



# Dispute settlement processes and their impact on investment in a converged world

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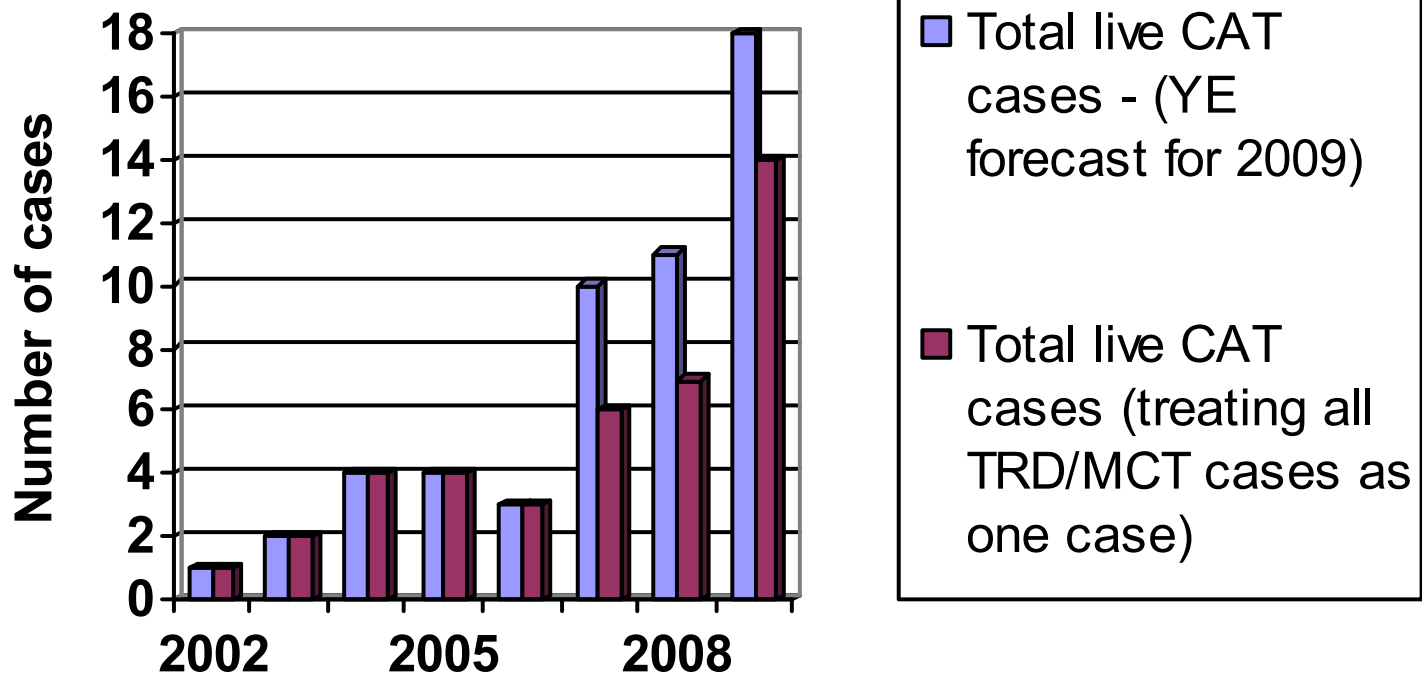


# Content

- The context – the converging environment; the changing profile of disputes and the scale of the issue
- Effective dispute resolution procedures – why it matters?
- Fast moving sector – are dispute resolution processes keeping up?
- Some international examples
- Best practice observations

