13TH SEMINAR FOR NATIONAL JUDGES

Ensuring predictable market regulation in an ever-changing environment

Brussels, 25 January 2019

Seminar Proceedings

Introduction

The 13th edition of the Seminar for national judges who deal with electronic communications issues took place in Brussels on 25 January, 2019, at the European Commission premises. Participants included 26 judges from 16 Member States, and 45 officials from 28 National Regulatory Authorities (NRAs). The event was organized by the Florence School of Regulation, Communications and the Media Area (FSR C&M) of the European University Institute (EUI), on behalf of DG CNECT of the European Commission.

Mr. Grussmann (European Commission, DG CNECT) launched the event by welcoming the participants and by providing a general overview of the topics that would be discussed during this year's Seminar. He then introduced the distinguished panelists, moderators and officials, who came from several services of the European Commission.

Prof. Parcu (EUI, FSR C&M) also warmly welcomed the participants and expressed his sincerest appreciation for yet another opportunity to organize this annual Seminar. He then presented the FSR C&M, and provided an overview of the activities it organizes, which include research, training and policy events. Professor Parcu also reminded the participants of the opportunities that the FSR C&M's online platform offers and encouraged them to use it actively to contribute to a lively exchange of national experiences beyond the present Seminar. Lastly, Prof. Parcu recounted the Seminar's topics in detail, explaining the focus of each session.

Keynote Speech

The evolution of EU case law in electronic communications in 2018

Anthony Michael Collins | General Court of the European Union

Judge Anthony Michael Collins opened the Seminar by recounting the list of selected cases that the Court of Justice of the European Union (CJEU) handed down in the field of EU electronic communications law in 2018. The selected cases, Judge Collins explained, touch upon issues that are intrinsically connected with electronic communications, and which testify to the evolving complexities in that sector. Thus, the cases abut fields such as consumer protection and the protection of electronic communications data.

By way of a preliminary statement, Judge Collins explained the elements from which one can infer the importance of a given case. First, since it is no longer the case that judgments of the Court are preceded by an opinion from an Advocate General, where such an opinion is delivered it tends to show that the case at hand raises an important point of law. A second indication concerns the number of judges judging the case: straightforward cases are adjudicated upon by three judges, more technical cases are heard by five, whilst cases raising important or novel issues are heard by the Grand Chamber of fifteen judges.

The judgment in the first of the consumer protection cases under consideration (Case C-332/17) concerned the interpretation of Article 21 of Directive 2011/83 on consumer rights, and it was delivered by three judges. Starman, a telecommunications and internet service provider, offered two help lines for subscribers: a landline at a basic rate, and a speed dial number at a higher rate when calling from a mobile phone. According to Article 21 of Directive 2011/83, where a trader operates a telephone line for the purpose of communications regarding the contract, consumers must not have to pay more than the basic rate for such calls. Interpreting that provision, the Court of Justice adopted a teleological approach in favour of the consumer, and ruled that Starman could not charge more than the basic rate on any of the telephone lines it offered to its customers so that they could make calls concerning their contracts with it.

The second of the consumer protection cases (Joined Cases C-54/17 and C-55/17) revolved around the question as to whether the marketing of SIM cards that contained internet enabling and voicemail services which operated automatically if not deactivated, constituted an 'aggressive commercial practice' for the purposes of Directive 2005/29 on unfair commercial practices. According to the Italian Competition Authority, AGCM, which fined both companies for having pursued such activities, it did. On appeal to the Italian Council of State, the CJEU was asked whether such activities were caught by Directive 2005/29 and, if yes, whether there was a conflict between that Directive and the Universal Service Directive, such that the latter applied and the conduct in question had to be regulated by reference thereto.[1] According to the Court of Justice, the practice in question constituted demanding payment for products that were supplied, but which were not solicited by the consumers, i.e., inertia selling, as defined in Annex I, Point 29 of Directive 2005/29. As for the set of rules applicable to such behaviour, the Court held that for there to be a conflict between two sets of EU rules amounting to a divergence between the rules in Directive 2005/29 and other EU rules that cannot be resolved by a

[1] Art. 3(4) of Directive 2005/29 on unfair commercial practices established a 'specialty principle' whereby a conflict between the application of national provisions adopted thereof and other EU rules "regulating specific aspects of unfair commercial practices" is to be resolved in favour of the latter.

unifying formula. Here, the Court of Justice again took a very protective view of consumers, holding that no such conflict existed, as the rules in question pursued the same aims. As a consequence, the AGCM, and not the NRA, was competent to penalize the conduct complained of. At Paragraph 54 of its judgment, the Court of Justice also recognized that in a sector as technical as that of electronic communications, there is a major imbalance of information and expertise between the service providers and the consumers.

