2 June 2009, ECLI:NL:CBB:2009:BJ0727; CBB 2 June 2009, ECLI:NL:CBB:2009:BJ0715
[77] Lavrijssen, Eijkens & Rijkers, 2014, p. 43
[78] See more comprehensive Lavrijssen, Eijkens & Rijkers, 2014, p. 49
[79] CBB 29 June 2010, ECLI:NL:CBB:2010:BM9470
[80] See more comprehensive Lavrijssen, Eijkens & Rijkers, 2014, p. 43
[81] CBB 30 November 2006, ECLI:NL:CBB:2006:AZ3365, CBB 29 June 2010, ECLI:NL:CBB:2010:BM9470 and CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307.

reflected some degree of efficiency. Instead, the CBB rejected appellant's arguments quite easily while there were several indications that the costs needed to be efficient. Second, appellants challenged the manner in which the regulatory asset base (RAB) had been established by the ACM. The used valuation method had profound consequences on the tariffs consumers had to pay. In fact, particular costs were paid twice by consumers. However, the CBB appeared reluctant in interfering with the ACM's decision-making. It argued that the ACM had a margin of discretion is deciding the valuation method for the RAB. Therefore, the CBB hardly assessed the substance of appellant's arguments and ignored the question whether it was right that the valuation method entailed that consumers had to pay twice for certain costs. The CBB failed to live up to the EU energy regulation objective of protecting consumer interests. It should have assessed whether these interests played a decisive role in establishing the RAB. Third, the CBB also reviewed the establishment of the weighted average cost of capital (WACC) in a marginal way. Because of the ACM's margin of discretion, the CBB found it suitable to merely review whether the ACM had acted within its borders of discretion. Thus, the cases on the national transmission net regulation demonstrate that the CBB reviews the assessment of the facts in a very restrained way and put heavy evidential burdens on appellant to prove the unreasonableness of the decision.

LUP-cases

In the so called *LUP*-cases, the CBB ruled on the producer-exemption. This exemption comprises that network-operators (and thereby consumers) and not the producers have to pay for costs for feeding in energy in the system. In the first case, appellants argued that this exemption violated EU-principles of non-discrimination, because a distinction was made between producers feeding in at the national high voltage grid and the producers who feed in at the distribution networks. The latter were not obliged to pay any transport dependent costs as the exemption applied to them, while former had to pay 25% of the transport dependent costs. However, CBB decided that the ACM had not trespassed the boundaries of its discretion because the producers feeding in at the distribution network did make use of the high voltage sections of the grid and therefore a distinction could be made, hereby referring to the principle of cost-reflectiveness. In the second LUP-case, the ACM-decision establishing a transport tariff for electricity fed in at the high voltage network was challenged. The tariff was set at 0%. Hence, producers of electricity did not bear any of the transport-related costs when feeding in at the high voltage network. Underlying rationale of the ACM was to create a level playing field between electricity producers of different EU Member States in order to enhance the competitive position of the electricity producers at the EU market of electricity. Appellant stipulated that the decision did not respect the principle of cost-effectiveness of the network-tariffs – which had been applied in the first LUP-case – because in that light, costs of transport should be borne by both the producers and the consumers of the electricity. The CBB did not agree with appellants, suddenly ignoring the principle of cost-effectiveness and referring again to the margin of discretion of the ACM with regard to establishing the tariff structures.[82] Accordingly, the CBB stated that the ACM was not obliged to apply the principle of cost-causation, as it could balance interests and attach more weight to the interest of creating a level playing field. In several subsequent cases, the

[82] CBB 11 February 2005, ECLI:NL:CBB:205:AS7083

CBB repeated this reasoning.[83] Lavrijssen et al. conclude that the CBB awards the ACM considerable leeway when it comes to the establishment of transport tariffs and there is an inconsistent approach with regard to the referring to the EU principles of cost-reflectiveness and non-discrimination, while it is obliged to apply these principles.[84]

The negative x-factor

System operators should make sure that their revenues are below the revenues of the average efficient system operator. If the revenues are higher, a system operator is corrected by means of an efficient discount (x-factor). In this way, system operators are stimulated to work as efficient as possible and tariffs are kept low for consumers. Until 2010, the x-factor was always a positive number, thereby providing a real 'discount'. However, the ACM then decided to give the x-factor a negative value. Therefore, the total income that was allowed was not lowered to promote efficiency, but increased instead. This negative x-factor decision was appealed.[85] Nevertheless, the CBB upheld the decision, because although the law and parliamentary documents assumed that the x-factor was a positive number, there could be circumstances in which a negative x-factor is justified. Subsequently, the CBB referred to this decision in several appeals of negative x-factor decisions following to this case.[86] Lavrijssen, Eijkens and Rijkers note that the Tribunal should have clarified what kind of circumstances should be considered to this regard and how this relates to national and EU energy law. Moreover, they point out that it appears that the CBB has accepted the negative x-factor without reviewing the legality of the negative x-factor decision on the grounds of the legal and factual arguments provided by appellants in a thorough way.[87]

A new approach of the CBB towards more intensive review?

Notwithstanding abovementioned cases, in 2014 the CBB seems have changed its cautious approach in its more recent ruling regarding the right to a connection a gas grid. [88] In this case, appellants challenged the decision of the ACM establishing the gas distribution networks regions. Appellant argued that this decision was not in line with the law, because the decision did not determine the exact borders of the regions. Consequently, this was left to be decided by the network operators. In addition to that, the decision stated that there was no right to a connection to a gas grid for consumers living in a region where a district heating system as provided by the Act on District Heating (Dutch: Warmtewet) is or will be situated. Appellant argued that the ACM should in its decision clarify which system operator should guarantee the right to a connection to a gas grid. The CBB agreed with appellant and overruled the decision. The Tribunal considered that the ACM had not applied a transparent weighting of the interests involved. Indeed, it only referred to the definitions of the Act on District Heating. Thereby, it remained unclear in what areas exactly consumers were not entitled to a connection to a gas grid. This practice

[83] CBB 16 December 2011, ECLI:NL:CBB:2011:BU7963 and CBB 2 July 2013, ECLI:NL:CBB:2013:52
[84] Lavrijssen, Eijkens & Rijkers also remark that it would have been reasonable for the CBB to ask a preliminary question with regard to in the interpretation of the principles of cost-reflectiveness and non-discrimination for the allocation of transport costs.
[85] CBB 23 April 2013, ECLI:NL:CBB:2013:CA1052
[86] CBB 13 February 2014, ECLI:NL:CBB:2014:50 and CBB 13 February 2014, ECLI:NL:CBB:2014:46
[87] See Lavrijssen, Eijkens & Rijkers 2014, p. 60
[88] CBB 22 April 2014, ECLI:NL:CBB: 2014: 134

violates the rights as provided by the Third Energy package. In contrast to previous judgments, the CBB here applies an intensive review of the decision on the ground of provided arguments by appellant.[89]

In March 2015, the CBB again applied a more intensive review of the substance of a decision in the case regarding the appeal of GTS against a method and x-factor decision. Both for determining the efficient costs and the starting costs for dynamic efficiency, the ACM derogated from its own former practice. The CBB intensively reviewed the ACM's reasoning in this regard. It found that the ACM's determination of the WACC did possibly not fully cover the efficient costs of GTS. However, instead of annulling the decision on the basis of reasonableness, the CBB concluded that the ACM had not adequately substantiated its decision with concrete facts and hereby failed to live up to its duty state reasons with regard to its sudden deviation from its own practice and the establishment of the WACC per se. Also with respect to so called dynamic efficiency, the CBB concludes that the ACM violate its duty to state reasons and states: *"The ACM has not provided reasons on the basis of which objective data it has come to this choice"*. Because the decision is annulled on the basis of procedural defects, the CBB uses the administrative loop. It sends the method decision back to the ACM. Hence, the ACM can repair the detected effects. Instead of referring to the ACM's discretion, the CBB addresses the facts of the case and considers whether the ACM could have come to this conclusion on the ground of these facts. The fact that the decision is quashed for failure to live up to the duty to state reasons, does not change this. Although the recent case-law demonstrates a more intensive review of the substance, it is still to be seen how the CBB's approach will develop.

4.3.SYNTHESIS

The empirical research of Lavrijssen et al. covers several quite important regulatory decisions in the Dutch energy market of the past years. The study demonstrates that the CBB reviews various aspects of the ACM's decisions in a rather restrained way. In particular, the CBB has in several cases applied a rather marginal review of the substance of the decision. In several judgments, the Tribunal referred to the margin of discretion of the ACM. As a consequence, no actual scrutiny of the substance of the decision was applied. In addition, the CBB seemed to ignore that the ACM omitted to mention how its explanation fitted within the aim of both national and EU-law and principles. Therefore, the CBB failed to assess whether the interests of energy consumers had actually been safeguarded by the ACM. In this way, the ACM could attach more value to the interests of energy producers than that of consumers. Taken this all together, Lavrijssen, Eijkens and Rijkers argue that the conclusion may be drawn that the CBB has not fully lived up to the requirements of effective legal protection. They emphasize that it follows form *Tetra Laval* that effective legal protection requires a more thorough review of the substance than the marginal way of review provided by the CBB. The marginal review results in a manifest-error test. It reviews whether the ACM has remained within the borders of its discretion and only in case of a manifest error, the decision can be quashed. Also, the heavy evidential burden put on appellants in the national gas transmission network and LUP cases renders it difficult for consumers to effectuate their right to effective legal protection. However, the right to a connection to a gas grid case and the method-decision case may

[89] See Lavrijssen, Eijkens & Rijkers 2014, p. 61

be a sign of a shift to a more intensive review of the substance of the decision. Nevertheless, more time is needed to speak of a new trend.

5. THE DUTY TO PROVIDE EFFECTIVE REVIEW OF COMPETITION DECISIONS IN THE NETHERLANDS

In addition to the regulation of liberalized markets, the ACM is responsible for the enforcement of competition law in the Netherlands.[90] This chapter covers the legal review of the ACM's competition decisions. To what extent is the standard and intensity of review applied by the administrative courts different from that in energy regulation? Where do these differences stem from and are they justified, or can – and should – the CBB apply the competition review in energy cases as well? First, a brief background of the system of Dutch competition supervision is provided. Subsequent, several visions on effective review in the field of competition demonstrated by literature and Community case law is addressed. Lastly, the review of competition decisions by the CBB and District Court of Rotterdam is investigated.

5.1. COMPETITION SUPERVISION AND ENFORCEMENT IN THE NETHERLANDS

In the field of competition, EU harmonization and Commission supervision play an essential role as well.[91] Material competition law follows from the Dutch Competition Act (hereafter: CA) and the TFEU. The ACM should apply both national and community competition law.[92] The ACM provides ex-ante enforcement by means of merger decisions (articles 26-49 Competition Act and the Merger Regulation). Ex post competition enforcement is exercised by decisions on antitrust violations (article 6 CA and Article 101 TFEU) and abuse of dominant position (Articles 24 CA and 102 TFEU). In addition, further material interpretation of the Treaty and procedural aspects of the enforcement of competition law is provided by the Commission in Regulation 1/2003.[93] Corresponding to energy regulation, the enforcement of competition law aims at promoting market forces. Competition is assumed to lead to efficiency, lower prices and innovation.[94] In the end, this benefits consumers.

As provided above, the ACM is an independent administrative body. In order to supervise the compliance with – and when needed enforce – competition law, the ACM has broad competencies.[95] The decisions of the ACM are – after the objection phase at the ACM – reviewed by the specialized Rotterdam District

[90] Article 2 Competition Act
[91] National competition Authorities and national courts are obliged to cooperate with Commission. See Regulation 1/2003 and Commission Notice on cooperation within the Network of Competition Authorities, 27 April 2004, C 101/43-54
[92] Article 3 of Regulation 1/2003
[93] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
[94] Gerbrandy 2009, p. 9
[95] The ACM's competencies are derived from the general GALA, more specific the Act on the Establishment of the ACM (*Instellingswet* ACM) and even more specific the Competition Act.

Court.[96] If parties wish to challenge the District Court's ruling, they can appeal at the CBB. Therefore, in competition cases, the CBB is not the only instance, though it is the final instance.

5.2. DISTINCT CHARACTER OF COMPETITION DECISIONS

Decisions made for the enforcement of competition law differ in nature from regulatory decisions. This may influence the standard of review applied. To start, regulatory decisions often comprise generally binding measures, while competition decisions are always individual administrative decisions. Decisions for violating competition law are aimed at particular undertakings, while code- and method decisions are generally applicable. It is in assumed that generally binding decisions involve more political control, and should therefore be reviewed in a more marginal way.[97] Moreover, decisions based on the cartel prohibition and abuse of dominant position often comprise an administrative fine. It follows from Article 14(5) of the International Convention for Civil and Political Rights (hereafter: ICCPR) that legal review of decisions establishing a crime, such as competition decisions, should take place in two – instead of merely one – instances. Moreover, it follows from Article 6 ECHR that the punitive character of competition decisions imposing a fine entails that the national court must apply an intensive review to the height of the fine.[98] For example in the case of *KME*, the ECJ ruled that the assessment of the facts should be subject to a legality review and refers to the *Tetra Laval*. [99] However, this legality review is complemented with full jurisdiction with regard to the height of the fine.[100] For the ECJ, this follows from article 261 TFEU and Article 31 of Regulation 1/2003. In the case of *Limburgse Vinyl Maatschappij and others*, the ECJ clarified that this entails that the court must review the lawfulness of the penalty and substitute its own appraisal for that of the authority.[101] This is also acknowledged in the CBB's and District Court of Rotterdam's case law[102] and the administrative review system.[103]

5.3. REVIEW OF THE ASSESSMENT OF THE FACTS: COMPLEX ECONOMIC ANALYSES

However, to some extent competition and regulatory decisions are alike. Both in energy decisions and competition decisions, economic analyses play a crucial role.[104] The assessment of economic facts affects the standard and intensity of review. A distinction is made between the establishment of the facts and the assessment of the facts. In most areas of law, the establishment of the facts is sufficient to meet requirements provided by the legal provision. This so called mechanical application of the law can also be found in competition law. For instance to proof the existence of particular cartel agreements for the application of article 101(1) TFEU. [105] However, to establish a violation of competition law, there must be

[96] *Kamerstukken II* 2003/04, 29702, no. 3, p. 123; This is a deviation from article 8:7 GALA
[97] H.C.H. Hofmann and A. Turk, 'The development of integrated administration in the EU and its consequences' *European Law Journal*, 2007, p. 268; Lavrijssen 2009, p. 177
[98] *Justitiële verkenningen*, jrg. 34, nr. 6, 2008, p. 40; Gerbrandy 2009, p. 7 and 109
[99] ECJ 8 December 2011, Case C-389/10 P (*KME Germany AG and others/Commission),* par. 121
[100] *KME Germany AG and others/Commission,* par. 120
[101] ECJ 15 October 2002, Joint Cases C-238/99 P *(Limburgse Vinyl Maatschappij and Others v Commission)*
[102] For example CBB, 10 April 2014, ECLI:NL:CBB:2014:118, par. 4.9.3; See further on this Stijnen 2012, p. 123-124
[103] *Kamerstukken II* 2003-2004, 29702, nr. 3, p. 128
[104] Remarkably, the importance of economic proof seems to increase in competition law cases. According to Bay and Calzado 2005, pp. 433-440; Gebrandy 2009, p. 116; Lavrijssen 2009, p. 175; Kalbfleisch, p. 22
[105] Bellamy 1993, p. 390

'sound economic reasons for intervention'.[106] Ottow speaks in this regard of economic reality: the fact that there is a conduct capable of restricting the competition, is not sufficient. Competition authorities must prove that the competition is actually restricted in order to establish a violation of competition law. To establish the effect of the agreement or concerted practice, all economic aspects should be taken into account and a balancing of all interests at stake is made.[107] This is commonly referred to as 'complex economic analyses'. In fact, there seems to be a development towards a more economic approach by the Commission, which is followed by the Member States.[108]It is assumed that the court must not interfere with the discretion of the Administration. Therefore, the court must review the assessment of complex economic facts in a restrained way. The establishment of the facts involves no discretion and should be reviewed in a more intensive way.[109] However, the distinction between the establishment and the assessment of the facts is not that easy to make in practice. This issue will be discussed below.