# Converging environment, increased complexity and the economy

- There has been a huge upswing in disputes in the ICT sector



# Increased disputes

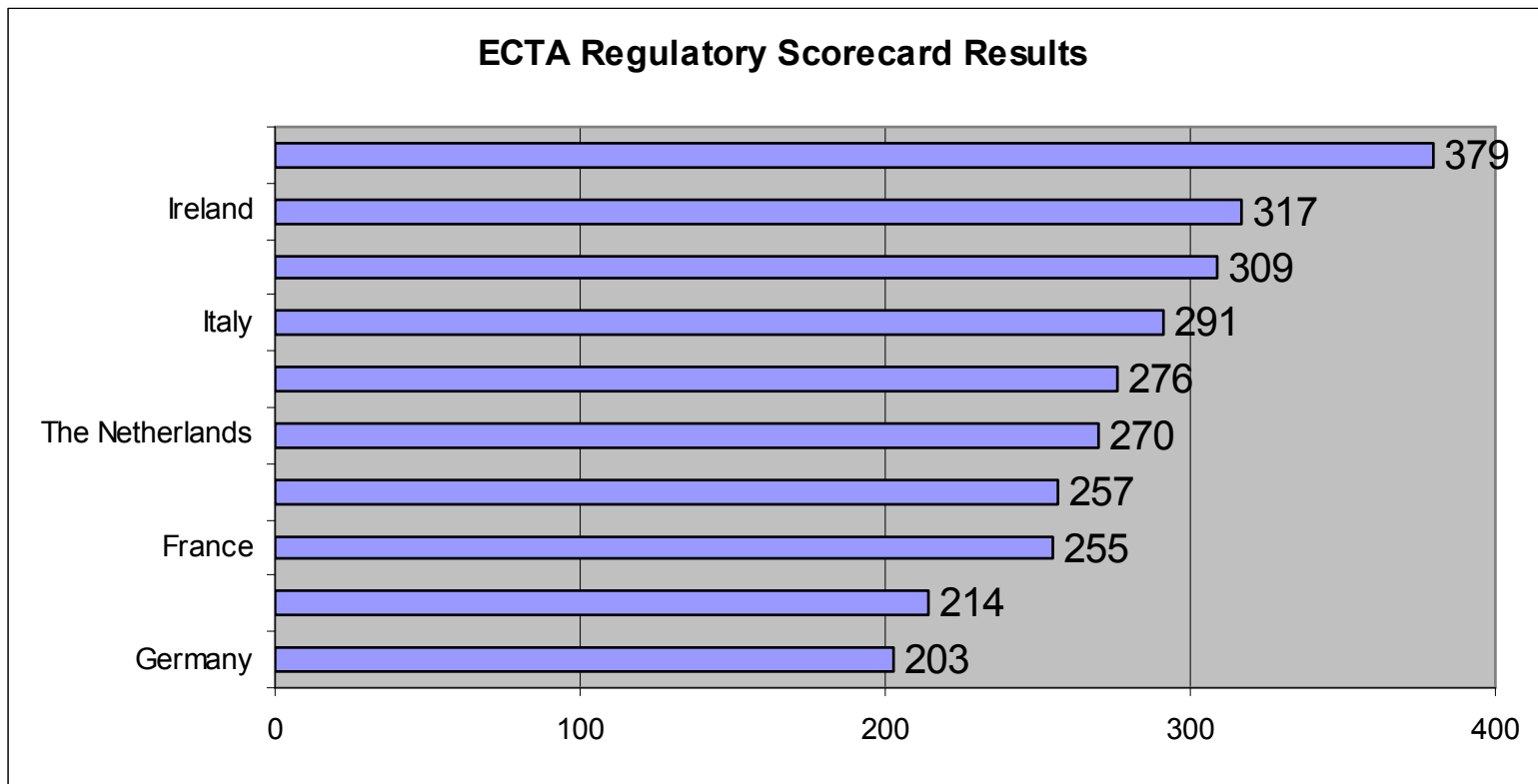
- Economic environment – need to recoup cash. Regulatory relationships in world where cash is king. Cases involving both large and small sums.
- Increased number of players from different sectors looking at converging ie bundled service offerings – eg mobile operators seeking fixed access; fixed operators seeking mobile; content providers seeking fixed and mobile and content owners seeking preferential or free carriage over broadband.
- Increasing complexity of issues: including access disputes over access to monopoly infrastructure; content access; spectrum allocation; rates for international carriage (externality charge).
- Increased number of regulatory players – courts; competition authorities; sectoral regulators and policy makers.
- Fee arrangements with externals to run disputes.