Judge Collins proceeded to discuss a preliminary ruling concerning the Universal Service Directive (USD). The French Council of State asked the CJEU whether livestreaming amounts to the provision of an electronic communications network for the distribution of radio and television under the USD, and whether an EU law precludes a Member State from imposing on undertakings offering livestreaming of television programmes 'must-carry' obligations that are similar to those in Art. 31 USD.[2] The response to the first question was that livestreaming consists of the use, and not of the provision, of a telecommunications network. As for the second, since livestreaming was not regulated by the USD, Member States were free to impose 'must carry' obligations on undertakings offering such services. Whilst such national rules must comply with Article 56 TFEU, it was not clear how EU law applied to the facts of this case, in which all of the relevant elements appeared to be internal to France.[3] As already pointed out, where all of the elements in a case are internal to a Member State, the national court must explain how the dispute at hand is connected to EU law.

Judge Collins briefly mentioned Case C-192/17 *COBRA v. MISE*, which concerned the requirement to affix information pertaining to the conformity of radio equipment. At Para. 46 of the judgment, the Court observed that Commission Guidelines, where they exist, may be useful in interpreting EU law, even where those guidelines are not legally binding.[4]

Case C-207/16, *Ministerio Fiscal* was decided by the Grand Chamber of the Court. It concerned the level of protection to be afforded to electronic data in the hands of telecommunications providers.[5] The question that arose was whether access to the data sought by the police was sufficiently serious as to require that such access be limited to fighting serious crime, and, if so, how such seriousness was to be assessed. The Advocate General and the Court adopted a similar approach, holding that the processing of such data may be justified, but such processing must always be proportionate to the seriousness of the offence.

Judge Collins closed his speech by giving a preview of two cases that are pending before the Court of Justice regarding the compatibility with EU law of national taxes and levies imposed on telecommunications operators.[6]

[2] Case C-298/17, *France Télévisions v Playmédia, Conseil supérieur de l'aduivisuel (CSA),* ECLI:EU:C:2018:1017
[3] See Case C-268/15, *Ullens de Schooten v Belgium,* ECLI:EU:C:2016:874.
[4] Para. 46.
[5] Case C-207/16, *Ministerio Fiscal,* ECLI:EU:C:2018:788.
[6] Case C-75/18, *Vodafone Hungary and Case C-119/18, Telefónica Móviles España*

Session I – Panel I: Principles applied in electronic communications law 2.0

Moderator: Frederik Zuiderveen Borgesius |University of Amsterdam

Henk Jaap Albers | Administrative High Court for Trade and Industry, The Hague

Marek Kolasiński | Court of Appeal, Warsaw

Ana Paula Lobo | Supreme Administrative Court, Lisbon

Rosa Perna | TAR Lazio, Rome

Judge Henk Jaap Albers focused on the timely topic of the impact of technological changes on market definition. The first case concerned the 2017 market analysis of the market for fixed telephony, in which the ISDN technology is being pushed out by VoB technology. According to the Dutch NRA, ACM, as there was a risk of significant market power (SMP) in the wholesale market for dual call services,[7] access remedies on the incumbent, KPN, had to be imposed. KPN's competitors argued that KPN also had SMP in the wholesale market for single call services. The ACM was well aware that the market was shrinking, that KPN's market share would fall, and that ISDN would be phased out by September, 2019. Accordingly, the Court held that the ACM could consider KPN to have SMP in the wholesale market for dual call services until 1 April, 2019, but not after that date. The second case concerned the Dutch postal services market for 24-hour business and bulk mail, on which the ACM imposed regulatory measures concerning access and prices on to the postal incumbent, PostNL. PostNL argued that the market definition was wrong, as it should have included digital mail. ACM focused on the qualitative differences between classic and digital mail, and argued that migration to digital was an autonomous price, while PostNL put forward a SSNIP-test to show that digital mail belonged to the relevant market. The Court annulled ACM's decision, stating that even though the SSNIP test is not perfect, it does have the value of proof.

Judge Marek Kolasiński's contribution to the Seminar focused on the issue of mobile termination asymmetry in Poland in the context of mergers' policy in the electronic communications sector. Judge Kolasiński explained that, in 2007, when the Polish market was divided between three companies, the Polish NRA (UKE) implemented a very drastic asymmetric regulation policy to support the entry and growth of the fourth player. Eventually, asymmetric regulation was abandoned in 2012. The reason it is still an important issue is that, unfortunately, court cases related to asymmetric regulation are still pending before the Polish courts. Moreover, the situation is further complicated by the fact that there were many MTR decisions; some of them settled, others not. Judge Kolasiński expressed cautious optimism as to whether these cases will be resolved in the next three years, hence ten years after the administrative decisions in question had been issued. He then raised the question as to whether courts should replace regulatory authorities in shaping telecommunications policy when the decisions of the administrative authorities are significantly wrong, and their consequences cannot be corrected without great effort, economic knowledge and politically-related choices.