The margin of discretion awarded to the authority and the standard of review applied to the assessment of the facts is closely related to the standard of proof resting on the Authority. It follows from Article 2 of Regulation 1/2003 that the Commission or the NRA bears the burden of proof for a violation of competition law. The authority must qualify the established facts in the light of the law to prove that the conditions of the competition provision are met. The standard of proof determines the level of persuasion required to establish that the conditions of the legal provision are met.[110] Logically, the more intensive the review applied, the higher the standard of proof is needed. The other way around, a less intensive review entails a lighter standard of proof. Moreover, the standard of proof correlates to the duty of investigation of administrative bodies. A low standard of proof encompasses a less stringent duty to investigate. In principle, the standard of proof depends on the circumstances of the case. In general, it is assumed that in administrative law, both at EU and national level, the standard of proof comprises that it must be 'sufficiently plausible' that the legal conditions are met.[111] However, when the authority has a margin of discretion – for example to establish the effect of the conduct – it is up to the authority to determine which facts are relevant in light of the law for the particular decision. The authority must balance all interests involved and execute an assessment of the economic facts to decide whether the conditions of the legal provision are met. [112] Thus, the margin of discretion weakens the standard of proof. This applies particularly for merger decisions. The prospective nature of the proof used for merger decisions requires a lower standard of proof. Indeed, it is impossible to establish with certainty that the market will develop in a certain way. As a consequence of this rather low standard of proof, the facts assessment in merger decisions must be reviewed in a restrained way. Essentially, the more discretion involved, the less intense the review should be, and the lower standard of proof applies to the competition authority.

[106] Ottow 2009, p.41
[107] Ibid, p. 42
[108] Ibid, p. 43
[109] Stijnen 2012, p. 122
[110] Gerbrandy 2009, p. 89
[111] Ibid.
[112] Lavrijssen 2009, p. 179

5.3.1. THE ECJ ON EFFECTIVE REVIEW OF COMPETITION DECISIONS

It follows from settled community case-law that the general conditions for application of competition provisions – the establishment and qualification of the facts in light of the law – should be subject to an intensive review.[113] In contrast, a more restrained review should be applied to the assessment of complex economic facts.[114] As discussed in chapter 3, the ECJ has interpreted the legality review of Article 263 TFEU in a way that economic analyses must be subject to full review on reasonableness of the assessment. Because the line between establishment and assessment of the facts is often unclear, the review of the complete substance of the decision often takes place in a marginal way. Indeed, the court may violate the authority's discretion if they would chose to apply a full review.

Recent years, the ECJ ruled several cases with respect to the effect-requirement for cartel decisions. These cases touch the division between the establishment of the facts and the assessment of economic facts. As starting point, it follows from the ECJ's *Völk/Vervaecke*-judgment that an agreement only falls within the scope of article 101(1) TFEU if it is capable to restrict the competition.[115] However, it is not necessary to assess whether a decision restricting by object *actually* restricts the competition in practice.[116] Instead – at least for a long time – the authority had to prove the appreciable effect of the restriction by object. Nevertheless, in the *Expedia* case, the ECJ provided that agreements which can be qualified a restriction by object and (can) influence the trade between Member States, always violate the cartel prohibition, notwithstanding the market share of the undertakings involved. After the case of *Expedia,* it was unclear whether this appreciable effect requirement had completely disappeared, or it should be executed in order to qualify the restriction by object. [117]

In the more recent judgment of the ECJ in *Cartes Bancaires,* the ECJ has provided guidance in this regard. The Court explicitly referred to the principle of effective legal protection and emphasized that the Court should apply a full review of the establishment and qualification of the facts. In carrying out this review, the Court must not refer to the margin of discretion of the Commission 'as a basis for dispensing with an in-depth review of the law and of the facts'. Therefore, the margin of discretion with regard to complex economic facts does not entail that the Court can refrain from reviewing the Commission's legal classification of these facts. It should review whether the facts could lead to the conclusion that Article 101(1) TFEU is violated. With regard to the restriction by object, the ECJ stated that the concrete effects of the decision should not be assessed in order to apply article 101(1) TFEU. This is only necessary for restrictions by effect. Because the General Court did assess the potential effects of the measures under investigation, it indicated that the measures at issue cannot be considered 'by their very nature' harmful

[113] ECJ 11 July 1985, Case 42/84 (*Remia and Others*)
[114] For example ECJ, 7 January 2004, Case C-204/00 (*Aalborg*), para. 279: "Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined 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."
[115] ECJ 19 July 1969, Case C-5/69 (*Völk/Vervaecke*)
[116] *Expedia*, par. 35, referring to ECJ 13 July 1966, C-56/64 and C-58/64 (*Consten and Grundig* v. *Commission*), par. 426.
[117] *Expedia,* par. 37: "An agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition"; See for the discussion on the interpretation of *Expedia:* Outhuijse 2014, p. 393-394

to the proper functioning of normal competition.[118] In other words, to qualify an agreement a restriction by object, the competition must be sufficiently harmed by the agreement, and this harm must follow from the very nature of the agreement, not from the effect of agreement. [119] Thereby, the line between the establishment of a restriction by object and the effect of the agreement under discussion seems to be restored.

What does this mean for the standard of review? It can be argued that since the establishment of the restriction by object does not involve any assessment of complex economic facts, the court should intensively review this qualification.[120] However, this conclusion appears too short-sighted in practice. The review of the qualification of the restriction by object is often linked to the question whether the authority has executed an adequate investigation of the facts.[121] Therefore, a little more restrained review seems appropriate. It follows from case law that this review corresponds to the *Tetra Laval* reasonableness-test: did the Commission had good grounds to take the decision under review, considered the used wordings and the context of the agreement? Thus, although the Commission does not need to prove the appreciable effect – which would involve more discretion and therefore make the standard of proof lower for the Commission – it must prove that the nature of the decision harms the competition in a sufficient extent. Because the ECJ reviews this in a rather full way – it merely goes not beyond the legality review – a high standard of proof rests on the Commission to proof that the agreement restricts the competition by object.[122] To provide sufficiently convincing proof, there must be executed an adequate investigation by the Commission.[123] The next paragraph addresses several relevant rulings of the Dutch administrative courts. Again, the national courts are not bound to follow the ECJ's findings. However, the Dutch administrative courts seem to refer regularly to the ECJ's case law.

5.4. CASE STUDIES OF THE DISTRICT COURT OF ROTTERDAM AND THE CBB

Also the Rotterdam District Court and in particular the CBB apply an rather intensive review of ACM-decisions when determining the applicability of Articles 101 and 102 TFEU and 6 and 24 CA.[124] At least the establishment of the facts, the qualification of these facts in light of the relevant legal provisions and the interpretation of the law is subject to an intensive review.[125] This intensive review may even include the (partial) substitution of the ACM's decision.[126] Nevertheless, considered that it still comprises a legality review, administrative courts may substitute the decision by its ruling solely if there is no other decision

[118] *Cartes Bancaires,* par. 51, 52 and 82
[119] Hereby, the ECJ relativizes the earlier ruling that it was sufficient that the conduct is capable of restricting the competition. See ECJ, (*T-Mobile Netherlands*), par. 31.
[120] Gerbrandy 2009, p. 290
[121] Gerbrandy 2009, p. 292:
[122] D. Bailey, 'Standard of proof in EC Merger Proceedings: A Common Law perspective', 2003, *Common market law review*, p. 1340-1342
[123] Gerbrandy 2009, p. 259
[124] Lavrijssen 2009, p. 182; Lavrijssen & De Visser, 2009, p. 118
[125] Gerbrandy 2009, p. 291
[126] The examples are numerous, for the purpose of illustration: District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10173 and District court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129 (*Foreclosures Cartel*); CBB 10 April 2014, ECLI:NL:CBB:2014:119; District Court of Rotterdam, 18 June 2003, ECLI:NL:RBROT:2003:AH9702; CBB, 25 April 2013, ECLI:NL:CBB:2013:BZ8522 (*Vodafone and others v. ACM*)

possible and the court has (access to) sufficient expertise.[127] A more intensive review is applied on the height of the fine. This review goes so far, that the decision regarding the height of the fine can be substituted by the court. [128] In contrast, a more restrained approach can be seen in cases concerning the applicability of exceptions, such as the third paragraphs of Articles 6 CA and 101 TFEU.[129]

The following study addresses the standard of review of the ACM's facts assessment by the District Court of Rotterdam and the CBB.[130] Because of the large amount of case-law the CBB has provided in this regard, a selection of some outstanding judgments has been made.[131] The emphasis lies on how the CBB has dealt with the review of the assessment of complex economic facts.

5.4.1. APPRECIABLE EFFECT OF RESTRICTION BY OBJECT

Before the *Expedia*-case, the Dutch competition courts enforced an 'effect-based approach'.[132] Therefore, despite several attempts of the ACM, the Rotterdam District Court and the CBB resolutely decided that also in case of restrictions by object, the appreciable effect should be demonstrated by the ACM in order to apply articles 6 CA and 101 TFEU.[133] In the case of *Secon,* the CBB pointed out that an agreement providing a restriction by object may not fall within the scope of article 6(1) CA if the undertakings occupy such a weak position on the relevant market that the decision cannot have an appreciable effect.[134] Hence, the ACM should prove the appreciable effect of the agreement. To that end, it should execute an economic analysis, taking the economic and legal context in which the undertakings operate in account.[135] Because such an economic analysis omitted, the CBB quashed the ACM's decision on the ground that the ACM has violated the duty to state reasons.[136] Also in the *Modint* case, the CBB judged that the ACM should have adequately executed a market analysis, taking all circumstances of the agreement and the market into consideration.[137]

---

[127] Gerbrandy 2009, p. 109

[128] This is possibility is regularly used. Some recent examples are District Court of Rotterdam, 20 March 2014, ECLI:NL:RBROT:2014:4935 (*KPN v. ACM*); District Court of Rotterdam, 20 March 2014, ECLI:NL:RBROT:2014:2045 (*Zilveruienkartel*) and District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10173 and District court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129 (*Foreclosures Cartel*)

[129] Lavrijssen & De Visser, p. 118

[130] The aspects of competition decisions under discussion are also addressed by civil courts. The value of private enforcement should not be underestimated. However, this thesis explicitly focuses on the role of the administrative court in reviewing administrative decisions. Still, it should be noted that there seems to be differences in understandings of particular issues amongst civil and administrative courts in the Netherlands. See for example on the *Expedia*-ruling Outhuijse 2014, p. 395

[131] In the period from 2005-2015, the CBB has decided on 114 competition cases (according to www.rechtspraak.nl)

[132] Ottow 2009, p. 45

[133] First in District Court of Rotterdam, 18 June 2003, ECLI:NL:BROT:2003:AH9702 (*Bredase Notarissen*); and later in the case District Court of Rotterdam, 17 July 2007, ECLI:NL:BROT:2007:AY4928; and also affirmed by the CBB in the case CBB, 8 April 2010, ECLI:NL:CBB:2010:BM1588

[134] CBB, 7 December 2012, ECLI:NL:CBB:2005:AU8309 (*Secon*), par 6.5. In *Secon,* a distinction is made between qualitative (the capability of the decision) and quantitative (market share) appreciable effect. In general, only the quantitative appreciable effect is reviewed. See Outhuijse 2014, p. 392-393

[135] See also Lavrijssen 2009, p. 183

[136] *Secon*, par. 6.5 "Het College stelt vast dat in de beslissing op bezwaar daarmee onvoldoende tot uitdrukking is gekomen dat de NMa in aanmerking heeft genomen de concrete situatie waarin de overeenkomst effect sorteert. Gelet hierop is het College van oordeel dat de rechtbank in de aangevallen uitspraak ten onrechte vernietiging van de beslissing op bezwaar in zoverre achterwege heeft gelaten, aangezien deze in strijd met artikel 7:12 Awb niet op een deugdelijke motivering berust."

[137] CBB 28 October 2005, ECLI:NL:CBB:2005:AU5316 (*Modint*)

In the post-*Expedia* era, there seem to be divergent understandings whether the appreciable effect still needs to be proven.[138] The most recent case-law of the CBB on competition, dating from December 2014, interprets the *Expedia* and *Cartes Bancaires* rulings. [139] In three cases on the *Executieveilingen*, the District Court of Rotterdam explains that the *Cartes Bancaires*-ruling comprises that the competition authority should demonstrate how the agreement is capable of restricting the competition. In other words, the Court should review whether the Authority has *good grounds* to decide – on basis of the elements involved in the decision and looking at the objectives, used wordings and context of the agreement under investigation – that the agreement has a negative impact on the competition and therefore constitutes a restriction by object.[140] Moreover, the Court explains extensively why the way in which the analysis is executed, should be considered sufficient.[141] Notably, this approach of the qualification of the agreement equals the *Tetra Laval* standard of review. It must be remarked that in the ruling of *Cartes Bancaires*, the ECJ merely established how the court can qualify the agreement to be a restriction by object. In this qualification, there is no room for quantitative appreciability. However, this does not mean that the position of the undertakings on the market – the quantitative appreciable effect of the conduct under investigation – should not or should be investigated in national legal order. There can be drawn different conclusions in this regard.[142] The Rotterdam District Court expresses the opinion that in addition to the qualitative appreciable effect, the quantitative appreciable effect should reviewed by the Court. However, instead of reviewing whether the ACM could have come to the conclusion that the agreement had a quantitative appreciable effect, the Court merely states that the appreciable effect is necessarily given, because the agreement under investigation covers the entire Dutch territory.[143] In this regard, it does not assess the ACM's economic analysis.

5.4.2. Review of the complex facts assessment in merger decisions

Merger decisions are different from cartel decisions, as they seldom impose a fine.[144] Moreover, economic assessments for the establishment of merger decisions may be considered even more complex because of their prospective nature, while at the same time, these analyses have an even bigger influence on the decision. The Dutch administrative courts traditionally review these economic assessments in a

[138] Compare Preliminary Relief Court of the District Court of Rotterdam, 1 august 2013, ECLI:NL:RBROT:2013:5927 and District Court of Rotterdam, 20 March 2014, ECLI:NL:RBROT:2014:2045, par.53; District Court of Rotterdam, 12 June 2014, ECLI:NL:RBROT:2013:4689, par. 14.5; See also several rulings of the District Court of Rotterdam with regard to the *flour cartel*. District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:5830, par. 6.45; District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:4849, par. 6.41; District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:5884, par. 6.45 and District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:5822, par. 7.4

[139] District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10174, par. 10; Similar District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129, par. 10.2;

[140] District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10173; District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10174, par. 10; District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129, par. 10.1;

[141] District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129, par. 10.2; the District Court explains that the ACM has assessed how the market under investigation exactly works and how the conduct of the undertakings decreased competition and changed the market structure.

[142] Gerbrandy 2009, p. 278

[143] District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129, par. 10.2

[144] In the field of mergers, there can only be applied a fine for not reporting an intended merger (Article 34 CA). However, these decisions are not common.

way that holds between marginal and intense.[145] This means that the ACM must have made it 'sufficiently likely' that the proposed merger would have the effects to restrict the competition. This standard of review is corresponding to the *Tetra Laval* standard of review. After the ECJ's ruling, the Dutch Competition Courts used to the wordings of the *Tetra Laval* -standard of review in *Nuon/Reliant*.[146] Thus, in line with *Tetra Laval*, the Dutch courts review in merger decisions whether the ACM has made it sufficiently plausible that the decision taken is the right decision, considered the facts of the case. In this case, the CBB found that the ACM had failed to make it sufficiently plausible that the effect of the proposed merger would be restricting the competition. To that end, it should have provided an economic assessment.