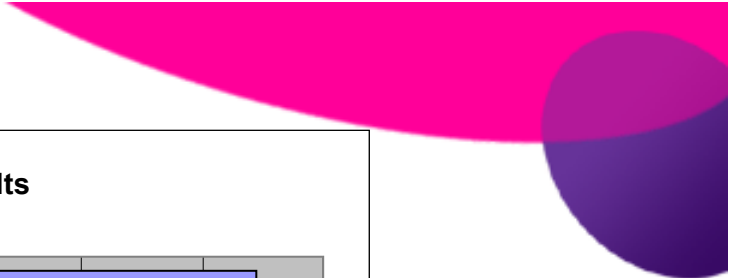
# Why does it matter?

- Conclusively shown that the effectiveness of the overarching telecommunications regime impacts on INVESTMENT in telecommunications
- Critical to that effectiveness is dispute resolution

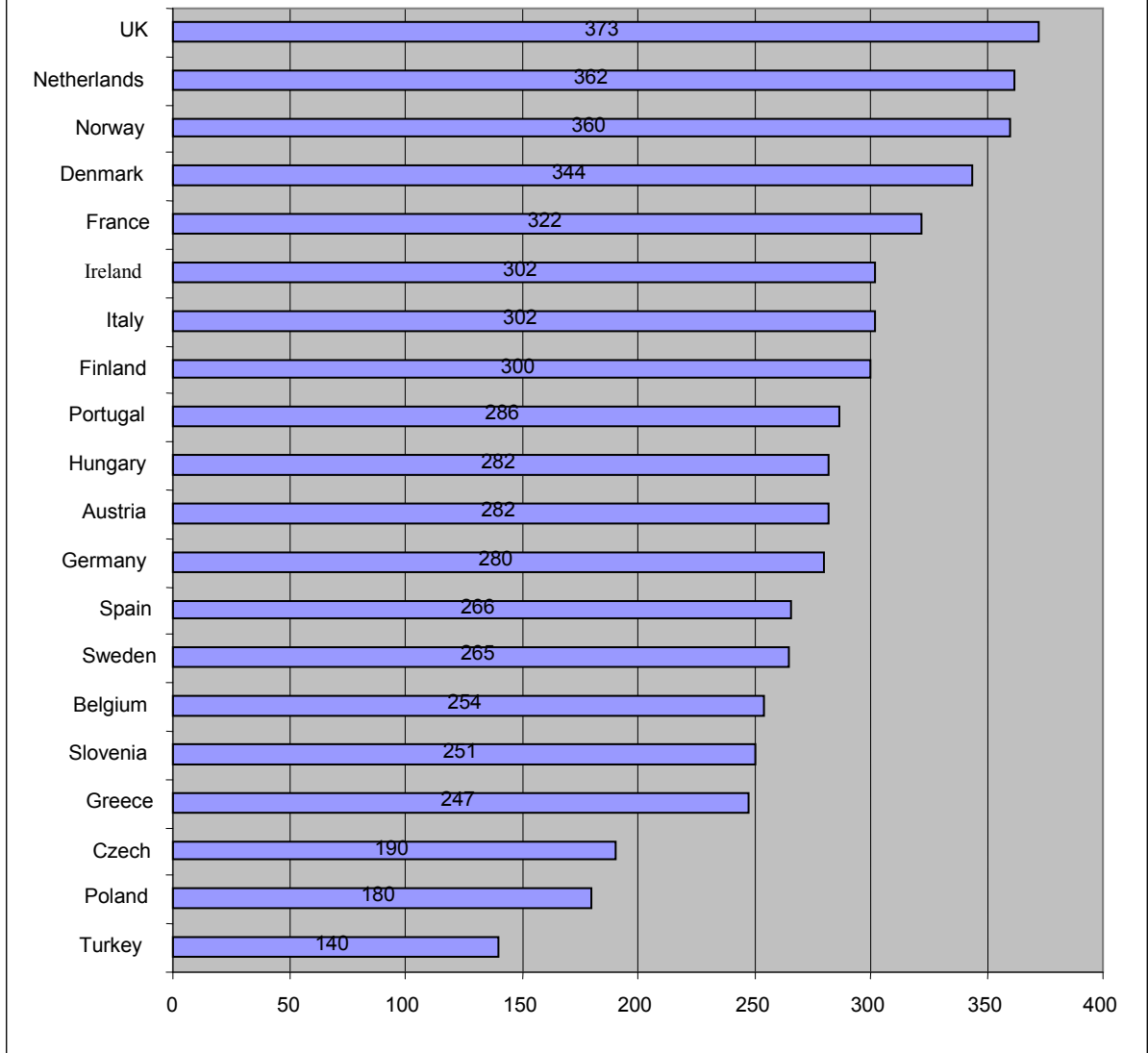
Detailed ITU study concluded that *“Disputes can be enormously destructive to the sector and effective dispute resolution is increasingly central to successful deployment of modern information infrastructure”* – ITU study on dispute resolution in the telecommunications sector