In Judge Kolasiński's view, the economic reasoning of the Polish Supreme Court and UKE was at odds with the Commission's merger policy. UKE's MTR policy, which was accepted by the courts, was based on a simple assumption that it is better to have four, rather than three, companies in the mobile market, and that in order to achieve this, it is better to apply a strong regulatory policy. Such an assumption, Judge Kolasiński argued, is in stark contrast with the Commission's current clearance, both conditional and unconditional, of 4-to-3 mergers in the mobile sector. Judge Kolasiński argued

[7] The dual call services market is the market for connections that allow the subscriber to make two to twelve calls at the same time.

that while such mergers are always supported by strong economic reasoning, Polish MTR regulatory decisions were not. He also remarked that Polish courts have great difficulties in having access to independent economic expert witnesses. Judge Kolasiński concluded his presentation by remarking that, in his view, the Polish mobile market, after a decade of asymmetric regulation, is at the same point that it was before the fourth player entered the market.

Judge Ana Paula Lobo started her presentation by remarking that she would focus on the experience of the Supreme Administrative Court of Portugal in reviewing the decisions of tax authorities that impose tax or fees on enterprises or providers of telecommunication services. She then explained that since the tax regime covers all economic activity, including electronic communications, it inevitably has an impact on the development of the European information society. This is because it can either contribute to the establishment of effective competition in the telecommunications sector, or it may constitute barriers to its development.

In the context of the electronic communications sector, taxation for the rights of way is particularly important. In Portugal, City Halls have brought many cases to court wishing to impose fees for the right to use, and rights to install, facilities on, over or under public property. Judge Lobo recalled that, in light of the objectives set in Article 8 of the Framework Directive 2002/21/EC, such fees have to be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose. Judge Lobo remarked that the Supreme Administrative Court of Portugal has always decided that the fee for rights of way (MFRW) is the only one that the undertakings providing electronic communications networks and services have to pay for the deployment, transit and crossing of systems, equipment and other resources of the electronic communications networks and services, on, over or under public or private municipal domains. The City Hall can choose between imposing this fee or imposing no fee at all, but it cannot impose some other kind of fee or charge. Such fees may, or may not, contribute to the development of the internal market, in so far as they allow, or do not allow, for the discriminatory treatment of telecommunications service providers. Judge Lobo concluded her contribution by stating that, in her view, the tax system can support or hamper telecommunications policy, and that the national courts must ensure the consistent and coherent application of EU sector-specific regulation for electronic communications.

Judge Rosa Perna presented two recent Italian cases, *Europa Way* and *Persidera*, in which the Italian Council of State issued a verdict after the CJEU had delivered a preliminary ruling in the cases last year, thereby concluding the first panel. Judge Perna explained that the main proceedings took place in the context of the transition from analogue to digital frequencies for terrestrial television in Italy, which occurred between 2008 and 2012. The *Europa* Way case concerned procedures for the assignment of the digital dividend, and, in particular, the cancellation of a beauty contest by the Italian NRA, AGCOM, while the *Persidera* case concerned the criteria for the complete digitalization of terrestrial television networks. In light of the CJEU's preliminary ruling in the *Europa Way* case, the Italian Council of State recognized the incompatibility of the Italian regulatory suspension of the beauty contest with the relevant European legislation. It also acknowledged that the frequency conversion system was not in accordance with the principles of non-discrimination, transparency, freedom of competition and proportionality. This stated, it re-attributed to AGCOM the power to choose, in full autonomy, whether to conclude the beauty contest or accept the contents, criteria, conditions and outcomes of the onerous competition.

In the *Persidera case,* the Council of State recognized that the frequency conversion system was not in accordance with the principles of non-discrimination, transparency, freedom of competition and proportionality; moreover, RAI and Mediaset held some digital networks in violation of the anti-

concentration limits. Nevertheless, yet importantly, the Council of State chose not to cancel the frequency planning which is currently in force, in order not to create a regulatory vacuum, but to invite the AGCOM to take into account the previous dynamics for the purpose of preparing the new national frequency allocation plan.