5.5.SYNTHESE

Both the ECJ and the Dutch Competition Courts review whether the Competition Authority has proven that the allegedly competition restricting conduct or agreement exists in a rather intensive way. This comprises the establishment of the facts. However, the Competition Authority has a margin of discretion to establish the effect of this behaviour. Because this commonly involves complex economic assessments, the Courts apply a more restrained review on the facts assessment. The conclusion can be drawn that the *Tetra Laval* standard of review has been copied by the Dutch courts in both merger and cartel cases. In merger decisions, the approach which was traditionally used before the ECJ's ruling even corresponds to the *Tetra Laval* standard. The Court examines the ACM's assessment of complex economic facts to answer the question it could reasonable have come to its conclusion.[147]

With respect to cartel decisions, recent community case law shows that the standard of review is still developing as long as the legal conditions keep developing. *Expedia* and *Cartes Bancaires* provide that an agreement can be qualified a restriction by object, if this follows from the nature of the agreement *per se*. If that is the case, and the agreement influences the trade between Member States, the conditions of Article 101(1) are met. There is no need to demonstrate the qualitative appreciable effect. In principle, it is assumed that the qualification does not involve a margin of discretion.[148] Therefore, a considerably intensive review is desirable in the light of effective legal protection. However, this seems not to be the practice of the ECJ nor the Dutch courts. The difference between establishment of the facts and the assessment of the facts is difficult to make. As a consequence, the CBB and District court seem to apply a more restrained review of the qualification of the restriction by object, cautious to interfere with the ACM's margin of discretion.[149] The ECJ provides that the court should review whether the Commission

[145] See Lavrijssen & De Visser 2006, p. 119; There seems to be a divergence between the review applied by the District Court of Rotterdam, which reviews intensively, and the CBB, which finds a more marginal review suitable. For instance, compare District Court of Rotterdam 20 September 2000, ECLI:NL:RBROT:2000:AA9482 and CBB 5 December 2001, ECLI:NL:CBB:2001:AD6693
[146] CBB 28 November 2006, ECLI:NL:CBB:2006:AZ3274 (*Nuon/Reliant*); See also CBB 31 December 2007, ECLI:NL:CBB:2007:BC1396 (*Mobiele operators*), par. 9.2 and more recent . District Court of Rotterdam 27 February 2014, ECLI:NL:RBROT:2014:1323, par. 3.3; The *Tetra Laval* standard of review for merger decisions has been confirmed in ECJ 25 February 2006, Case T-209/01 en 210/01 (*GE Honeywell*)
[147] Stijnen 2012, p. 122
[148] Gerbrandy 2009, p.290
[149] Lavrijssen, Eijkens & Rijkers 2014, p. 15

had good grounds to draw the conclusion upon which the decision in based. This approach is followed by the District Court of Rotterdam.

Moreover, it appears that an error in the substance of the decisions is more likely to lead to the annulment of the decision on the basis of procedural principles than on the basis of unreasonableness. Even when the facts assessment is addressed, this is often dismissed because of failure to live up to the duty to state reasons.[150] Lastly, it should be remarked that the confusion with regard to the interpretation of the requirement of appreciable effect in national context should have been a reason for the national courts to ask a preliminary question. It is remarkable that this has not yet been done.

6. EFFECTIVE REVIEW OF UK ENERGY REGULATION

This chapter trespasses the borders of the Dutch system of review. Because the UK is an EU member state as well, the UK national legal order is also subject to EU legislation.[151] Therefore, the UK has also implemented the third energy package, establishing independent authorities.[152] Moreover, corresponding to the Dutch implementation of the Energy Package, the UK Government understands Article 37(17) of the Gas Act as that the suitable mechanisms required "could be a court or other tribunal empowered to conduct a judicial review".[153] Although the *Tetra Laval* case has only been cited once by the Competition Appeal Tribunal (hereafter: CAT) - in a telecommunications case[154] - several authors assume that the standard applied in the UK corresponds with the *Tetra Laval* standard.[155] This chapter investigates whether that actually is the case and therefore demonstrates how the duty to provide effective review has been interpreted in the UK by the Administrative Division of the High Court and the Competition Commission (the latter is since April 2014 emerged in the new CMA, see below).

6.1.THE UK SYSTEM OF ECONOMIC REGULATION OF THE ENERGY MAKRET

Contrary to the Netherlands, the UK knows a more separated system of administrative bodies endowed with tasks of economic regulation of specific sectors (the Ofgem for energy[156])on the one hand and general competition supervision on the other hand (Competition and Markets Authority CMA.[157] The Ofgem's regulation aims at "*promoting value for money, promoting security of supply and sustainability*

[150] For example *Secon*, par. 6.5 and *Modint,* par. 7.4

[151] This research is limited to England and Wales, because judicial review is procedurally different in Ireland and Scotland. See M. Clarke and T. Cummins, 'Judicial Review in the Energy Sector: The England and Wales perspective', *International Energy Law Review*, Issue 6, 2011, p. 244

[152] See 'The implementation of the EU Third Internal Energy Package', par 2.5. Found at www.gov.uk ; Explanatory memorandum to the electricity and gas (internal markets) regulations 2011, no. 2704

[153]*Streamlining Competition and Regulatory Appeals,* Annex I: Appeal Requirements in European Legislation

[154] *Hutchison 3G (UK) v. Office of Communications* [2005] CAT, par. 39 and further.

[155] See C. Graham, 'Judicial review of the decisions of the competition authorities and economic regulators in the UK, in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation,* Groningen, Europa Law Publishing, 2009, p. 243 and 261

[156] Often referred to the overarching body of the GEMA, which provides Ofgem a strategy and policy priorities.

[157] Section 26 Enterprise and Regulatory Reform Act 2013. The CMA has entered into force at the 1th of April 2014. Still, the Ofgem and the CMA may have concurrent competition powers in competition-cases in the energy sector. See *Memorandum of Understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority*, 11 August 2014, found at www.gov.uk.

(…), the supervision and development of markets and competition and regulation and the delivery of Government schemes".[158] To this end, the Ofgem provides licenses and industry codes and supervises whether companies live up to their license conditions, their duties of consumer protection and competition legislation.[159] Subject to this regulation are the system operators.[160]

6.2.THE UK SYSTEM OF APPEAL OF REGULATORY DECISIONS

6.2.1. REGULATORY DECISIONS AND APPEAL ROUTES

As provided by Table 1 attached in annex 1, there can be drawn a distinction between ex-ante and ex-post regulatory decisions. Ex-ante regulatory decisions are set in advance, such as price or access charge controls and decisions setting license conditions or modifications thereof. Price controls are used to limit the prices charged by network operators by establishing the allowed revenues. In this way, the Ofgem incentivizes the operators to act in an efficient manner. Access charge controls establish how much network operators may charge to grant access to the net. Furthermore, licenses allow particular companies to operate in the energy sector: Any undertaking which wishes to supply, distribute, transmit or generates electricity may not do this without a license. Licenses establish which activities are allowed and which conditions they must meet. Also, the industry codes and standards – which provide rules with regard to market operation and connection and access to energy networks – apply to the licenses.[161] The modification of a granted license is a decision as well. In addition to ex-ante regulatory decisions, there are ex-post regulatory decisions, comprising regulatory enforcement, in particular for breaching license conditions. The appeal body to address depends on the decision the party wishes to challenge. To start, for the review of price or access controls and license modifications the CMA is admissible. [162] The same applies for industry code modifications. In case a party aims at challenging a regulatory enforcement decision the High Court is the appeal body to address (see annex 1).

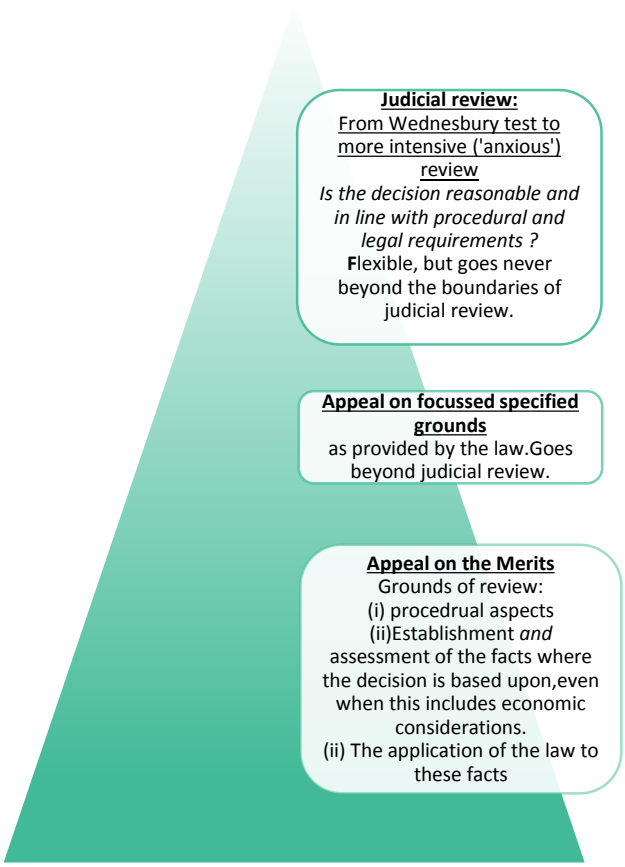
The UK system of appeal is essentially different from that of the Netherlands. In the UK, a distinction must be drawn between an action for judicial review and an appeal on the merits. Judicial review is defined under UK law as: "*A decision, action or failure to act in the exercise of a public function"*[163]*.* Hence, the judicial review procedure aims at controlling the legality of administrative actions. In contrast, an appeal process, in which the merits of the case are reviewed, provides more grounds and a more intensive review. An appeal on the merits varies from a full review of all aspects of the decision to a more limited review when the law provides the particular grounds on which the decision may be challenged. Judicial review and appeal on the merits are two different paths to walk. However, it is not up to the party to

[158] According to the website of the Ofgem. Guidance on the Powers and duties of GEMA, 19th July 2013, link: www.ofgem.gov.uk/about-us/who-we-are. Accordingly the Ofgem has formulated the themes (i) promoting value for money; (ii) promoting security of supply; (iii) promoting sustainability and (iv) delivering government programmes.
[159] According to the website of the Ofgem. See www.ofgem.gov.uk/about-us/how-we-work
[160] At the national level these are the National Grid Electricity Transmission (NGET) and the National Grid Gas (NGG).
[161] www.ofgem.gov.uk/licences-codes-and-standards
[162] For a long time, the High Court has been the appeal body. This has been changed with the amendment of standard of review from judicial review to appeal in 2011.
[163] Civil Procedure Rule (CPR) 54, Judicial Review and Statutory Review

choose which path is chosen. There must be a statutory basis under UK law to apply for appeal on the merits.[164] Judicial review applies in any case the law is silent on how appeal should take place.[165]

6.2.1.1. JUDICIAL REVIEW

The rationale underlying judicial review can be found in the rule of law. The principle of the rule of law establishes that any actor, including economic regulators, is subject to the law. In other words, NRAs should respect the boundaries of the by the law to them mandated administrative powers and the procedural rules resting on them. According to Clarke and Cummins, in case of judicial review the court *"considers whether decisions were taken fairly, legally, rationally and reasonably. If they were not, the court may cancel the decision and sent it back to the appropriate body for reconsideration."* [166] Therefore, it is argued that administrative decisions must be subject to judicial review.[167] The judicial review procedure takes place in two steps. First, a party needs to file an application for judicial review, which is commonly awarded when the claim has been filed in time (promptly and in any event not later than 3 months) and whether the party has sufficient interest in the decision.[168] Second, if this permission is awarded, the substance of the claim is heard. It follows from case-law that traditionally there can be distinguished three grounds for judicial review.[169] This is referred to as the *Wednesbury*-test.



1) Illegality: the NRA extends it activities beyond its legally mandated powers (it acts ultra vires).
2) Procedural impropriety: The administrative body must comply with the principle of procedural fairness (the rule against bias and the right to be heard).[170]

[164] Graham 2009, p. 244
[165] *Streamlining Regulatory and competition appeals*, p. 15
[166] Clarke Cummins 2011, p. 244; See for the function of judicial review also 'The judge over your shoulder', 2006, Found at: www.gov.uk
[167] J. Arancibia, 'Judicial Review of commercial regulation', Oxford university press, New York, 2011, p. 4:
[168] T. Eldridge and M. Rudd, Demystifying judicial review, 13 August 2009, p. 3. Found at www.lexology.com
[169] *Associated Provincial Picture House v Wednesbury corporation*, 1947 and *Council of Civil Service Unions v. Minister for the Civil Service*, 1985, AC 374
[170] Clarke and Cummins 2011, p. 249

3) Irrationality/Reasonableness: In the *Wednesbury*-case, Lord Greene stipulated that even though the decision is legal and established in line with the procedural requirements, the decision may be unreasonable if *"no reasonable authority could ever come to it".* Later on, the Case of *Council of civil service Unions* provided the conditions for a decision to be unreasonable by stating that an applicant may appeal on the ground that an administrative decision is unreasonable when the decision is: *"So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*[171] Hence, there rests no duty on the court to review the reasonableness. Only when there is a manifest error, the decision may be quashed. It is generally assumed that it is particularly challenging to prove that a decision is unreasonable in the sense of the Wednesbury-test.[172]

The Wednesbury test is assumed to be similar to the grounds of legality review under article 263 TFEU.[173] In addition, judicial review may be sought on other grounds as well. Clarke and Cummins explain that legitimate expectation, which allows a person to rely on a proper indication (explicit statements or prior conduct) that the Administrative body would act in a certain way, can constitute a ground of review. The UK Government recognizes these four grounds of appeal for judicial review as well.[174] Also, Clarke and Cummins argue that the violation of human rights may provide a ground for a – more intensive - judicial review.[175] Subsequent to a judicial review procedure, the parties may appeal the judgment of the Administrative Court at the Court of Appeal. The Court of Appeal assesses whether the judgment can be considered correct in law. Finally, there is the possibility to appeal the Court of Appeal's judgment at the House of Lords. This decision is final.

6.2.1.2. INTENSITY OF REVIEW

The intensity of review determines how restrained or intense the grounds of review are assessed. The application of judicial review may vary from a very restrained Wednesbury-test via a marginal review to a more intrusive review.[176] The intensity of review applied by the court depends on the circumstances of the case.[177] Therefore, the Wednesbury-test is flexible and may provide a more or less restrained review when needed. According to Graham, in case of a judicial review procedure, the intensity of review is at its highest when human rights are at issue.[178] However, even then, the court will not go beyond the boundaries of judicial review. In other words, it will not substitute the assessment of the facts and consider the expediency of the decision.[179] The hereafter elaborated Streamlining proposal also mentions that review may be less restrained when human rights or EU-rights are at stake and emphasizes as well

[171] *Council of civil service Unions*, par. 374 and *Wednesbury,* par. 680.
[172] Lavrijssen & De Visser 2006, p. 121
[173] Article 263 TFEU mentions that the court has jurisdictions in actions brought on grounds of legality, infringement of essential procedural requirements and misuse of powers. Graham 2009, p. 254.
[174] *Streamlining Regulatory and competition appeals*, p. 15
[175] Clarke and Cummins 2000, p. 250
[176] Graham 2009, p. 255; See also Lavrijssen & De Visser 2006, p. 121
[177] Graham 2009, p. 244;
[178] This is sometimes referred to as 'anxious review'. See for example, *R.* v.*Ministry of Defence ex parte Smith* [1996] QB 517; Also *R (on the application of Daly) v. Secretary of State for the Home Department, 2001*.
[179] Graham 2009, p. 244

that a court should refrain from *"second guessing educated predictions for the future that have been made by an expert or experienced decision-maker, such as a regulator*".[180]

6.2.1.3. APPEAL ON THE MERITS

In case of a full appeal on the merits, a court is allowed to consider all aspects of the case in a comprehensive way. Appeal bodies addressed in an appeal on the merits are specialized courts. Therefore, the court has developed expertise and experience with regard to the substance of the case-law, which may comprise complex technical matters. Without this specialized knowledge, the court would not be able to review the assessment of the facts made by the regulator. The streamlining proposal explains that in case of appeal on the merits, an appeal body may annul a decision even though it was in accordance with the law and procedural aspects and it was a reasonable decision to make.[181] Appeal on the merits may also take place in a more limited way when the law provides the particular grounds on which appeal can take place, for example error in fact.