# Investment flows to effective regimes – dispute resolution is key

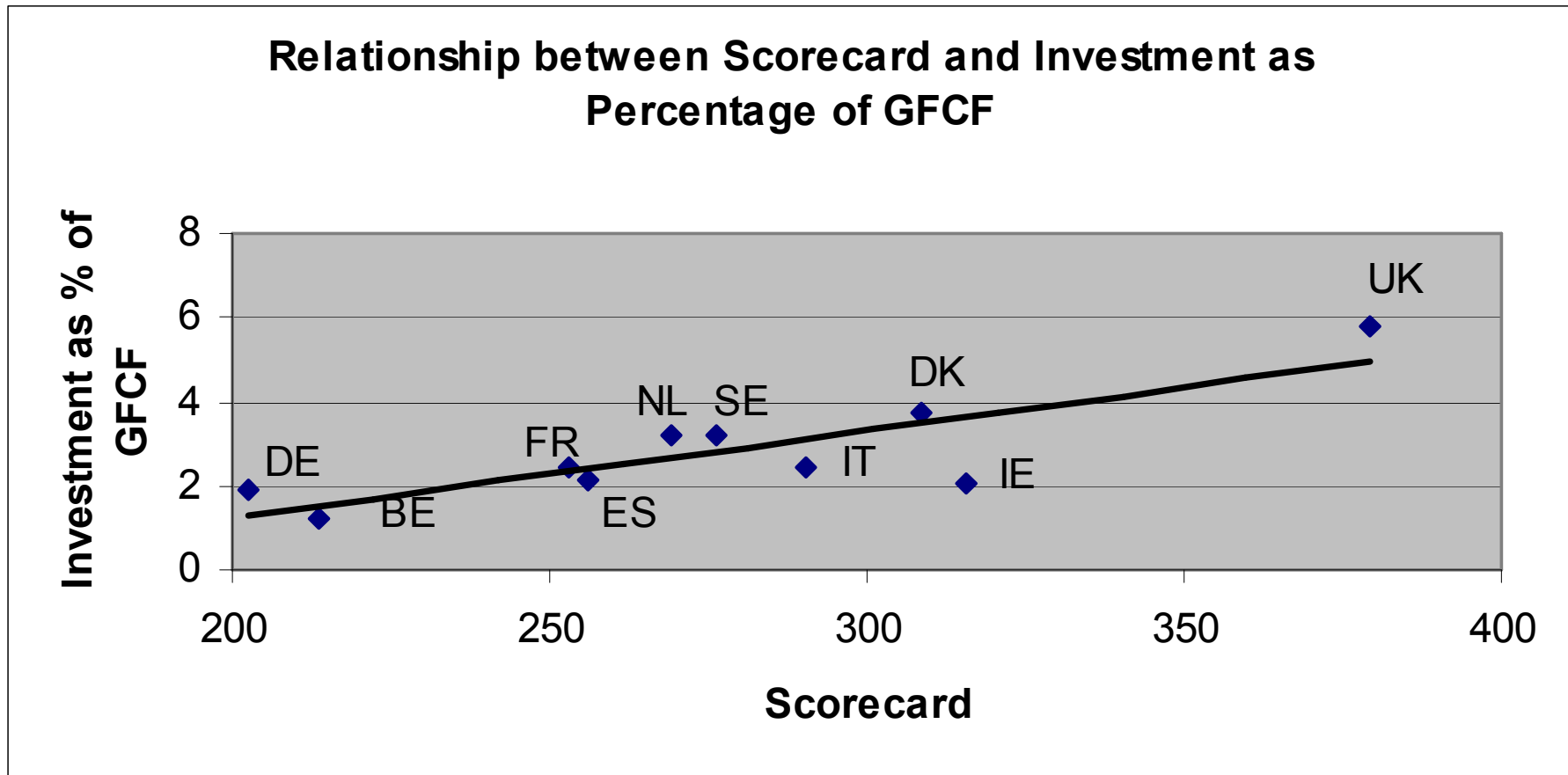




### ECTA Scorecard 2008: Summary Results



# Investment and Regulatory Effectiveness





# Models of Dispute Settlement and Core Principles

- Speed is key – like all good comedy – timing is everything
- Transparency
- Clear and effective rights of recourse
- Consistency
- Certainty
- Expertise
- Focus on core bottlenecks but technology neutral
- Turning to each of above...

# Speed

- Critical – investment dampening impact of delay
- EC rules on interconnection disputes and mandated time frame are welcome but:
- The new 4 month deadline for resolving access disputes only achieved in 4 countries – Germany, France, Hungary and Sweden. Nb this includes only certain defined types of dispute
- National procedural rules on appeals can render ineffective the process
- Interim remedies – danger if there is not a presumption on remaining in force unless material risk of error – this is critical. Eg i/x dispute may take 4 months but appeal process takes 5 years - see BiiCL report on national appeals and latest European Commission Implementation Report

# Case example – pay tv UK

- Access to pay tv content – Ofcom
- Review of the need for mandated wholesale access to Sky content
- Issue raised 2006 – Ofcom enquiry started early 2007
- Now at second consultation phase
- Decision end 2009
- Appeal likely

# Interim relief

- If regulator decision suspended while case is heard at appeal – the incentive to appeal is hugely increased
- Tests need to be appropriately high. And rapidly secured.
- Example of the UK Wimax case and appeals against the UK regulator to auction Wimax spectrum
  - Limited window for the launch of spectrum
  - Issues – transparency of the rules and timelines to secure judgment
  - Delays to auction process meant that government forced to withdraw the process in face of industry walk away

# Transparency

- Need effective and speedy consultation process