The discussion that followed the presentations revolved mostly around the issues concerning the use of experts and appeals. It revealed that the use of experts varies greatly among the countries. In some, it may be limited, as courts face difficulties in finding independent specialized experts, but also because there may be insufficient resources. In countries, where resources come from clients, experts are used more frequently. The judges also agreed that it is extremely important that courts are adequately empowered to deal with appeals in a timely manner.

Session I – Panel II: New rules of the game: The impact of the EECC on regulating electronic communications markets

Moderator: Adam Scott (CAT, London)

Marie Baker | Court of Appeal, Dublin

Annegret Groebel | BNetzA, Germany

Anthony Whelan | European Commission

The second panel dealt with the changes that the new European Electronic Communications Code (EECC)[8] will introduce in EU Member States, from both a regulatory and institutional perspective. After clarifying that NRAs will have the power to impose financial penalties against infringements of national provisions by virtue of Art. 29.1 of the EECC, **Judge Marie Baker** provided an overview of the impact that this will have in Ireland, where the code still has to be transposed into national legislation.[9] It was pointed out that, under the current regime, the national regulator, ComReg[10], is empowered to find infringements without being able to impose financial penalties directly. In order for the Irish NRA to obtain this result, an application has to be lodged before the High Court, although it is possible to provide recommendations on the amount to be determined. A recent case for which a settlement agreement was reached with Eircom Ltd. (trading as 'Eir'), the largest telecoms operator in the country, has shown the complexity of the matter.

It was remarked that the company consists of two divisions: one controlling the wholesale network and the other representing the retail side, which is in charge of providing services to customers. Numerous complaints over the last few years have alleged that Eircom has favoured its own retail division in different ways, already signaling the existence of market distortions. Indeed, in June, 2017, ComReg found five breaches of wholesale-related regulatory obligations in three different markets,[11] and lodged an application for a financial penalty order, besides declarations of non-compliance, by

[8] EU Directive 2018/1972 of the European Parliament and the Council of 11 December, 2018, establishing the European Electronic Communication Code (Recast), OJ l 321/36 of 17 December, 2018. The new Code represents the first complete overhaul of the framework for the telecommunications sector since 2002, as the last significant update was in 2009. It consolidates and replaces the four existing directives that constitute the EU regulatory framework for the electronic communications sector (i.e., the Framework Directive, the Access Directive, the Authorization Directive, and the Universal Services Directive).

[9] Member States have until 21 December, 2020, to transpose the new directive into national legislation.

[10] The Commission for Communications Regulation was established on 1 December, 2002, by the Communications Regulation Act 2002.

[11] Notably, ComReg set out the general context for enforcement actions in relation to wholesale obligations in its Communications Strategy Statement 2017-2019.

virtue of EU Access Regulation 2011[12]. In return, the telecoms company took legal action against the Communications Minister and the Attorney General, challenging the validity of the legislation on which ComReg based its penalty application, and obtaining a stay on the regulator's enforcement cases, pending the outcome of these proceedings. For its part, ComReg successfully appealed this order; it also successfully applied to join the proceedings against the Government and requested to have the case listed in the fast-track commercial division of the High Court.

Finally, the company agreed to pay a €3 million fine to settle the case before the High Court, accepting the setting up of an oversight body composed of five members, including the Chair, of which three will be appointed by ComReg, for the purpose of closely monitoring the relationship between its wholesale and retail arms, and to place a payment of €9 million in an escrow account in case the agreed remedies and rules are not put in place. It was noted that the resolution of the dispute initiated against the Government by Eircom might have had crucial implications for ComReg. With reference to the constitutional compatibility of the power of an Irish NRA to impose financial penalties on companies, it was reported that, a few years ago, the Supreme Court had held that there is no obstacle imped administrative, regulatory or decision-making functions from being conferred on a non-judicial body. Without doubt, the case demonstrates that a substantial adaptation of the way ComReg currently operates will be needed, in order for Ireland to transpose the new EECC into the domestic legal regime.

At this stage of the Seminar, **Dr Annegret Groebel** presented the main structural changes of the regulatory framework governing the sector. First, it was explained that the revised version of the Directive establishing the ECCC reflects crucial market developments. In fact, over-the-top-1 (OTT-1) services[13] that provide similar functionality to traditional 'electronic communications services' (ECS) and, thus, potentially compete with them, are now included in the definition provided by Article 2.[14] It was noted that such an enlargement of the provision's scope of application will allow NRAs to create a level playing field in a more effective way by regulating all ECS.