6.3. LEGAL REVIEW OF OFGEM'S DECISIONS IN PRACTICE

6.3.1. CURRENT SITUATION

For a long time, all regulatory decisions were subject to judicial review by the Administrative division of the High Court. However, this has changed in 2011. When implementing the Third Package, the UK Government has concluded that an appeal on the merits should be inserted for price controls and licence modifications.[182] The appeal body to address for appeal is the CMA (See annex 1).[183] According to the UK Government, the former establishment process of license modifications could not ensure independent, timely and expeditious decision-making. This so called collective objection process, in which stakeholders were able to object a decision beforehand, was replaced by a right of appeal for all licensees affected by the proposals.[184] For challenging ex post regulatory decisions, in particular enforcement decisions for the breach of license conditions, parties can apply for judicial review at the High Court.

6.3.2. STREAMLINING REGULATORY AND COMPETITION APPEALS, CONSULTATION ON OPTIONS FOR REFORM

Despite these recent amendment, the *Streamlining Competition and Regulatory Appeals* proposes to change back to the judicial review procedure. In July 2013, the UK government published a consultation document aiming at the streamlining regulatory and competition appeals. In view of the UK government, there should be put a lid on litigation, combating costs and restrictions of businesses' operations. During

[180] *Streamlining Regulatory and competition appeals*, p. 15
[181] *Streamlining Regulatory and competition appeals*, p. 16
[182] The Electricity and Gas (Internal Markets) Regulations 2011. DECC Implementation of EU Third Internal Energy Package Government Response URN 10D/953 paragraphs 2.24-2.26
[183] Before, the Competition Commission was the appeal body for these decisions. Since the merger of the CC and the OFT, this task has been transferred to the CMA.
[184] DECC, Consultation on the implementation of the EU Third Internal Energy Package, July 2010, URN 10D/727, p.57-58

the consultation period, details of stakeholder workshops were added.[185] Subsequently, summaries of stakeholder's views and public responses were published.[186]

In the proposal, the UK Government stipulates that the standard of review is an instrument to create a balance between the possibilities of legal review on the one hand and the interest of effective decision-making on the other hand.[187] Although the Streamlining proposal recognizes that appeal on the merits is an important instrument to effectuate accountability, it also stipulates that appeal entails costs for NRAs and regulated market parties. Moreover, the UK government fears that appeal becomes a way of decision-making per se or an instrument to delay decision-making.[188] Therefore, the proposal states several changes to the current appeal system.

6.3.2.1. KEY MODIFICATIONS OF THE STREAMLINING REGULATORY AND COMPETITION APPEALS

The UK government explicitly acknowledges that *"the right of firms to appeal regulatory and competition decisions is central to ensuring robust decision-making and holding regulators to account in the interests of justice."* [189] Although the UK government itself finds that the appeal regime works quite well, the consultation document proposes several modifications to enhance it further.[190] This thesis primarily addresses the change of the standard of review for appeals of regulatory and competition decisions. The streamlining consultation document proposes to substitute appeal on the merits by judicial review or focused grounds of review provided by the law.[191]

For every kind of decision which is reviewed on the merits, the two options of judicial are given and substantiated.[192] The proposal aims at consultation of stakeholders on these options. Remarkably, the *Streamlining* emphasizes that the important value and possible impact of price control decisions may require that the merits review is retained. It states that: "*Price control decisions are central to the way regulated businesses are operated – they will affect the rate of return on a firm's assets, which in turn*

[185] 'Streamlining regulatory and competition appeals consultation on options of reform – summary of stakeholders views from consultation workshops (24 July 2013 – 1 August 2013)', 6 September 2013. To be found on www.gov.uk/government/consultations/regulatory-and-competition-appeals-options-for-reform

[186] 'Regulatory and competition appeals: options for reform - consultation responses A to H' of 17 September 2013; and 'Regulatory and competition appeals: options for reform - consultation responses I-Z' of 17 September 2013, both to be found on www.gov.uk/government/consultations/regulatory-and-competition-appeals-options-for-reform

[187] *Streamlining Regulatory and competition appeals*, p. 26

[188] *Streamlining Regulatory and competition appeals*, p. 11

[189] HM Government, Department for Business, Innovation and Skills, *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform*, 19 June 2013. To be found on www.gov.uk, p. 4

[190] Further changes proposed by the consultation document are amongst others: (i) limiting the time period in which the CAT must reach decisions. With regard to 'straight forward' cases, the time period will be 6 months, while other appeals have to be decided within 12 months; (ii) More consistent framework of appeal routes of different Regulatory Authorities; (iii) Cases should be solved on the papers as much as possible, keeping oral hearings to a minimum; (iv) Stricter rules on the admissibility of new evidence during appeal are proposed; and (v) A review of the competition Appeal Tribunal in order to increase effectiveness and accessibility of appeals. Hence, the change from review on the merits to juridical review should be considered in combination with other adjustments.

[191] The focused grounds of review address whether the following aspects have been met by the Ofgem: (i) the right procedures have been followed; (ii) The decision is not based on wrong facts; The decision is unlawful; (iii) the decision trespasses the borders of the Ofgem's discretion as provided by its statutory duties; (iv) The decision is based on a unreasonable judgment of the facts**;** and (v) the decision is unlikely to achieve the objective aimed at.

[192] In general, in regard of Energy regulation, a distinction is made between price control decisions and all other kinds of decisions. See p. 39-46

affect investors' decisions. In addition, the economic analysis required for a price cap determination is not only complex, but also involves a substantial degree of judgment on the part of the regulator. There is an argument that providing a merits-based appeal rather than judicial review for price control decisions will create greater regulatory certainty by providing a higher level of scrutiny and accountability for these decisions" Hence, instead of a restrained review because of the discretion in assessment and policy involved – which is often advocated because of the division of powers – the impact of the decision seems leading.

The document provides several goals which underlie the proposed changes.[193] The abolishment of appeal on the merits finds its basis in the ideas of efficiency and consistency. Appeal on the merits-procedures are time- and money-consuming and entail regulatory uncertainty.[194] The consultation document emphasizes that the predictability of regulation can be endangered when the instrument of appeal is used as means of decision making. This can happen when appeal is used as an instrument to delay the decision-making process.[195] Moreover, regulatory certainty creates confidence for investors and is therefore of great influence of an optimal business environment.[196] It is argued that the standard of judicial review is very flexible, because the intensity of the review can be adapted to the circumstances of a particular case.[197] A judicial review concentrates at recognizing errors affecting the material outcome of a judgment, or an unreasonable decision.[198]

6.3.2.2. POINTS OF CRITICS REGARDING THE STREAMLINING

In reaction to the consultation document, a total of 1275 pages of critical consultation responses was send in.[199] A great extent of the criticism referred to the proposed change from appeal on the merits to judicial review. In general, it follows from the summary of stakeholder's view that the following main points of critic can be distinguished:[200]

- Reduced incentives to appeal: According to several stakeholders, the abolishment of appeal on the merits will discourage parties to apply for appeal, since a judicial review is less likely to succeed than appeal on the merits. In particular, a stakeholder suggests that small and medium enterprises (and probably domestic consumers as well) are unlikely to take the risk of appeals under a judicial review standard.

[193] In general, the following goals can be distinguished: (i) to shift the emphasis to identifying material errors; (ii) harmonizing the different appeal routes; (iii) appeal possibilities are made more easily available to the parties affected by the decision; (iv) new objectives of UK Government with regard to the appeal system are inserted; and (v) the appeal system is as efficient as possible, hence reducing time and costs. *Regulatory and Competition Appeals – Consultation on Options for Reform*, p. 4

[194] A.J. Metselaar & P.C. Adriaanse, 'Grensoverschrijdende inning van bestuurlijke boetes - Een verkennend onderzoek naar ervaringen in België, Duitsland en het Verenigd Koninkrijk en mogelijkheden voor internationale samenwerking', WODC, Ministerie van Veiligheid & Justitie, 10 juni 2014

[195] See for example on the Ofcom decision in case of Sky Pay TV, University of Manchester, 'The UK Competition Regime: Regulatory Appeals', link: http://www.policy.manchester.ac.uk/resources/regulation/economic/appeals/

[196] *Streamlining Regulatory and Competition Appeals*, p.9

[197] T. Jones, '*UK government proposes "streamlining" regulatory and competition appeals',* Competition Bulletin, 20 June 2013. Link: www.competitionulletin.com

[198] *Streamlining Regulatory and Competition Appeals*, p. 24

[199] 'Regulatory and competition appeals: options for reform - consultation responses A to H', 17 September 2013

[200] Streamlining Regulatory and Competition Appeals Consultation: summary of views from stakeholder workshops

- No need for safeguarding efficiency: In addition, according to some respondents, appeals are costly and therefore firms don't appeal lightly. Hence, the balancing whether an appeal is worth the costs is already made by the applicant and should not be determined by changing the design of the appeal regime.
- Decreased control of NRAs: Abolishment of appeal on the merits is more likely to uphold wrongful decisions, because the substance of the decision escapes legal review. Moreover, it is less difficult for NRAs to meet the requirements which are subject to judicial review (procedural requirements, reasonableness and legality), than the substantial elements subject to review on the merits. Thus, NRAs may become more focussed on making their decisions 'judicial review proof', instead of focussing at the substance of the case. In addition, several stakeholders commented that the fact that regulators are given significant discretion to reach a decision requires that there is a strong appeal process to control these NRAs. Lastly, it was argued that there may be a greater risk of confirmation bias. In other words, a regulator becomes less willing to alter their initial views in the light of consultation responses if changes are made to the standard of review.
- Wrongful decisions harm economic growth as well: As a consequence of the decreased control of NRAs, economic growth is harmed instead of stimulated.
- Proportionality: It is doubtful whether changing the standard of review is the best instrument to meet the objectives formulated in the streamlining proposal, if it is an instrument at all. Respondents argue that in order to achieve faster appeals, there may be introduced procedural changes first before abolishing appeal on the merits. Also, it is disputable whether judicial review will actual lead to less cases and shorter procedural time periods. One of the stakeholders states that the appeal bodies may have to send more decisions back to the NRA.
- Proposed changes create uncertainty: In 2011, in reaction to the Third Energy Package, amendments to the appeal system have been made.[201] A new appeal-possibility was inserted with regard to license modifications and to provide "an appropriate appeals mechanism from such decisions for affected parties (required by Article 37(17) and Article 41(17) of the Gas Directive)." Recently, a report of the UK Government provided that appeal on the merits should not be changed.[202] Therefore, new amendments may result in uncertainty.

6.4. CASE STUDIES ON THE STANDARD AND INTENSITY OF REVIEW IN THE UK

Because the introduction of the appeal on the merits only dates from 2011, the effect of this system has not yet been properly tested. Therefore, the empirical research in the UK mainly provides an insight in the question how judicial review takes place in practice and what this means in the light of effective legal protection. Thus, the following case-studies will demonstrate how the judicial review standard applied in the past approximately 10 years has functioned. In that way, it is demonstrated whether the critics of the respondents is legitimate and whether this should lead to an appeal on the merits.

[201] Explanatory memorandum to the electricity and gas (internal markets) regulations 2011, no. 2704, p. 5-6
[202] D. Black, G. Harman and B. Moselle, 'Should energy consumers and energy network users have the right to appeal Ofgem price control decisions? If so, what form should the appeal process take?', *LECC* 7 October 2009

6.4.1. METHODOLOGY

The cases subject to scrutiny in this paragraph are selected on the basis of the following elements: (i) The appeal or applications of judicial review aims at a decision of the Ofgem; (ii) the Ofgem-decision is of regulatory nature. Cases aiming at challenging competition decisions, both ex-post and ex-ante, are excluded because the research focuses on the field of energy regulation, and (iii) the decision has been taken in the period in the period of 2003-2015. This period roughly corresponds with the period used in the research of Lavrijssen, et al. (2002-2013). [203]

6.4.2. CASE STUDIES

In the period from 2003-2015, ten regulatory decisions of the Ofgem have been challenged for legal review.[204] In most cases judicial review has been applied (eight out of ten). Of the two remaining cases, one appeal has been withdrawn. Therefore, the previous twelve years, merely one Ofgem-decision has been subject to appeal on the merits.

6.4.2.1. JUDICIAL REVIEW

It follows from the law whether interested parties may appeal or apply for judicial review. In case of judicial review, the claim may be based on one (or more) of the grounds for judicial review. Case law shows that if parties try to expand the boundaries of judicial review, the Court is unlikely to cooperate.[205] Below, the several grounds of review are addressed to sketch a picture of legal review in the UK.

6.4.2.1.1. REVIEW OF THE REASONABLENESS OF THE DECISION

In most cases where irrationality is brought up as ground of appeal, a rather restrained review is applied. The Court has shown to be cautious in interfering with the discretion of the NRA. In the case of *R (on the application of Exoteric Gas Solutions Ltd.) v. Gas and Electricity Markets Authority*, the Court explicitly refers to the expertise and 'a broad discretionary area of judgment' of the Ofgem. Moreover, In the Judgment of *R (on the application of Scottish Power Energy Management) Ltd v Gas and Electricity Markets Authority*, the Court ruled that the Ofgem had made a reasonable decision simply because the decision was in the range of decisions which could be considered reasonable. In addition to that, the Court considered it relevant that the Ofgem had based its decision on a sufficient amount of information to make the decision in a rational manner. Reviewing the facts where the decision was based on would go beyond the boundaries of a judicial review procedure. The Court appeared to find the requirement of reasonableness easily met and it did not go into the substance of the decision.

---

[203] The supplementary written evidence submitted at the Energy Climate Change Committee – Consumer engagement with energy markets, providing an overview of the challenged decisions of the Ofgem in the period 2002-2012 and the Streamlining document have provided helpful guidance for finding case law. Energy and Climate Change Committee - Consumer Engagement with Energy Markets, Supplementary written evidence submitted by Sarah Harrison, Ofgem, 30 October 2012. Available at www.publications.parliament.uk

[204] The number of appeals of regulatory decisions in the energy sector is strikingly low. For example, in the field of telecommunications, in the period of 2008-2012 a percentage of 15% of the cases have been fought, while in that same period this is only 5% of the regulatory decisions of the Ofgem.

[205] See for example *Western Power Distribution v. Gas and Electricity Markets Authority* and *R (on the application of Exoteric Gas Solutions Ltd.) v. Gas and Electricity Markets Authority.* The Court seems to draw the parties' attention to the fact that the proceedings are not an appeal on the merits, but a judicial review application. In this way, the court explains why it should refrain from assessing particular aspects, such as the proportionality of the decision.

However, the flexibility of then Wednesbury-test is demonstrated in the case of *R (on the application of Infinis plc and Infinis (Re-gen) Limited) v Ofgem*. In this case, applicants claimed that the Ofgem had an erroneous understanding of the law. Interpretation of the law can only lead to annulment of the decision if the wrongful understanding of the law constitutes a manifest error. The Ofgem decided to refuse applicants a certificate, which was based on a wrongful understanding of the law. Thereby, the Ofgem violated the applicant's right to possessions (section 8 of the UK Human Rights Act 1998 and article 1 of protocol 1 of the European Convention of Human Rights). Therefore, a more intensive review of the substance was applied in this case.