- Third party inputs key – intervention must be possible
- Business secrets respected but not to detriment of process
- Ensure the rules are clear and recourse is even more clear – ie which is relevant body
- Clear policy goals set out in advance – e.g. infrastructure investment v service level competition

# Clear and Effective Rights of Recourse

- Single body with clear powers and if more than one body, e.g. anti-trust and regulatory agency – strong co-operation – ideally similar legal base. Court coordination also critical – and ideally pan-national coordination mechanisms in place.
- Clear rules on when dispute will be deemed worthy of remedy by regulator – not vitiable by one party. Guidance is key.

# Consistency

- Investment is driven on this key criteria
- No material change in policy without material impact assessment
- If more than one body or if mediation in place in individual disputes – mechanisms in place to determine conflicts of position

# Certainty

- To reduce disputes – laws must only be instituted after effective consultation with the sector and business and investor community
- Clearly enunciated principles and clear cost benefit analysis is key



# Expertise

- Increasingly complex issues have to be determined by regulator or specialist agency
- Discrimination, price squeeze, cost allocation methodology – need hugely skilled people
- Mesh with consultation of interested parties

# Focus on Core Bottlenecks but Technology Neutral

- For access regulation – focus only on the bottlenecks
- Keep the review focussed

Don't miss alternate bottlenecks – e.g. content

# Mandatory Settlement

- ADR mechanisms can be appropriate – however need clear and effective fall back
- If pass disputes to alternate body, e.g. arbitrator, need to very clearly map distinctions from normal interconnection dispute process
- Both parties must agree
- Thresholds to alternate mechanisms clearly articulated and all principles above adhered to – including transparency and consistency