With reference to the general objectives pursued by the Directive, it was remarked that Article 3.2(a) EECC explicitly mentions the promotion of 'connectivity' amongst them. By putting emphasis on the roll-out of very high capacity networks (VHCNs), including fixed, mobile and wireless networks, the current legal text seems to mark a regulatory shift from the encouragement of competition towards the promotion of investment for the most crucial technological advances with which the sector has to cope, such as the deployment of optical fibre and fifth-generation (5G) mobile systems.

As for the symmetrical regulation, it was argued that some of the introduced modifications regarding non-replicable network assets (bottleneck facilities) have brought the result of enlarging the toolbox on which NRAs can rely in order to exercise their powers. Whereas, in the past, regulators could only impose access obligations on these assets inside buildings, and up to the first concentration or distribution point outside buildings, the EECC now enables NRAs to extend the obligations beyond the first concentration or distribution point under certain circumstances (Article 61.3 of the EECC). At the

[12] *Commission for Communications Regulation v. Eircom Ltd.* 2017/186 MCA & 2017/187 MCA. The application was lodged by virtue of Regulation 19, Paragraph 4 of Statutory Instrument no. 334 of 2001, European Communities (Electronic Communications Networks and Services) Access Regulation 2011.

[13] According to the definition provided by BEREC, OTT services can be defined as 'content, a service or an application that is provided to the end user over the public Internet'. The category includes OTT-0, which qualifies as an ECS; OTT-1, an OTT service that is not an ECS, but that potentially competes with an ECS; and OTT-2, including all other OTT services. See BEREC, Report on OTT Services, BoR (16) 35, January, 2016.

[14] As a result, the category of ECS now includes: (1) internet access services, (2) interpersonal communications services, and (3) services consisting wholly or mainly of the conveyance of signals.

same time, however, such new powers seem to be significantly constrained by the double-lock veto procedure, as per Article 33, holding that if the Commission holds serious doubts on the remedies chosen by an NRA for the national market, it can ask the authority to withdraw them in order to ensure compatibility with EU law, provided that BEREC adopts an opinion supporting the EC's views on the matter.

By contrast, the asymmetrical access regime has not undergone fundamental changes. The general approach to regulation, in this case, in principle remains the same. In fact, it still consists of periodic market reviews that are aimed at identifying markets in which a single operator, or several operators, jointly hold a significant market power (SMP) position. However, the review periods are lengthened from three to five years in order to improve regulatory stability, and also to reflect the need to take into account the results of a longer-term analysis, which is likely to be necessary in the case of VHCNs. Furthermore, it was stressed that some principles guiding NRAs' market analysis, which have been set out in soft law instruments, such as the Commission's recommendations so far, are now directly codified: this is the case with the 'three-criteria test', which is to be used to identify markets that are susceptible to *ex ante* regulation.

Another important novelty that is introduced by the Code is that SMP operators can offer commitments to open the deployment of VHCNs to co-investment arrangements,[15] by virtue of Article 76. These networks should consist of optical fibre elements up to the end-user's premises or base station. In the case where an NRA decides that all the criteria established by Article 79 are met, it will have to make the commitments binding, and decide not to impose any further obligation on the network's parts, subject to the commitments. It was noted that this set of provisions has been designed to allow a particular type of newly built asset to be exempt from access remedies that would otherwise have applied because of the SMP status of the operator, as per Chapter IV of the EECC.

Notably, Paragraph 2 of Article 76 provides that, under duly justified circumstances, the NRA can still impose, maintain or adapt remedies, in order to address significant competition problems in specific markets. However, as in the case of Article 61.3 regarding the extension of access obligations for non-replicable network assets, the EC may significantly constrain NRAs' powers by expressing its serious doubts on the choice of proposed remedies, and may take a decision requiring the national authority to withdraw such measures if BEREC supports the same view.

The debate next dealt with the most significant developments introduced by the enhancement of BEREC's mandate through EU Regulation 2018/1971.[16] The newly enacted legislative instrument entrusted the EU-level regulatory body with new tasks to ensure that the Code is applied consistently, such as providing NRAs with guidelines on geographical surveys of network deployments (Article 22 of the EECC) and also developing common approaches to delivering peer-reviewed opinions, databases and reports. Notably, the Regulation did not turn BEREC into an EU agency, thus preserving its well-functioning two-tiered structure, and did not confer any binding decision-making power on it. Thus, its advisory nature has been reconfirmed.

[15] The Directive provides a list of possible examples of co-investment arrangements: SMP operators may offer co-ownership or long-term risk sharing through co-financing, or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.
[16] Regulation 2018/1971 of the European Parliament and the Council of 11 December, 2018, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120, and repealing Regulation (EC) No 1211/2009, OJ L 321/1 of 17 December, 2018.