6.4.2.1.2. REVIEW OF THE LEGALITY AND PROCEDURAL IMPROPRIETY

With respect to the other grounds of review, the Court has proved to be less cautious. In the case of *R (on the application of Scottish Power Energy Management) Ltd v Gas and Electricity Markets Authority*, the Court acknowledged that the Ofgem had failed to provide sufficient reasons in a response on the complaint of applicants. However, since this duty did not exist in the decision under appeal, the Court upheld the decision. The Court appears to weigh the interests of time and fairness and explains that a different explanation would make decision-making a very time-consuming process. Moreover, in *R (on the application of Teesside Power Ltd and others) v. Ofgem,* the Court decided that the Ofgem had trespassed the boundaries of its mandate and therefore acted illegal.

6.4.2.2. REVIEW ON THE MERITS

There has been one decision subject to appeal on the merits. In the case of *E.On UK plc and GEMA and British Gas Trading Limited, Decision and Order of the Competition Commission*, E.On challenged the decision of the Ofgem to agree with the proposal of the National Gas Grid Operator to modify the Uniform Network Code. That the grounds of appeal are more extensive in case of appeal becomes clear: applicants state that i) the Ofgem has acted in breach with the them mandated tasks and duties; ii) the decision would not have the effect aimed at; iii) the decision does not give appropriate weight to several matters and purposes; iv) decision is based on an error of fact; and v) the decision is wrongful in law. Remarkably, this is the only decision from the previous 12 years explicitly referring to consumer interests. The Competition Commission quashes the decision because the Ofgem failed to regard consumer interests in the establishment of the decisions by stating that "*the Decision did not present an adequate basis for the conclusion that the costs of reform to industry parties and to consumers will be outweighed by benefits to consumers"*[206] Moreover, the CC agreed with applicants that the cost-benefit analysis was deficient and transparency was lacking with regard to the actual benefits the reform would entail.

6.4.3.FINDINGS IN LITERATURE

The conclusion that the judicial review applied by the administrative court in the UK can be considered rather restrained is confirmed in literature.[207] Arancibia speaks of a non-interventionist approach.[208] Also,

[206] E.On UK plc and GEMA and British Gas Trading Limited, Decision and Order of the Competition Commission, par. 7.12
[207] C. Scott 'The Juridification of Relations in the UK Utilities Sector', in Commercial Regulation and Judicial Review, 24. See also Prosser, Tony, 'The Powers and Accountability of Agencies and Regulators', in English Public Law, David Feldman (eds.), (Oxford: Oxford University Press, 2004) 296.
[208] Arancibia, 2011, p. 6-7

the comment is made that it appears that UK Courts attach convincing value to considerations of respect for the NRA's expertise, institutional autonomy and administrative efficiency.[209] By means of this approach, the courts prevent to interfere with the economic regulatory policy. However, as a consequence, it appears that the High Court attaches more value to the interests of the Ofgem, than those of applicant. The grounds review leave only a little room for safeguarding consumer interests which are not safeguarded by legality or procedural requirements. In practice, the reasonableness test seems to be interpreted as 'the Ofgem is right in its decision, since it is an expert body with broad discretion, unless the decision is evidently not a decision which would have been in the range of decisions open for the Ofgem'.

6.5.SYNTHESIS

It appears that the landscape of the legal review system in the UK is still in constant movement. Although the comprehensive critics provided by consulted parties rises doubts whether the Streamlining proposal will be followed by actual modifications of the standard of legal review, the UK appears to be still searching for a balance between accountability, optimal pursuance of justice and uniform procedures for different sectors on the hand and lower costs, legal certainty due to faster procedures and safeguarding the independency of NRAs on the other hand.

The restrained review of the Ofgem decisions shows that a step back to the judicial review procedure, as proposed by the Streamlining, would result very minimal possibilities of effective review. However, there can be found case law in which the boundaries of the Wednesbury-test are expanded to a more intensive review. For example, in case of human rights. Moreover, there are benefits of the High Court's approach as well. As discussed, a judicial review procedure is less complicated and therefore not as time-consuming as an appeal on the merits procedure. Whether these benefits offset the drawbacks is critically reviewed by the stakeholders.

It seems that the High Court has not concerned the European Court's view in *Tetra Laval* in energy regulation, since it does not review the Ofgem's establishment and assessment of the facts underlying the decision.[210] The fact that one of the judgments shows a more intensive review in the case of human rights, may be hopeful, but should be considered an exception. In the one case which was appealed on the merits, the CMA refers to consumer interests. In fact, this standard of review seems to correspond to the good grounds-standard. The CMA states: "*the Decision did not present an adequate basis for the conclusion that the costs of reform to industry parties and to consumers will be outweighed by benefits to consumers".*

Moreover, one may wonder why merely 10 decisions Ofgem regulatory decisions have been challenged the previous decade. To put this in perspective: for the period 2008-2012, this was only 5 percent of the total amount of decisions provided by the Ofgem.[211] Possible answers can be found in a lacking need for appeal because stakeholders are satisfied with the Ofgem's decisions. This can be the result of sufficient

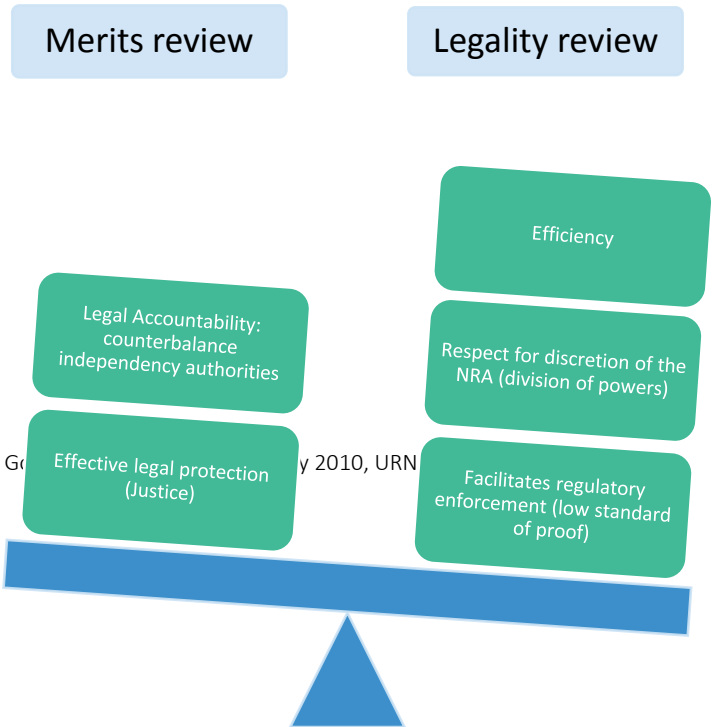
[209] Arancibia 2011, p. 6-7 and Graham 2009, p. 244
[210] Graham 2009, p. 258
[211] *Streamlining Regulatory and competition appeals*, p. 19

consultation during the establishment process of decisions, which creates a market-wide support. However, it is also possible that legal review is not an attractive instrument because of the costs, time and expertise involved. It is remarkable that all applications for judicial review are brought before court by energy suppliers and network operators. There cannot be found one case in which a consumer or consumer organization filed a claim. This may be explained on the same grounds as the low number of appeals as they may play an important role in consultations, but also in the requirement of legal standing. Are consumers allowed to challenge regulatory decisions of the Ofgem? The same applies for consumer organizations. These representative organisations can play an essential role in safeguarding consumer interests. Indeed, they are more likely to apply for legal review than individual consumers because of the presence of (more) expertise, money and time.

Lastly, it must be remarked that the body of appeal is of importance as well. It is comprehensible that judicial review can be executed by the general administrative court, as it includes no assessment of substantive (technical and complex) elements of the decision. In that light it is not surprising that the one ground of review which touches the substance of the decision - the reasonable-test - is applied in a very cautious way: the High Court is not specialist and therefore not the right body to decide about the substance of the decision. In contrast with competition review, which is done by the CAT, the CMA is here the admissible appeal body for appeal on the merits. The question is what consequences this entails. The consultation of the implementation of the Third Energy package in the UK shows that almost all stakeholders agreed with the proposal that the CC was considered the best possible appeal body.[212] This is primarily because of the experience of the CC. Moreover, the CMA is an independent body. However, the CMA is not a court, but an administrative body. Therefore, the question raises whether this tasks should not better be endowed to the CAT. In may not be surprising that the *Streamlining* proposes to "*move the jurisdiction for energy code modification appeals from the Competition Commission to the CAT, to benefit from the CAT's expertise in hearing adversarial appeals on regulatory matters*".[213]

7. REFLECTION: HOW IS EFFECTIVE REVIEW BEST SERVED?

Article 37(17) of the Electricity Directive leaves leeway to Member States and national courts with regard to how review should take place in order to be considered effective in the light of



[212] DECC, 'Implementation of the EU Third Internal Energy Package - G y 2010, URN 2.19

[213] *Streamlining Regulatory and competition appeals* p. 53

the right to effective legal protection as provided by Article 19 TFEU. In particular the standard and intensity of review applied to the assessment of complex economic facts seems to diverge amongst different Member States and sectors. The question how the administrative court should review the complex facts assessment underlying regulatory decisions can be visualized as a balance. On the one side of the balance there is intensive review, aiming at effective legal protection of energy consumers and accountability of NRAs. On the other side of the balance, there is marginal review, pursuing the separation of powers, effective regulatory enforcement and efficiency.

This chapter provides a reflection on the previous chapters. How should the differences between the review of in the energy decisions in the Netherlands and the UK, and between the Dutch administrative Court's review in energy and competition cases be valued? Can the CBB learn something from other standards of review? To that end, first the advantages and disadvantages of the demonstrated possibilities are assessed. Second, this chapter provides a normative approach on the role of the administrative court: what position should it occupy in economic regulation, and how can this position be realized? Finally, taken this into account, the question is answered how the CBB can meet a balance between efficiency, respect for the ACM's discretion and effective regulation on the one hand and legal accountability and of course effective legal protection when reviewing the ACM's energy decisions.

7.1.THE LEGAL COMPARISON: A BIRD'S EYES VIEW

In general, it can be assumed that the court should fully and intensively review whether the authority has lived up to the principles of good administration and followed the right procedures. [214] Though, it may be doubtful whether this is actually done in practice (par. 4.2.1). In contrast, literature and practice demonstrate different opinions with regard to review of the substance. In particular the part of the decision to which the NRA has a margin of discretion, namely the assessment of complex economic facts.

The Wednesbury-test seems to be the most restrained standard of review. Only when a decision is blatantly unreasonable, the decision will be quashed. However, the interpretation of the judicial review test in the UK is more flexible in practice. In fact, the standard of judicial review corresponds to the legality test. Case studies show that judicial review offers room for a more intensive review when needed. However, it will always remain a review of the legality. Therefore, it never goes so far to substitute the facts assessment of the decision, nor the balancing of different interests. The subject of standard of review is *hot topic* in the UK. In 2011, the UK Government has substituted the judicial review procedure for price controls and license modifications by appeal on the merits. More recent, the *Streamlining* proposes to change the appeal on the merits back to a judicial review procedure. However, remarkably, the UK Government acknowledges in the *Streamlining* that it can be argued to preserve the appeal on the merits for this particular category of decisions. It considers the impact of price controls and license modifications of such influence, that a merits appeal can be considered be defendable. The fact that the insertion of the merits review has only taken place four years ago makes it difficult to draw conclusions on the differences between these standards of review in practice. However, in general, it should be

[214] Gerbrandy 2009, p. 110

assumed that judicial review clearly refrains from assessment of the facts. In contrast, the one case in which the decisions has been reviewed on the merits demonstrates the opposite. Whether it is coincidental or not, exactly in this case, the court concludes that the Ofgem failed to duly take consumer interests into account.

The Administrative Court's judicial review of Ofgem's decisions seems to correspond to the CBB's interpretation of legality review in energy decisions. The case studies of the CBB's review of energy decisions show a recent shift from rather restrained and limited review the past decade, to a more full review in the two most recent cases. In older case-law, the CBB regularly refers to the margin of discretion of the ACM when reviewing several elements of the decision. By doing so, it refrained from actual scrutiny of the substance of the decision. Therefore, the CBB did not assess whether the interests of energy consumers had been safeguarded by the ACM. Moreover, case studies even raise the question whether the manifest-error test is actually executed by the CBB. In the cases on the *National Gas transmission net regulation*, the CBB reviewed the assessment of the facts in a very restrained way and put heavy evidential burdens on appellant to prove the unreasonableness of the decision. In other words, the CBB omitted to review the reasonableness of assessment underlying the decision, while there were several indicators that the ACM's decision was not reasonable. Hence, the conclusion can be drawn that the CBB failed to live up to its duty to secure effective legal protection. More recent case-law demonstrates less restrained review of the assessment of the facts. However, it also shows that even when the CBB addresses the assessment of the facts by the ACM, this will not always result in an annulment of the decision on the basis of the substance of the decision. In the case of 5 March 2015, the CBB criticized the substance of the ACM's decision, but chose to quash the decision on the basis of the duty to state reasons.

The CBB's review in competition shows a contrasting practice. The CBB provides a rather intense review of the decisions of the ACM. In merger decision cases, the CBB's practice corresponds to the *Tetra Laval*-standard of review. Therefore, the economic analysis of the ACM is reviewed to investigate whether the ACM has *good grounds* to come to the decision. To that end, the ACM should provide a sound economic analysis. Also in cartel cases, the good grounds requirement is used. In *Carted Bancaires*, the ECJ provides that the qualification of a restriction by object involves the question whether the Commission had good grounds to come to the decision that the agreement restricts the completion by object, when looking at the nature of the decision per se. However, the quantitative appreciability, which typically involves more complex economic facts, is reviewed separately, in a more restrained way.

In all three fields of investigation, there seems to be a tendency towards proceduralization of the review of the substance. Even when the Court expresses the opinion that the substance of the case cannot be considered free of errors, the decision is often quashed on the basis of failure to state reasons. Lastly, it should be noted that the study demonstrates that the grounds of review seem rather identical in practice. The CBB applies a judicial review, just like the High Court until recently. However, the intensity of the review causes disparities between different practices.

7.2. ADVANTAGES AND DISADVANTAGES OF DIFFERENT STANDARDS AND INTENSITIES OF REVIEW

Effective review comprises a balancing between different aims and interests of effective legal protection. Both from an individual (consumers) and a more general point of view, there can be distinguished different points of interest. One may argue that this balancing should *inter alia* take legal certainty, efficiency, justice, effective regulation and legal accountability into account. A more restrained review of the facts assessment is defendable for different reasons. To start, a restrained review is less time and money consuming than an intense review. Obviously, the court needs more time to substitute the NRA's facts assessment than a manifest error test, especially when the facts are complex. This is one of the main arguments brought forward by the UK government in the Streamlining for abolishment of the appeal on the merits. By abolishing a review on the merits, the costs of the judiciary and undertakings can be cut down. In addition – related to this argument of efficiency – the longer legal review takes, the more regulatory uncertainty is created in the market. This may reduce the attractiveness of a legal order to invest in.[215] In particular when the substance of the decision can be completely revised after legal review because the Court should review the assessment of the facts, regulatory uncertainty is increased. Indeed, until the legal review has taken place, regulation can still change. In this regard, the Streamlining notes that a merits review can be used as means of decision-making. Moreover, Gerbrandy argues that a restrained review can be suitable for reasons of efficiency, for example when the decision has already been subject to assessment in first instance.[216] However, it may be argued that the argument of efficiency should not weigh too heavy, as the consideration whether an appeal is worth the costs is already made by the applicant and should not be determined by changing the design of the appeal regime. Moreover, it can be argued that intensive review creates more legal certainty indeed. When the court comprehensively reviews the decision, it creates clarity with regard to how the legal provision at stake should be interpreted in practice.