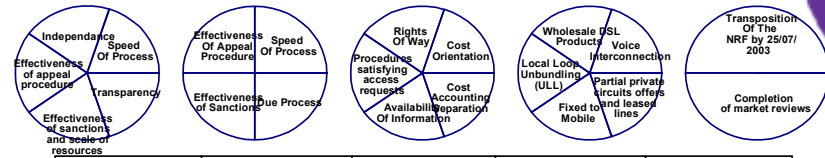
# Bolster enforcement mechanisms

- Functional separation to drive non-discrimination - the UK model – Openreach
- Change the incentives of the relevant organisation – Openreach
- Back up alternate dispute mechanisms for complex but technical barriers eg local loop adjudicatory process in UK

# Back ups

- ECTA scorecard charts

# Report on the effectiveness of national regulatory frameworks and investment impact



	Regulator: General	Regulator: Dispute Settlement	Access: Regulation	Access: Products	Transposition Of The NRF
Belgium					
Denmark					
France					
Germany					
Ireland					
Italy					
Netherlands					
Spain					
Sweden					
United Kingdom					

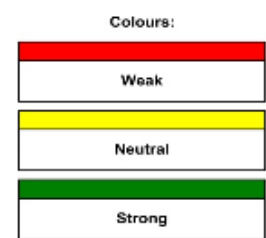
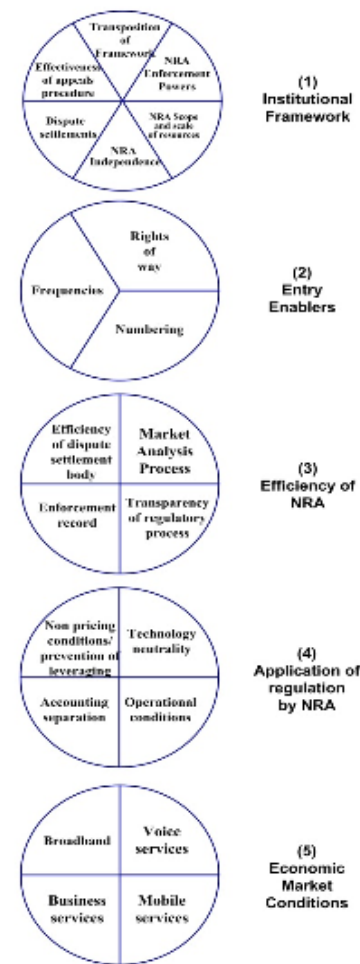
	red = "weakness"
	amber yellow = "neutral"
	green = "strength"



# Report on the effectiveness of national regulatory frameworks 2008



	(1) Institutional Framework	(2) Entry Enablers	(3) Efficiency of NRA	(4) Application of regulation by NRA	(5) Economic Market Conditions
Austria					
Belgium					
Czech Republic					
Denmark					
Finland					
France					
Germany					
Greece					
Hungary					
Ireland					
Italy					
Netherlands					
Norway					
Poland					
Portugal					
Slovenia					
Spain					
Sweden					
Turkey					
UK					



# BIICL Report: Regulatory Decisions and Appeals

	FRANCE	GERMANY	IRELAND	NLDS	SPAIN	UK
<b>Decisions by NRA 97-03</b>	57	750	90	109	235	53
<b>Duration of proceedings</b>	4-6 mths	1.2-2.2 mths for i/x much longer for other proceedings	5 mths	6.4mths	3-4 mths	5-6 mths



# Regulatory decisions and Appeals

	FRANCE	GERMANY	IRELAND	NLDS	SPAIN	UK
<b>Appeals to courts</b>	15 4 pending	1000 500 pending	3	70 112 internal revision 170 pending	429 250 pending 121 internal revision	7
<b>Duration of appeals</b>	4-5 months	2-4 years excl interim measures	8 mths 1 <sup>st</sup> instance	2.8 mths internal revision 1.5 years 1 <sup>st</sup> instance 1 year 2 <sup>nd</sup> instance	Up to 5 years	1.1 years

# Regulatory Decisions and Appeals

	FRANCE	GERMANY	IRELAND	NLDS	SPAIN	UK
<b>Overall Duration of Proceedings</b>	1-2 YEARS	UP TO 5-6 YEARS	1.2 YEARS	2.6 YEARS	UP TO 5 YEARS	1.1 YEARS