Finally, **Mr Anthony Whelan** remarked on the importance of the role played by the EECC, which has been conceived as a revolutionary piece of legislation, in ensuring better predictability, consistency and efficiency of radio spectrum management across the EU for the promotion of investments in the deployment of the 5G network. In this respect, due to possible cross-border harmful interferences across the EU, the Code envisages that Member States will have to coordinate with each other on the use of radio spectrum. The Code also harmonizes key aspects of individual usage rights, including the minimum license duration of twenty-five years, a streamlined process for spectrum trading and leasing, clearer conditions for restricting and withdrawing rights, and more consistent and predictable processes for granting and renewing rights.

With reference to spectrum assignment procedures, it was observed that one of the most significant changes concerning the regulatory framework is the establishment of a mandatory peer-review process. According to Article 35 of the EECC, when an NRA, or other competent authority, intends to undertake a selection procedure in relation to radio spectrum bands, for which technical conditions have been harmonized, it shall inform the Radio Spectrum Policy Group (RSPG)[17] about it, indicating whether, and when, it requests the RSPG to convene a 'Peer Review Forum'. Such a forum, to be open to voluntary participation by experts from other competent authorities and BEREC, should be held to discuss and exchange views on the draft measures transmitted. It should also facilitate the exchange of experiences and best practices on the draft measures transmitted by NRAs, or by competent authorities.

The last remark concerned termination rates. Article 75 of the Code obliges the Commission, upon BEREC's advice, to set single maximum voice call termination rates for both fixed and mobile networks. This will replace the current system, whereby termination rates can vary between countries, sometimes quite significantly.

The second panel ended with a lively debate concerning the impact of the most relevant institutional novelties introduced by the Code, with special emphasis on the provisions regarding the double-lock veto procedure. As for the new role that BEREC will play, it was noted that the issuance of several Guidelines, most of which are already in the pipeline, will ensure clearer definitions and a more consistent regulatory approach among NRAs. Finally, it was stressed that envisaging the exact procedural changes required at the domestic level in EU Member States in order to transpose the Code into national legislation, is currently a difficult task, although it is already possible to predict that a better degree of harmonization will be achieved. However, it remains to be seen how the new regime will cope with the challenges posed by the fast-paced technological evolution that these decades are witnessing.

[17] The RSPG was established by Commission Decision 2002/622/EC.

Session III: Enabling Smart Europe: An Overview of Selected Key Issues
Moderator: Pier Luigi Parcu | European University Institute
Wolfgang Feiel | BEREC
Peter Eberl | European Commission
Giovanni Sartor | European University Institute

The afternoon session of the Seminar addressed some selected policy issues with a relevant impact on the electronic communications sector.

The first presentation was delivered by Mr **Wolfgang Feiel** (RTR/Rundfunk und Telekom Regulierungs-GmbH), Chair of the Working Group on International Roaming of the Body of European Regulators for Electronic Communications (BEREC). The speaker focused on the role of BEREC in facilitating a fast and smooth deployment of 5G, the latest generation of cellular mobile communications. A key point underlined was that 5G technology will be less sectorial than other generations of mobile technologies, and hence is expected to be an enabler of innovation for many industries. In this respect, BEREC's role consists of actively and closely following the deployment of 5G, and specifically in identifying and eliminating the hurdles for a quick roll out of 5G, making spectrum available on time and engaging with stakeholders in a productive process of "listening and learning from each other".

Mr Feiel reported that, during 2018, 5G was a key focus of BEREC's Work Programme, and several outcomes resulted from this effort. Amongst them, the Report on Infrastructure Sharing,[18] aimed to identify best practices on mobile infrastructure sharing, and in developing a common BEREC position on the topic, which is relevant because the future rollout of 5G[19] is expected to lead to the need for NRAs to reconsider their existing approach to infrastructure sharing, and to design new models of infrastructure sharing arrangements. In this respect, the speaker reminded those at the seminar that, in addition to the provisions included in the Framework Directive (Article 8), in the Broadband Cost Reduction Directive,[20] (BCRD) and in competition law, the EECC provides several additional legal instruments for infrastructure sharing (namely, Articles 44; 47; 51; 52; 61(4)). In particular, the EECC provides for new powers for the Authorities to impose passive (which seems to be the preferred solution), or even active, sharing, under exceptional circumstances, and after applying a detailed assessment. Following the report, BEREC has developed a draft common position on infrastructure sharing, which was submitted for public consultation, and which is expected to be approved in its final version by the end of 2019. This common position relates to the typology of infrastructure sharing (CP1), the main objectives to be pursued when considering a network-sharing agreement (CP2,) and the parameters to consider when assessing network-sharing agreements (CP3). With respect to the