In addition, a restrained review does not meddle in with the Administration and therefore respects the separation of powers. The assessment of the facts and balancing interests involves a margin of discretion. It is not up to the court to interfere with that discretion for reasons of separation of powers and lack of expertise at the side of the court. Competition and in particular energy decisions may involve very complex knowledge, which the Court cannot easily master.[217] The importance of sophisticated economic models and analyses has increased to establish decisions. Therefore, the task of courts reviewing competition and regulatory decisions has recent years become more and more complex. This pleas for a restrained review of the assessment of complex economic facts.

Lastly, a very intensive review entails a heavy standard and burden of proof: when the court thoroughly scrutinizes whether the assessment of the facts has taken place in a correct manner, the authority needs a stronger basis for the decision. However, it may be disputable whether it is desirable that the Authority

[215] A.J. Metselaar & P.C. Adriaanse, 'Grensoverschrijdende inning van bestuurlijke boetes - Een verkennend onderzoek naar ervaringen in België, Duitsland en het Verenigd Koninkrijk en mogelijkheden voor internationale samenwerking', WODC, Ministerie van Veiligheid & Justitie, 10 juni 2014
[216] Gerbrandy 2009, p. 111
[217] Gerbrandy 2009, p. 120

bears a very heavy burden of proof. It seems that the digitalization of data has made it more difficult to obtain physical proof of violations of competition law. Therefore Gerbrandy offers that the standard of proof should not be too high. Consequently, the standard of review cannot be too high either.[218]

However, this brings us right away to the benefits of intensive review. It can be assumed that the more intensive the review applied, the less likely it is that a wrongful decision will be made and after review be upheld. In the end, this is what effective legal protection aims at: justice for consumer and other stakeholders and accountability of NRAs. Otherwise, the rights conferred on them as follows from both national and EU law, would be illusionary. For actual justice, an as intensive review as possible is needed. Indeed, the less grounds are reviewed and more cautious the assessment takes place, the likelier it is that a wrongful decision will be upheld by the court. As a consequence of the decreased control of NRAs, more wrongful decisions can be upheld and economic growth is harmed instead of stimulated. Moreover, the NRA may respond to the less intensive review of the substance by ensuring that the procedural part of the decision is in order because the chances are little that the decision will be quashed on the substance. Hence, restrained review may lead to decisions that are less well substantiated from a substantive perspective.

Lastly, a very restrained review entails that only in case of a clear error in the substance of the decision, annulment will follow. Hence, the parties bear a substantial risk that the application for legal review will not succeed. This may discourage parties to go to court. In particular small and medium enterprises (and probably domestic consumers as well) may find the burden of the risk too heavy.

7.3.THE ROLE OF THE ADMINISTRATIVE COURT

Lavrijssen et al. draw the conclusion that the CBB should apply a more intensive review of the substance of the case in order to provide effective review. The question is however, how intensive can and should intensive review be? In can be argued that the balance between effective legal protection and discretion of the authority lies there where the effective competition is achieved.[219] This means that in some cases a more restrained approach is suitable than in others. How should this be interpreted for energy decisions? The intensity of review courts apply on the assessment of the substance of the decision, depends on the role the administrative court plays with respect to the administration and in the whole of economic regulation. As the commission stipulates in *Tetra Laval: "The standard required is likewise different in nature inasmuch as it transforms the role of the Community Courts into that of a different body which is competent to rule on the matter in all its complexity and which is entitled to substitute its views for those of the Commission."*[220]

In this respect, there are two different understandings of the role of the administrative court.[221] On the one hand the court which must ensure that the correct facts have lead to a correct decision and investigates the assessment of the facts. On the other hand the court which focuses on the question

[218] Gerbrandy 2009, p. 90
[219] P. Kalbfleish, 'Tien jaar Mededingingswet: van 'The Paradise Lost' naar 'Met Recht Markt'. In: P. Kalbfleisch et al. (Eds.)*Beschouwingen over 10 jaar Mededingingswet en 10 jaar NMa*, p. 27
[220] *Tetra Laval,* par. 27
[221] Gerbrandy 2009, p. 111

whether the authority has duly gathered the facts and merely reviews whether the procedural requirements with regard to the establishment of the facts has been respected by the NRA. Which role should the court play to provide effective legal protection of energy consumers?

7.3.1. THE BOUNDARIES OF EFFECTIVE REVIEW: THE RULE OF LAW AND SEPARATION OF POWERS

When looking at the benefits and drawbacks of the available standards and intensities of review, the outer frame is clearly determined by the rule of law. The legal review should at least ensure that the Authority lives up to the law. This is a legality review. However, should the review go further than that? The principle of division of powers requires that the review will not extend to the substitution of the facts assessment. This principle is fundamental to the democratic state. One should not put the division of powers aside too easily. In relation to this aspect, it should also be noted that a substitution of the facts assessment is only possible if the Court has adequate expertise and (financial) means to execute an assessment of the complex economic facts. In practice, this will often be problematic. Another important reason to refrain from such a broad and intensive review is that it is indeed very time-and money consuming. Therefore, the substitution of the assessment of complex economic facts should solely take place if there are compelling reasons to do that. The *Streamlining* considers that the possible impact of price controls and license modification can be considered such a compelling reason. One may argue that a review on the merits is defendable if otherwise the right of effective legal protection cannot be safeguarded. Still, for the reasons mentioned, this thesis emanates from the starting point that the Authority's discretion should be impeded to a minimal extent.

7.3.2. HOW TO ADDRESS THE WEAKNESS OF LEGALITY REVIEW?

Hence, the question arises whether the right to effective legal protection can also be ensured by means of less extensive legal review. Can the Court who reviews whether the Authority has followed the right procedural requirements live up to its duty to provide effective review? This legality review comprises a restrained review of the assessment of complex economic facts in order to preserve violation of the authority's discretion. As a consequence, the standard of proof is lowered. This is a considerably weak point of legality review. It creates the opportunity for Authorities to – as long as they live up to the procedural requirements – provide decision on a poor substantial basis. At the same time, the Court cannot adequately supervise this part of the decision-making. This is also reflected by the CBB's case-law in the field of energy. Until 2014, the CBB reviewed the substance of several important regulatory decisions in a rather restrained way. By referring to the margin of discretion, no actual scrutiny of the substance of the decision was applied. Therefore, the CBB failed to assess whether the interests of energy consumers had actually been safeguarded by the ACM.

Nevertheless, the court can decide to take a new role, right in between the two understandings mentioned above. Directions for this role can be derived from the *Tetra Laval* standard. The CBB should also look at the reasonableness of the facts assessment. Did the court had good grounds to take this decision? The Court must review whether the facts assessment did take place in an adequate manner.

This approach is also defendable for the sake of consistency.[222] The facts assessment in competition decisions – especially merger decisions – corresponds to the facts assessment in energy decisions. Moreover, there cannot be thought of any reason to deviate from this approach in energy decisions.

Thus, the complex nature of the facts assessment involved in regulatory decisions require a less intensive review of the assessment of the facts than substantiation of the assessment. However, the interests of justice, legal accountability and effective competition require that wrongful decisions should be corrected. Because the economic assessments play such an (increasing) essential role in regulatory decision-making, the supervision of the NRA's decisions would be eroded if the CBB could only review whether a manifest error has been made. The margin of discretion of NRAs becomes broader to balance different interests, while political supervision has become minimal. If the use of discretion *per se* would entail that the Court is not allowed to review this aspect of the decision, the supervision of NRAs would be seriously eroded. At the same time, a more comprehensive review such as the merits review in the UK and the intensive review in competition would unnecessary interfere with the NRA's discretion.

7.3.3. Full review of the reasonableness of the assessment of economic facts or duty to state reasons?

One remark should be made in this regard. In practice, it seems that this approach still often leads to annulment of the decision on the ground of the duty to state reasons, instead of on the ground of unreasonable assessment of the facts. [223] Logically, the duty to state reasons is closely linked to the reasonableness of the facts assessment.[224] It is probably easier for the court to quash a decision on this ground than demonstrate that the Authority could not have come to its conclusion on the ground of the provided facts assessment. In this regard, Schimmel and Widdershoven speak of proceduralization of the Community Court's application of the *Tetra Laval* standard. [225] In practice, courts do not often provide which facts should have been considered by the decision-maker. Instead, the court answers the question whether the administration has executed 'a thorough and painstaking investigation' when assessing whether the procedural requirements have been met.

The question is whether this can be problematic. Is effective review weakened if the substantial errors are handled as procedural flaws? This approach entails that decisions can be repaired rather easily after being send back to the Authority. Both in the UK and Netherlands and at EU-level the court sends regulatory decisions back to the NRA if it is annulled. In the Netherlands, there exists the possibility of administrative loop for reasons of efficiency. Simple defects of a decision can be repaired by the Authority without being very time consuming. This addresses the need for efficiency and final dispute resolution. However, is there a chance that repairing the failure to provide good grounds by a sound facts

[222] Lavrijssen, Eijkens & Rijkers 2014; See also Lavrijssen & De Visser, p. 114.
[223] Gerbrandy p. 110; Schuurmans 2007, p. 116; See for example *Secon*, par. 6.5 "Het College stelt vast dat in de beslissing op bezwaar daarmee onvoldoende tot uitdrukking is gekomen dat de NMa in aanmerking heeft genomen de concrete situatie waarin de overeenkomst effect sorteert. Gelet hierop is het College van oordeel dat de rechtbank in de aangevallen uitspraak ten onrechte vernietiging van de beslissing op bezwaar in zoverre achterwege heeft gelaten, aangezien deze in strijd met artikel 7:12 Awb niet op een deugdelijke motivering berust."; See also *Boomkwekerijen*
[224] Gerbrandy 2009
[225] Schimmel & Widdershoven 2009, p. 75

assessment results in a substantial different decision? On the one hand, the chances seems low that this will happen: the Authority is not keen to change its own decision. Especially since decision has often already be reconsidered by the NRA in the objection phase. One the other hand, if this happens, there is no longer a simple defect. This may frustrate the administrative loop procedure.

8. CONCLUSION

Considered all above, both practice and literature demonstrate confusion with regard to how legal review should be interpreted in order to live up to the duty to provide effective legal protection. The most striking illustration must be the UK's *Streamlining Proposal*. This consultation witnesses of an ongoing search for what review is best. Review on the merits ensures legal accountability and effective legal protection, while judicial review ensures efficiency, respects the discretion of Authorities and enables effective regulatory enforcement.

Comparing different standards of review and their effect in practice generates the following findings. As a starting point, the rule of law requires that the authority should at least be subject to a legality review. However, the review should not be too broad and intense either. A merits review has several drawbacks, and no convincing advantages when comparing to judicial review. To start, the principle of division of powers should be respected, unless that would make effective legal protection actually impossible. The administration is a specialized body with a lot of experience and very complex knowledge, while the Court often lacks this knowledge. In addition, if the court is allowed to substitute the facts assessment, it would become an instrument of decision-making, delaying regulation and increasing legal uncertainty. Also, from economic perspective, it is not desirable that every facts assessment is redone. The legal review should only address errors which have a material impact. A too intensive review would also hamper effective regulation, because intensive review of the facts assessment places a high standard of review upon the decision-maker.

However, the judicial review standard has some flaws as well. The marginal review of the facts assessment – the manifest error test – entails a low standard of proof. As a consequence, the risk emerges that decisions which are based on a wrongful appreciation of the facts, but which comply with the procedural requirements, will not be quashed by means of legal review. This is where the CBB's practice in the period from 2002-2014 provides a perfect example. It follows from case studies that the CBB's review of energy regulation in that period cannot be considered 'effective'. The CBB's approach made it very difficult for energy consumers to invoke their rights. This is even more disturbing against the background of the increasing importance of economic facts in competition and regulatory decision-making. The more decisions are based on economic facts – which requires a margin of discretion – the greater extent of the decision escapes an intensive review by the court.

Thus, the CBB should take a position right in the middle between review on the merits and judicial review to provide effective legal protection. Coincidently or not, the CBB seems to take this approach in its most recent cases in the field of energy. In contrast with the past, these cases demonstrate a more intensive

review of the facts assessment by the ACM. In fact, this approach corresponds to the *Tetra Laval* – standard of review. This means that an intensive review should be applied, unless – and that will often be the case for energy decisions – it involves a complex economic analysis. Conform *Tetra Laval*, the reasonableness of the assessment of the facts should be reviewed: has the authority good grounds to come to this decision? Although the court is not allowed to go beyond the legality review – it cannot substitute the facts assessment – the *good grounds* standard ensures that the ACM must apply its discretion, expertise and experience in a sound assessment of the facts. Thereby, not only mistakes are noted, but it also uses the ACM's discretion as an instrument of accountability against itself. This is especially necessary in the light the increasing importance of economic proof. If the use of discretion per se would entail that the Court would not be able to review intensively, the control would be seriously eroded. Moreover, this standard of review follows the CBB's own practice in competition cases and will therefore benefit uniformity.

This development can be considered hopeful in the light of effective legal protection. If this approach is followed, the CBB has the possibility to provide effective legal protection, without placing an enormous financial, time-consuming burden on the ACM, itself and stakeholders. However, it should be remarked that several cases show that this standard of review often still lead to an annulment of the decision on the ground of procedural deficiencies. It must be noted that the CBB must be cautious in this regard. Though it may be an easy and efficient way to quash a decision, it provides less guidance on the exact reason of annulment. The CBB should make sure that when the possibility to review whether the right facts have been taken into account, and whether the ACM could reasonably have drawn its conclusion from these facts. The CBB's ruling of the *Right to a connection to a Gas Grid* of 2014 can be considered a textbook example.

Thus, it seems that the CBB's review increasingly ensures the right to effective legal protection. When looking at its own practice in the field of competition, it can learn something from its own approach. When looking at the UK, a rather confusing situation is perceived. The *Streamlining* puts question marks at its own proposal to insert judicial review for price controls and license modifications because of the impact these decision can possibly have. Still, this approach should not be followed. In addition to the above mentioned reasons, one must note that the number of applications for legal review is in the Netherlands is approximately nine times as high as in the UK in the field of energy. Maybe, further research can be recommended in this respect. In the end, in the interests of all stakeholders would be served best if there is no reason to go to court.