[18] BEREC Report on Infrastructure Sharing, BoR (18)116, available at: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/8164-berec-report-on-infrastructure-sharing_0.pdf
[19] 5G is expected to make use of higher frequency bands, which will entail, amongst other things, more use of small cells. This will result in an increase in the number of base stations relative to the existing networks.
[20] Directive 2014/61/EU of the European Parliament and of the Council of 15 May, 2014, on measures to reduce the cost of deploying high-speed electronic communications networks.

assessment criteria under CP3, BEREC included the level and evolution of the competition in the market, the type of sharing, the shared information, and the reversibility and contractual implementation.

Another relevant outcome of 2018's BEREC activities regarding 5G is the publication of the Report on practices on spectrum authorization and award procedures and on coverage obligations.[21] The report provides NRAs with an updated compilation of practices concerning the market-shaping aspects of spectrum licence granting, amendment or renewal of the bands harmonized for electronic communication services by the European Conference of Postal and Telecommunications Administrations (CEPT) and the European Union (EU). Mr Feiel presented selected findings on the spectrum's awarding mechanisms and recalled that, according to Articles 44 and 45 of the EECC, the Member States must ensure effective management of radio spectrum and the application of pro-competitive criteria in the allocation. As the design of selection procedures is likely to have an impact on the market structure and, in particular, it may drive the market towards more concentration, measures to safeguard competition will have to be considered. Besides spectrum caps, which are commonly used by NRAs, measures such as reserving spectrum for certain bidders or groups of bidders, and access obligations for MVNOs or national roaming obligations, are worth wider consideration. To conclude, Mr Feiel stated that actively and closely following the development of 5G remains one of the strategic priorities of BEREC in 2019, especially concerning the work tasked to BEREC in this field by the EECC.

In the second intervention of the session, **Mr Peter Eberl**, Deputy Head of Unit (Cybersecurity and Digital Privacy) in the European Commission's DG CONNECT, addressed E-Privacy legislation and the General Data Protection Regulation[22] (GDPR). The Commission's attempt to modernize the data protection framework, which culminated in the adoption of the GDPR in May, 2016, and its entry into force in May, 2018, also needed to adapt the existing privacy rules for the electronic communications sector[23], in order to align these with the new regulation. While the Commission's proposal for Regulation[24], published in January, 2017, and currently under discussion among the Member States at the European Council, is not an integral part of the EECC, it partially relies on definitions provided in the Code, including that of "electronic communications services". The proposal also brings over-the-top (OTT) communications service providers into its scope, both to reflect the market reality and to complement the EECC, which ensures the security of electronic communications services. In this respect, Mr Eberl underlined that one of the main novelties of the regulation under discussion is that it would provide the same level of protection to all users of all electronic communication services,

[21] BEREC Report on practices on spectrum authorization and award procedures and on coverage obligations with a view to considering their suitability for 5G, BoR (18) 235, available at: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/8314-berec-report-on-practices-on-spectrum-au_0.pdf
[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April, 2016, on the protection of natural persons with regard to the processing of personal data, and on the free movement of such data.
[23] Directive 2002/58/EC, amended in 2009 by the Directive 2009/136/EC.
[24] Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications, and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

irrespective of the technologies used: new players, such as WhatsApp, Facebook Messenger and Skype, will have to guarantee the same level of confidentiality in communications as traditional telecoms operators. Traditional telecoms operators, in turn, will have more opportunities to provide additional services and to develop their businesses, once consent is given for communications data - content and/or metadata - to be processed. Another novelty mentioned by the speaker is that the regulation aims to make simpler the management of cookies: browser settings will have to provide for an easy way to accept or refuse cookies and other identifiers. The regulation, being directly applicable, is also expected to create more legal certainty and to reinforce the internal market. The enforcement will be the responsibility of independent supervisory authorities that are already competent to enforce the GDPR, ensuring the uniform application of the regulation across the EU, and enhancing cooperation between Member States.

Mr Eberl commented that the ongoing discussion is complicated by the different interests of the numerous stakeholders involved, but also by the different distribution of competencies in the Member States, which makes finding a common position more demanding. From a substantive point of view, several contentious issues are debated, such as the possibility of the "further compatible processing" of electronic communications content and metadata; the cookie consent requirement, and the scope of the regulation with regard to data retention, national security and defence activities. The speaker concluded by illustrating the way forward for the legislative process, and by stating the expectation that the regulation should be adopted in a timely way, given its nature as a necessary complement to the GDPR.

Prof. Giovanni Sartor, whose research activity is focused on artificial intelligence (AI) and law, delivered the last speech of the Seminar, addressing the recent development of AI and its impact on citizens and consumers. The presentation started by distinguishing between "strong" and "narrow" AI: the first expression refers to the creation of computer systems that exhibit most of the human cognitive skills, while the second relates to the more modest objective of developing "artificial specialised intelligence", i.e., systems capable of satisfactorily carrying out single specific tasks requiring intelligence. The possible future emergence of "artificial general intelligence" already raises serious concerns, with many commentators stating the need to anticipate the "existential threats" which may result from super intelligent AI systems. While, according to the speaker, the risks associated with strong AI should not be underestimated, and will constitute a major challenge that will have to be addressed in the future, narrow AI has already brought several actual legal and social issues to policymakers' and scholars' attention.

The speaker illustrated how the development AI applications both presupposes and stimulates the availability of huge data sets, so-called "big data". The integration of AI into the global data processing infrastructure can lead to a worldwide generation and distribution of knowledge and wealth, to the creation of individualised private and public services, and could enable an environmentally friendly management of utilities and logistics. At the same time, the convergence between AI and data processing is able to endanger not only fundamental rights to privacy and data protection, but also other rights that are included in the European Charter, such as dignity, freedom of thought, expression and information, equality, non-discrimination, and consumer protection. Fundamental social goals,

such as welfare, competition, efficiency, advancement in science, art and culture, cooperation, and, ultimately, democracy, are also at stake. The speaker particularly focused on the legally relevant interests of the consumer which may be affected in a context in which AI technologies are deployed in the service of business entities and are used to influence consumer purchasing and other consumer behaviours. Amongst them, Prof Sartor mentioned the interest in data protection, namely, in a lawful and proportionate processing of personal data that is subject to oversight; the interest in fair algorithmic treatment, namely, the interest in not being subject to unjustified prejudice resulting from automated processing, and the indirect interest in fair algorithmic competition, i.e., in not being subject to market-power abuses resulting from exclusive control over masses of data and technologies. In the following part of the presentation, the speaker briefly reviewed some of the business practices that are related to the interests previously mentioned and which raise open legal and policy issues, such as price and products/services discrimination and targeted and personalised advertising. For each of them, the main applicable legal regimes were identified, as well as a set of key legal issues that needs to be addressed.

To conclude, the speaker underlined that, besides regulation and public enforcement, the countervailing power of civil society is also needed, and that AI technologies can actually contribute to addressing online violations. In this respect, a final point was made regarding the opportunity for public authorities to support and incentivise the creation and distribution of AI tools to the benefit of consumers and citizens.

Final Remarks
Pier Luigi Parcu & Wolf-Dietrich Grussmann

During the concluding session of the event, **Prof Parcu** summarised the main issues that had been presented by the panellists and discussed by the participants. He underlined the technical complexity of the cases presented by Judge Collins, touching upon aspects that are related to consumer protection, universal service, product conformity and the protection of electronic communications data, commenting that this complexity is expected to increase in the future. As had emerged in the first case presented by Judge Albers, these technical changes can also bring into question the tools that are at the disposal of the Authorities in correctly delineating the relevant markets in the electronic communications sector, and in identifying the significant market power of operators. In some of the cases presented by the distinguished panellists, the understanding of the technological changes of the sector appears to be crucial in order to reach the correct decisions. This evidence suggests that the involvement of technical expertise in judicial and regulatory processes may emerge as an issue that should be addressed at the EU level. On the basis of the evolution of the case law in the sector, it was also underlined that the advent of OTTs and of the global digital quasi monopolies has caused a backlash that requires new ways to regulate, ones that are more experimental and flexible, and possibly more proactive, regulatory approaches. Professor Parcu concluded by focusing on the era of General Purpose Technologies and 5G in which we are living: in this context, our economic tools are put under pressure by new business models and by new forms of economic dominance, with important implications for citizens and consumers. To confront this phase, and to respond to new and

pressing issues, Prof Parcu concluded that we need to activate our collective intelligence. This seminar, has hopefully contributed to this important task.

Mr Grussmann ended the Seminar by reminding the participants that the event is organised with the aim of providing national judges and regulators with a yearly opportunity to come together and discuss the most challenging issues that arise in their day-to-day work, with the aim of contributing to both the development of best practices that are widely spread amongst the European Union countries, and the creation of a long lasting network for judges and regulators who deal with electronic communications. Afterwards, he thanked all of the speakers, moderators, participants and contributors for attending, organising and supporting the event, and closed the Seminar.