ANNEXES

Annex 1: legal review system of the United Kingdom

Appeal body and standard of review of regulatory decisions [226]		
Ex-ante regulatory decisions		
	Before streamlining	*After streamlining (as proposed)*
Price or access charge control *Electricity Act 1989, s11C, E* *Or Gas Act 1986 s23B* **Licence Modifications** *Electricity Act 1989, s11C, E or Gas Act 1986 s11C, E*	Appeal on the **merits**[227] - error of fact - failure to achieve effect aimed at by modification - wrong in law[228] *Competition and Market Authority* [229]	**Focussed specified grounds** or **judicial review** The focussed specified grounds would be: a) Failure to carry out its **principal objective** or **duties** specified by the law; b) Failure of giving **proper weight** to such factor; c) Decision wholly/partly based on an **error of fact.** d) The modification does not have the **expected effect** according to the Ofgem e) Decision is **wrongful in law** *Competition and Market Authority*
Energy code modifications *Energy Act 2004, s175*	Appeal on the **merits** - error of fact - wrong in law *Competition and Market Authority*[230]	**Focussed specified grounds** or **judicial review** *Competition Appeals Tribunal*[231]
Ex-post regulatory decisions		
Regulatory Enforcement *Electricity Act 1989 s27 or Gas Act 1986 s30* License conditions enforcement	**Judicial Review**[232] illegality ***High Court*** [233](for all decisions except Transmission Constraint License Condition in Generation Licenses, then CAT is admissible appeal body).	**Judicial review** *High Court* OR *Competition Appeals Tribunal*

[226] See for the regulatory provision *Consultation Document Streamlining Regulatory and Appeal, p. 75* and the system of appeal p.24. However, some adjustments have been made, because the Competition Commission (CC) has been mergend with the OFT. See also Consultation response, ScottishPower response, p. 3

[227] An Appeal on the merits procedure for price controls and other license modifications has been inserted in reaction to the Third Energy Package. See The Electricity and Gas (Internal Markets) Regulations 2011

[228] *Streamlining Competition and Regulatory* Appeals, p. 114

[229] *Streamlining Competition and Regulatory* Appeals, p. 31-32 and 111; Competition *Commission Energy License Modification Appeals Rules* September 2012, found at www.gov.uk

[230] *Competition Commission: The Energy Code Modification Rules July* 2005, and Guide to Appeals in *Energy Code Modification Cases*, July 2005. Both found at www.gov.uk

[231] *Consultation Document Streamlining Regulatory and Appeal, p. 47 and 53*

[232] *Streamlining Competition and Regulatory* Appeals, p. 53

[233] *Streamlining Competition and Regulatory* Appeals, p. 111

Annex 2: Case studies in the United Kingdom

	Year	Case	Appeal body	Decision	Standard of review	Case and judgment	result
1	2003	*R (on the application of Drax Power Limited, ScottishPower Generation Ltd and Teesside Power Ltd) v Gas and Electricity Markets Authority*	High Court (Administrative Court)	/	**Judicial Review**	Text of the case unknown	Decision is **quashed** and remitted to Ofgem
2	**2003**	*R (on the application of Exoteric Gas Solutions Ltd.) v. Gas and Electricity Markets Authority*	High Court (Administrative Court)	Enforcement decision Decision not to take an enforcement action, in reaction to complaints, but to execute a market wide investigation.	**Judicial review**	**Irrationality** Case: In 1998, a survey of Ofgas (predecessor of Ofgem) demonstrated that Transco's services were not satisfying. Subsequently, Ofgas took a decision for an enforcement action, inter alia obligating Transco to introduce a compensation scheme for persons receiving late or incorrect quotations (estimated costs). However, Transco decided that Claimant (EGS) was excluded from the compensation scheme. EGS applied for judicial review of the decision of the Ofgem to *not* take an enforcement decision in reaction to the exclusion of ESG from the compensation scheme. Ground for Judicial Review: The decision of Transco that EGS was excluded from compensation according the scheme was based on an **error of law**. Therefore, the Ofgem should have taken an enforcement decision against Transco and hence acted **irrational.** Judgment: The court finds that the decision of the Ofgem to not take an enforcement decision cannot be considered irrational and refers to the discretion and expertise of the Ofgem. The court states in Para 83. "*These are judicial review proceedings. This is not a Court of Appeal from Ofgem's decision on the merits. It is an expert body upon which the parliament has deliberately conferred a broad discretionary area of judgment. The judgment that investigation rather than immediate enforcement was appropriate was well within the bounds of the broad discretion.*"	Decision is **upheld** (application dismissed)

3	2005	*R (on the application of Scottish Power Energy Management) Ltd v Gas and Electricity Markets Authority [2005] EWHC 2324 (Admin), [2005] All ER (D) 348 (Oct)*	High Court (Administrative Court)	Code modification Calculation method for charges	**Judicial review**	**Procedural impropriety** and **unreasonableness** Case: Claimants (Scottish electricity generators) challenged the decision of Ofgem to approve a new calculation method for the electricity transmission system in the UK. This new calculation method entailed that the Scottish electricity generators had to pay for use of the system and connection chargers. Although Ofgem had responded to the complaints of claimants about the calculation method, the Ofgem proceeded its decision without amendments. Grounds for judicial review: 1.) Ofgem failed it's **duty to state reasons** for its calculation method decision as provided by Article 23(2) of the Council Directive 2003/54.; 2.) The facts and reasoning where the Ofgem based its decision on, did not justify the decision. Therefore, claimants argue the decision was **unreasonable** and not **proportional**. Decision: application for judicial review dismissed. 1.) Ofgem had met its obligation to state reasons. Despite the fact that Ofgem's response to the complaint of claimants was inadequate and did not address claimant's detailed arguments, the decision itself did not need to provide a detailed answer to this complaint. Otherwise, it would become a time consuming process. 2.) Ofgem had made a decision that was within the range of reasonable decisions and reached the decision on the basis of an adequate amount of information. Therefore, it was not an unreasonable decision.	**Upheld**
4	2006	*Utilita Electricity Limited*	Competition Commission	Ex ante regulatory decision Code modification (modifying the Balancing and Settlement Code)	**Appeal**	Withdrawal appeal	**Upheld**
5	2007	*E.On UK plc and GEMA and British Gas Trading Limited, Decision and Order of the Competition Commission*	Competition Commission	Code modification Decision to accept the proposal of the National Gas Grid operator for a modification of the Uniform Network Code	**Appeal**	Case Applicant (E.On) applied for appeal under section 173 of the Energy Act '04. Decision under appeal is the modification of the Uniform Network Code, in particular the decision to implement a particular proposal of the National Gas Grid Operator. Grounds of appeal: 1.) the Ofgem has acted in breach with the them mandated tasks and duties; 2.) the decision would not have the effect aimed at; 3) the decision does not give appropriate weight to several matters and purposes; 4) decision is based on an error of fact; 5) decision is wrongful in law. Decision: 1) Ofgem failed to have regard its objective of protection of the interests of	(partially) **Quashed** and remitted to Ofgem

						consumers and promotion of efficiency and economy on the part of licensed persons, because *"the Decision did not present an adequate basis for the conclusion that the costs of reform to industry parties and to consumers will be outweighed by benefits to consumers"*[234]. 2) cost benefit analysis failed to quantify the costs of the accepted proposal and Ofgem lacked to have regard to the current absence of any scarcity of flexibility capacity; 3) transparency: *"Decision was not expressed in sufficiently clear and transparent terms, particularly in relation to the explanation of the qualitative benefits of reform, and in relation to the balancing of qualitative benefits against quantified costs".*[235] No error in fact or law	
6	2008	*R (on the application of Teesside Power Ltd and others)* v. *Ofgem*, 2008 EWHC 1415	High Court (Administrative Court)	Ex ante regulatory decision Modification to an industry code other than in accordance with a timetable for implementation previously set.	**Judicial review**	**Illegality** Case: Grounds for judicial review are: I) The regulatory framework does not state that the Ofgem is allowed to approve a modification proposal after the date set. It *"could not be granted such a wide reaching power without express words to that effect"*. Judgment: GEMA had acted beyond the limits of its powers.	Quashed and remitted to Ofgem
7	2008	*R (on the application of Excelerate Energy Limited Partnership & Seal Sands Gas Transportation Limited) v Ofgem*	High Court (Administrative Court)	Rejection of proposed modification of the Uniform Network Code	**Judicial Review**	Application for judicial review was withdrawn in 2008 following a re-consultation process	
8	2010	*R (on the application of Infinis plc and Infinis (Re-gen) Limited) v Ofgem CO/7013/2010; [2011] EWHC 1873 (Admin)*	High Court (Administrative Court)	Ofgem's decision to refuse accreditation for power generating stations owned and operated by applicants	**Judicial Review**	**Violation of Human Rights** (error of law) Case Under the Electricity Act 1989, Renewables Obligation Certificases (ROC) were issued to public electricity suppliers who supplied electricity from non-fossil fuel sources. If suppliers did not fulfil the requirements for these ROCs, they had to pay a charge. Appellants filed an application for judicial review of the decision to refuse a ROC for two generating stations for landfill gas. Ofgem stated that the generation stations were excluded, because replacement power purchase agreements (RPPAs) were effective and therefore no ROC could be issued. According to applicants, the RPPA were not effective at the moment of decision-making. Ground for judicial review is **violation of Human Rights** (section 8 of Human Rights Act 1998 and article	Decision was **quashed** and remitted to Ofgem, Ofgem paid damages.

[234] Para. 7.12
[235] Para 7.14

						1 of protocol 1 of the European Convention of Human Rights (Right to possessions).) Judgment: 1. The statutory exclusions did not apply, because the RPPAs had ceased to exist and therefore the decision of the Ofgem was **unlawful**. There was an erroneous understanding of the law. 2. Because applicants were deprived of an economic benefit (financial loss) by the decision to not grant the ROC, the decision had violated section 8 of the Human Rights Act.	
			Court of Appeal (Civil Court)			Affirmed	
9	2014	*Western Power Distribution* v. *Gas and Electricity Markets Authority*	High Court	Incentive scheme decision	Judicial review	Case This case concerns the Ofgems decision establishing a scheme to incentivize network operators to reduce the loss of electricity on their distribution networks. The more reducing electricity loss, the higher the revenues for the particular network operator were calculated. The decision was applicable from 2005-2010. However, there had been problems with the used data for the calculation of performance. Consequently, the Ofgem ended the incentive scheme. As a result, applicant had to pay back its customers an amount of £47m more than it received under the scheme. Applicants claimed that: 1. The effect of the Ofgem's decision was a *penalty* and therefore it was reviewable on grounds of proportionality. 2. "WPD further claimed that, since GEMA had capped payments made in favour of operators when closing out the scheme, GEMA should also have capped payments which operators were required to make in favour of customers." Judgment The Court ruled that the ground of review for proportionality was a claim for review on the merits of the regulatory decision, which was not permissible. The proportionality principle was merely applicable to a limited extend. Moreover, the decision establishing the incentivizing scheme dated from too long ago to be challenged.	Decision **upheld** No permission to bring a judicial review.

Annex 3: Overview of the sliding scale of standards of review

	Extremely Marginal review	Marginal (legality) review	Tetra Laval standard of review	Merits review	Extremely intensive review
Example	*Wednesbury-test (UK)*	*Judicial Review (UK) Legality Review (NL)*	*Legality review of administrative decisions, Art. 263 TFEU(EU)*	*Appeal on the Merits (UK)*	*Review of fines, Art. 261 TFEU (EU)*
Review of the procedure					
Correctness of followed procedures	•	•	•	•	•
General principles of good governance	•	•	•	•	•
Review of the Substance of the decision					
Establishment of the facts ***- Accuracy, reliability and consistency of the facts*** ***- Completeness of the facts***	*Is the decision blatantly unreasonable?*	*Is the decision reasonable? Has there been made a manifest error of appraisal of misuse of powers?*	*Is the evidence correct and does it contain all the information which must be taken into account in order to assess a complex situation?*	*Is the evidence correct and does it contain all the information which must be taken into account in order to assess a complex situation?*	*Is the evidence correct and does it contain all the information which must be taken into account in order to assess a complex situation?*
Interpretation of the law *(Discretion in interpretation)*			*Has the application of the law to these facts been done correctly?*	*Has the application of the law to these facts been done correctly?*	*Has the application of the law to these facts been done correctly?*
Assessment of the facts *(Discretion in assessment and in policy)*			Marginal/intense review: *Could the authority reasonably have come to its decision (made the conclusion sufficiently likely/had good grounds) considered the facts involved? No substitution of the facts assessment*	Intense review: *Substitution of the facts assessment, but no review of appropriateness and effectiveness of the decision.*	Very intense review: *the Court can substitute the complete decision, because it considers another decision better suiting.* Court functions as regulator

Annex 4: Legal comparison of standards of review

Type of decision	Standard of review
NL Energy (ex ante)	Legality
NL Competition	
- *Merger decisions (ex ante)*	Legality
- *Cartel and abuse of dominant position (ex post)*	Legality
- *Height of the fine*	Merits
UK Energy	
- *Price Controls and License modifications (ex ante)*	Merits
- *Regulatory Enforcement (ex post)*	Legality

LIST OF ABBREVIATIONS

ACM	Authority Consumer and Market *Autoriteit Consument en Markt*
CA	Competition Act *Mededingingswet*
CBB	Tribunal for Industry and Trade *College van Beroep voor het Bedrijfsleven*
CFI	Court of First Instance
CMA	Competition and Markets Authority
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Right
EU	European Union
GALA	General Administrative Law Act *Algemene Wet Bestuursrecht*
GEMA	Gas and Electricity Markets Authority
LUP	National Uniform Energy producer tariff *Landelijk Uniform Producententarief*
NCA	National Competition Authority
NRA	National Regulatory Authority
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Ofgem	Office of Gas and Electricity Markets
UK	United Kingdom
WACC	Weighted Average Cost of Capital

LIST OF REFERENCES

BOOKS

Arancibia, J., *Judicial Review of commercial regulation*, Oxford university press, New York 2011

Bellamy, C., 'Round table: antitrust and the courts'. In *International antitrust law & policy: Fordham Corporate Law 1993,* edited by B.E. Hawk, New York: Juris Publishing Inc 1993

Cappalletti, G. & Garth, B. (Eds.) *Access to Justice. A World Survey*. Vol. 1,Alphen aan de Rijn/Milan: Sijthoff and Noordhoff 1978

Eliantonio, M., *Europeanisation of Administrative Justice? The influence of the ECJ's Case Law in Italy, Germany and England.* Groningen: Europa Law Publishing 2009

Essens, O., Gerbrandy, A, and Lavrijssen, S. (Eds.), *National Courts and the Standard of Review in competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009

Gerbrandy, A., *Convergentie in het mededingingsrecht*, Den Haag: Boom Juridische Uitgevers 2009

Gerven, van, W. 'Substantive Remedies for the private Enforcement of EC Antitrust Rules before National Courts', in C. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: effective private enforcement of EC antitrust Law,* Oxford-Portland Oregon, Hart Publishing, 2003, pp.53-94

Hancher, L. & Larouche, P., 'The coming age of EU regulation of network industries and services of general economic interest', in Craig, P. & De Búrca, G. (eds.*), The evolution of EU law*, 2nd edn., Oxford, Oxford University Press 2011, pp. 743-782.

Jans et al., *Europeanisation of Public Law*, Groningen: European Law Publishing, 2007, p. 35-60

Lavrijssen, S.A.C.M., Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen van good governance, Den Haag: Boom Juridische Uitgevers, 2006

Lavrijssen, S. & Ottow, A. 'The Legality of Independent Regulatory Authorities', in: L. Besselink, F. Pennings and A. Prechal (Eds.), *The Eclipse of Legality*, Alphen aan den Rijn: Kluwer Law International 2011

Prosser, T., 'The Powers and Accountability of Agencies and Regulators', in D. Feldman (Ed.) *English Public Law*, Oxford: Oxford University Press 2004, pp. 287 - 332.

Safjan, M., *A Union of Effective Judicial Protection. Adressing a multi-level challenge through the lens of Article 47 CFREU*, King's College London, February 2014

Scott, C., 'The Juridification of Relations in the UK Utilities Sector', In: Black, J., Muschlilinkski, P. & Walker, P. (Eds) *Commercial Regulation and Judicial Review*, Oxfort: Heart Publishing

Thomas, R., 'Legitimate Expectations and proportionality in Administrative Law', Oxford: Hart Publishing, 2000

Ward, T. & Smith, K. (Eds.), *Competition litigation in the UK,* London: Sweet & Maxwell 2005

ARTICLES

D. Bailey, 'Standard of proof in EC Merger Proceedings: A Common Law perspective', 2003, Common market law review, p. 1340-1342

Bay, M.F. & Calzado, J.R., 'Tetra Laval II – the coming of age of judicial review of merger decisions', *World Competition* 2005, pp. 433-440

Berg, S., 'Infrastructure regulation - Risk, return and performance', *Global Utilities* 2001, pp. 3-10

Besselink, E.M.M., 'Groupement des Cartes Bancaires en de mededingingsbeperkende strekking van overeenkomsten', Mededingingsrecht in de Praktijk, 2014, issue 8, pp. 20-24

Clarke, M. & Cummins, T., 'Judicial Review in the Energy Sector: The England and Wales perspective', *International Energy Law Review* 2011*,* Issue 6, pp. 244-252

Cornelissen, H.M., 'Het Expedia-arrest: een merkbare koerswijziging?', *NtEr* 2013, nr. 5, pp.171-177

Eldridge, T. & Rudd, M., Demystifying judicial review, 13 August 2009, p. 3. Available at www.lexology.com

Gerbrandy, A., 'Prospectieve analyse en het vaststellen van de materiële waarheid door de bestuursrechter in concentratiezaken', SEW september 2013, nr. 9

Gerven, van, W. 'Of rights, remedies and procedures', *Common Market Law Review* 2000, no. 3, pp. 501-536

Hancher, L, Larouche, P. & Lavrijssen, S. 'Principles of Good Market Governance', *Journal of Network Industries*, 2003/4, pp. 355-389

Hofmann, H.C.H. & Turk, A. 'The development of integrated administration in the EU and its consequences' *European Law Journal* 2007, p. 268

Jones, T. 'UK government proposes "streamlining" regulatory and competition appeals'*, Competition Bulletin*, 20 June 2013. Link: www.competitionulletin.com

Kalbfleish, P. 'Tien jaar Mededingingswet: van 'The Paradise Lost' naar 'Met Recht Markt'. In: P. Kalbfleisch et al. (Eds.) *Beschouwingen over 10 jaar Mededingingswet en 10 jaar NMa*

Lavrijssen, S., Eijkens, J. & Rijkers, M., 'The Role of the Highest Administrative Court and the Protection of the Interests of the Energy Consumers in the Netherlands' September 1, 2014, TILEC Discussion Paper No. 2014-032 . Available at SSRN: http://ssrn.com/abstract=2491564

Lavrijssen, S. & De Visser, M., 'Independent administrative authorities and the standard of judicial review', *Utrecht Law Review* June 2006, Volume 2, Issue 1, pp. 111-135.

Lavrijssen, S. 'De rol van de Nederlandse administratieve rechter bij het toezicht op de mededinging', *SEW* 2004, pp. 18-38.

Lenaerts, K., 'Effective Judicial protection in the EU', 2013, available at http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf.

Meulmeester, P., 'Lange termijn investeringen in elektriciteitsnetwerken niet gegarandeerd' *TPEdigitaal,* vol. 2, no. 2, 2008, pp. 93-113

Outhuijse, A. 'Wat doet de Nederlandse rechter met het merkbaarheidsvereiste na *Expedia*?', *SEW*, nr. 9, September 2014, pp. 391-397

Parret, L.Y.M., 'Effectieve rechtsbescherming: eindeloos potentieel, ongeleid projectiel?', *NtER* 2012-5, pp. 157-168

Rhee, D. J., 'The principle of effective protection: reaching thise parts other principles cannot reach?', BEG/ALBA conference, Athens 2011

Sanchez, P.A. 'De nieuwe mededeling van de Commissie betreffende overeenkomsten van geringe betekenis ('deminimis')', *Mededingingsrecht in de Praktijk* 2014(8), pp. 25-29

Stijnen, R., 'Menarini en KME: marginale of volle toetsing van mededingingsboetes door de rechter?', *NtER* mei 2012, nr. 4, pp. 119-125

Van der Vijver, T. and Vollering, S. 'Understanding appreciability: the European Court of Justice Reviews the Journey in Expedia', *CML Review* 2013, p. 1133-1144

Widdershoven, R.J.G.M. 'Het beginsel van effectieve rechtsbescherming', *Europa Instituut Utrecht*, volume 1, 2011, pp. 103 – 114

REPORTS

A.J. Metselaar & P.C. Adriaanse, 'Grensoverschrijdende inning van bestuurlijke boetes - Een verkennend onderzoek naar ervaringen in België, Duitsland en het Verenigd Koninkrijk en mogelijkheden voor internationale samenwerking', WODC, Ministerie van Veiligheid & Justitie, 10 juni 2014;

Streamlining Regulatory and Competition appeals, consultation on Options for Reform, 19 June 2013, HM government, Department for Business Innovation & Skills.

2012 Report on the Application of the EU Charter of Fundamental Rights, European Commission 2013.

R. Hakvoort, et al., De Tariefsystematiek van het elektriciteitsnet, Zwolle, D-cision, ECN and TU Delft, 2013

Evaluatie Elektriciteitswet 1998 en Gaswet Eindverslag (evaluation of April 2012, ACM), Den Haag, ACM, 2012

DECC, 'Implementation of the EU Third Internal Energy Package - Government Response' January 2010, URN: 10D/953

D. Black, G. Harman and B. Moselle, 'Should energy concumers and energy network users have the right to appeal Ofgem price control decisions? If so, what form should the appeal process take?', LECC 7 October 2009

R. Caranta, M. Andenas and D. Fairgrieve, *Independent administrative authorities*, British Institite of International and Comparative Law, London 2004

Verhey, L., and Zwart, T., *Agencies in European and Comparative Perspective,* Intersenia Antwerpen-Oxford-New York 2003

OECD, Regulatory reform in The Netherlands, Regulatory reform in the Electricity industry, 1999

CASE LAW

European Court of Justice

ECJ, 11 September 2014, Case C-67/13 P (*Cartes Bancaires*), ECLI:EU:C:2014:2204

ECJ 26 November 2013, Case C-50/12 P (*Kendrion v. Commission*), ECLI:EU:C:2013:771

ECJ 13 December 2012, Case C-226/11 (Expedia), ECLI:EU:C:2012:795

ECJ 8 December 2011, Case C-389/10 P (*KME Germany AG and others/Commission*), ECLI:EU:C:2011:816

ECJ 18 March 2010, Joint cases C-317-320/08 (*Alassini*) , ECLI:EU:C:2010:146

ECJ, 4 June 2009, Case C-8/08 (*T-Mobile Netherlands*), ECLI:EU:C:2009:343

ECJ 24 April 2008, Case C-55/06 (*Arcor*), ECLI:EU:C:2008:244

ECJ, 29 March 2007 , Case C-347/04 (*Rewe-Zentralfinanz*), ECLI:EU:C:2007:194

ECJ 13 March 2007, Case C-432/05 (*Unibet*), ECLI:EU:C:2007:163

ECJ 25 februari 2006, Case T-209/01 en 210/01 (*GE Honeywell*), ECLI:EU:T:2005:455

ECJ 15 February 2005, Case C-12/03 (*Tetra Laval*), ECLI:EU:C:2010:280

ECJ 7 January 2004, Case C-204/00 (*Aalborg*), ECLI:EU:C:2004:6

ECJ 15 October 2002, Joint Cases C-238/99 P (*Limburgse Vinyl Maatschappij and Others v Commission*), ECLI:EU:C:2002:582

ECJ 21 January 1999, Case C-120/97, (*Upjohn),* ECLI:EU:C:1999:14

ECJ 5 March 1996, Joint cases C-46/93 en C-48/93 (*Brasserie du Pêcheur), ECLI:EU:C:1996:79*

ECJ 31 March 1993, Case C-19/92 (*Dieter Kraus* v. *Land Baden-Wurttenberg*), ECLI:EU:C:1993:125

ECJ 7 May 1992, Case C-104/91 (*Colegio Oficial, ECLI:EU:C:1992:202*)

ECJ 19 November 1991, Joint cases C-6/90 and C-9/90 (*Francovich*), ECLI:EU:C:1991:428

ECJ 7 May 1991, Case C-340/89 (*Irene Vlassopoulou v. Ministerium fur Justiz Bundes- und Europaangelegenheiten Baden-Wurttenberg*), ECLI:EU:C:1991:193

ECJ 15 May 1986, Case 222/84 (*Johnston*), ECLI:EU:C:1986:206

ECJ 11 July 1985, Case 42/84 (*Remia and Others*), *ECLI:EU:C:1985:327*

ECJ 19 July 1969, Case C-5/69 (*Völk/Vervaecke*), ECLI:EU:C:1969:35

ECJ 13 July 1966, C-56/64 and C-58/64 (*Consten and Grundig* v. *Commission*), ECLI:EU:C:1966:41

Court of First Instance

CFI 14 December 2005, Case T-210/01 (*General Electric*), ECLI:EU:T:2005:456

CFI 6 June 2002, Case T-342/99 (*Airtours v. Commission*), ECLI:EU:T:2004:192

European Court of Human Rights

ECtHR, 8 April 2014, Case (*Dhabi v. Italy*)

ECtHR 19 April 1994, Case 16034/90 (*Van de Hurk v. The Netherlands*)

ECtHR 16 December 1992, Case 12945/87 (*Hadjianastassiou v. Greece*)

ECtHR, 21 February 1975, Case 4451/70 (Golder v. United Kingdom)

Appeal Tribunal for Industry and Trade (CBB)

CBB 13 January 2015, ECLI:NL:CBB:2015:5

CBB 4 September 2014, ECLI:NL:CBB:2014:318

CBB 22 April 2014, ECLI:NL:CBB: 2014: 134

CBB 10 April 2014, ECLI:NL:CBB:2014:118

CBB 10 April 2014, ECLI:NL:CBB:2014:119

CBB 13 February 2014, ECLI:NL:CBB:2014:50

CBB 13 February 2014, ECLI:NL:CBB:2014:46

CBB 2 July 2013, ECLI:NL:CBB:2013:52

CBB 25 April 2013, ECLI:NL:CBB:2013:BZ8522

CBB 23 April 2013, ECLI:NL:CBB:2013:CA1052

CBB 7 December 2012, ECLI:NL:CBB:2005:AU8309

CBB 8 November 2012, ECLI:NL:CBB:2012:BY2307

CBB 16 December 2011, ECLI:NL:CBB:2011:BU7963

CBB 29 June 2010, ECLI:NL:CBB:2010:BM9470

CBB 8 April 2010, ECLI:NL:CBB:2010:BM1588

CBB 3 November 2009, ECLI:NL:CBB:2009:BK1790

CBB 2 June 2009, ECLI:NL:CBB:2009:BJ0727

CBB 2 June 2009, ECLI:NL:CBB:2009:BJ0715

CBB 30 November 2006, ECLI:NL:CBB:2006:AZ3365

CBB 28 November 2006, ECLI:NL:CBB:2006:AZ3274

CBB 28 October 2005, ECLI:NL:CBB:2005:AU5316

CBB 28 June 2005, ECLI:NL:CBB:2005:AT8919

CBB 11 February 2005, ECLI:NL:CBB:205:AS7083

CBB 14 January 2005, ECLI:NL:CBB:2005:AS5818

CBB 10 September 2004, ECLI:NL:CBB:2004:AR2366

CBB 24 April 2004, ECLI:NL:CBB:2004:AO9530

CBB 29 October 2003, ECLI:NL:CBB:003:AO0898

CBB 27 September 2002, ECLI:NL:CBB:2002:AE8688

CBB 4 September 2002, ECLI:NL:CBB:2002:AE8317

CBB 2 August 2002, ECLI:NL:CBB:2002:AE6323

CBB 2 August 2002, ECLI:NL:CBB:2002AE7300

CBB 2 August 2002, ECLI:NL:CBB:2002:AE7302

CBB 5 December 2001, ECLI:NL:CBB:2001:AD6693

District Court of Rotterdam

District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10174

District Court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10173

District court of Rotterdam, 18 December 2014, ECLI:NL:RBROT:2014:10129

District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:5884

District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:5830

District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:4849

District Court of Rotterdam, 17 July 2014, ECLI:NL:RBROT:2014:5822

District Court of Rotterdam, 12 June 2014, ECLI:NL:RBROT:2013:4689

District Court of Rotterdam, 20 March 2014, ECLI:NL:RBROT:2014:4935

District Court of Rotterdam, 20 March 2014, ECLI:NL:RBROT:2014:2045

District Court of Rotterdam 27 February 2014, ECLI:NL:RBROT:2014:1323

Preliminary Relief Court of the District Court of Rotterdam, 1 august 2013, ECLI:NL:RBROT:2013:5927

District Court of Rotterdam, 17 July 2007, ECLI:NL:BROT:2007:AY4928

District Court of Rotterdam, 18 June 2003, ECLI:NL:RBROT:2003:AH9702

District Court of Rotterdam, 18 June 2003, ECLI:NL:BROT:2003:AH9702

District Court of Rotterdam, 20 September 2000, ECLI:NL:RBROT:2012:BX8528

Competition Appeal Tribunal

Hutchison 3G (UK) v. Office of Communications, 2005

Associated Provincial Picture House v Wednesbury corporation, 1947 a

Council of Civil Service Unions v. Minister for the Civil Service, 1985, AC 374

R. v.Ministry of Defence ex parte Smith, 1996, QB 517

R (on the application of Daly) v. Secretary of State for the Home Department, 2001.

R (on the application of Drax Power Limited, ScottishPower Generation Ltd and Teesside Power Ltd) v Gas and Electricity Markets Authority 2003

R (on the application of Exoteric Gas Solutions Ltd.) v. Gas and Electricity Markets Authority 2003

R (on the application of Scottish Power Energy Management) Ltd v Gas and Electricity Markets Authority [2005] EWHC 2324 (Admin), [2005] All ER (D) 348 (Oct)

Utilita Electricity Limited, 2006

E.On UK plc and GEMA and British Gas Trading Limited, Decision and Order of the Competition Commission, 2007

R (on the application of Teesside Power Ltd and others) v. Ofgem, 2008 EWHC 1415

R (on the application of Excelerate Energy Limited Partnership & Seal Sands Gas Transportation Limited) v Ofgem

R (on the application of Infinis plc and Infinis (Re-gen) Limited) v Ofgem CO/7013/2010; [2011] EWHC 1873 (Admin)

Western Power Distribution v. Gas and Electricity Markets Authority

R (on the application of UK Power Networks Services (Contracting) Limited and The Gas and Electricity Markets Authority and Heathrow Airport Limited

LEGISLATION

Directives

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ 2009, L337/37).

Directive 2009/73/EC of the European Parliament and of the Council of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009, L211/94).

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009, L211/55).

Regulations

Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation 1775/2005 (OJ 2009, L211/36).

Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation 1228/2003 (OJ 2009, L211/15).

Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for Cooperation of Energy Regulators (OJ 2009, L211/1). Regulation 1775/2005 of the European Parliament and of the Council of 28 September 2005 on conditions for access to the natural gas transmission networks (OJ 2005, L289/1).

Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2002 L1/1).

Recommendations and Communications

Rec(2004)20, the Judicial Review of Administartive Acts (Strasbourg 2005)

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012, C338/01), par. 11 and 15;

Minimis Notice, *Pb. EG* 2001, C 268/13

Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), PB C 291 van 30 Augustu 2014

Treaties

European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

International Covenant on Civil and Political Rights

Treaty on the Functioning of the European Union (OJ 2008, C155/47).

Explanatory Memorandum and other Governmental documents

Netherlands

Kamerstukken II 2008/09, 31901, no. 1-2

Kamerstukken II 2010/11 32814, nr. 3

Kamerstukken II 2003/04, 29702, no. 3

United Kingdom

Explanatory memorandum to the electricity and gas (internal markets) regulations 2011, no. 2704

Memorandum of Understanding between the Competition and Markets Authority and the Gas and Electricity Markets Authority, 11 August 2014

DECC Implementation of EU Third Internal Energy Package Government Response URN 10D/953

HM Government, Department for Business, Innovation and Skills, Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform, 19 June 2013

Streamlining regulatory and competition appeals consultation on options of reform – summary of stakeholders views from consultation workshops (24 July 2013 – 1 August 2013)', 6 September 2013

Regulatory and competition appeals: options for reform - consultation responses A to H, 17 September 2013 AND *Regulatory and competition appeals: options for reform - consultation responses I-Z,* of 17 September 2013

INTERNET SOURCES

Annex Third Package Transition Note, available at: www.gov.uk

Competition Commission Energy License Modification Appeals Rules, September 2012, available at www.gov.uk

Energy and Climate Change Committee - Consumer Engagement with Energy Markets, Supplementary written evidence submitted by Sarah Harrison, Ofgem, 30 October 2012. Available at: www.publications.parliament.uk

European Network of System Operators for Gas, available at: www.entsog.eu/national-regulatory-authorities-nras

Hof van justitie scherpt voorwaarden voor toepassing kartelverbod aan, 29-10-2014, available at: www.maverick-law.com

The judge over your shoulder, 2006, available at: www.gov.uk