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## SEMINAR

### Electronic Communications Regulation at a Cross-road

*Brussels, 15th January, 2016*

#### Seminar Proceedings

##### Introduction

The 10th edition of the Seminar for national judges and regulators, dedicated to electronic communications' regulation within the European Union, took place in Brussels the 15<sup>th</sup> January, 2016, at the European Commission's premises, with 30 judges from 20 EU Member States and 25 representatives from 20 National Regulatory Authorities (NRAs), as well as 2 representatives from the EFTA Surveillance Authority. The event was organised by the Florence School of Regulation, Communications and Media Area (FSR C&M) of the European University Institute (EUI), on behalf of the European Commission, DG Connect.





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Mr Grussmann (European Commission, DG Connect) opened the event and welcomed the participants. He pointed out that this annual event is a good occasion for national judges who deal with electronic communications' regulation and national regulators to exchange their experiences and views on recent policy and legislative developments.

Prof Parcu (EUI, FSR C&M) also welcomed the seminar participants, and introduced the Seminar topics, explaining the focus of each session.

### **Session I: Past Experiences and Future Challenges**

**Moderator: Pier Luigi Parcu**

**Roberto Viola** | European Commission  
**Meinrad Handstanger** | Administrative Court, Vienna  
**Martin Cave** | Imperial College Business School  
**Anthony Michael Collins** | General Court

The first session, on *Past Experiences and Future Challenges* opened with a keynote intervention by Mr Roberto Viola, followed by presentations by Judge Meinrad Handstanger and Prof Martin Cave, and it ended with a keynote speech by Judge Anthony M. Collins.

Mr Viola, the Director-General of DG Connect, stressed the importance of initiatives like the Seminar and provided an overview of the current and future initiatives in the electronic communications field. Firstly, he highlighted that things are changing quickly, whether it be in the way we live, work, or the way we approach the daily life, and that Europe will have to catch-up with these rapid changes. In order to achieve its objectives, the European Commission takes a horizontal approach to the digitalisation phenomenon and has established cross-sectoral coordination. Secondly, Mr Viola gave an overview of the three pillars of the Digital Single Market strategy: (i) improving access to online goods and services across Europe (e.g., by tackling unjustified geo-blocking, establishing a new copyright framework, working on consumer rules); (ii) improving infrastructures, mainly by investing in digital networks and innovative services, while ensuring cybersecurity, especially for critical infrastructures, such as electricity grids, ports, airports; (iii) industrial policy, meaning the maximisation of the potential of the digital economy and the role of big data in leading growth. He raised particular issues with regard to copyright



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rules, the AVMS Directive, the e-privacy Directive, the electronic communications services (ECS) regulatory system and the radio spectrum.

Judge Handstanger and Prof Martin Cave provided their respective views about the achievements and shortfalls of the current regulatory framework for electronic communications' services, and expressed their opinions on what the future challenges will be. Both highlighted a sort of difficulty, from the legislative side, in keeping pace with the rapid evolution that the electronic communications' sector is facing, and both debated on the right balance between *ex-ante* and *ex-post* intervention. Judge Handstager focussed more on the legal perspective, and spoke about the challenges to national courts and national authorities in applying EU law. He mentioned the role of soft law instruments, which are prominent in the sector. Finally, he drew attention to the actors who are involved in the application of the framework, which are many, and the consequent need for co-ordination and clarity in the allocation of tasks.

Prof Cave concentrated on the economic aspects of the regulatory framework. He mentioned that the latter contains asymmetric regulation (SMP and remedies) and elements of convergence with competition law. He recalled the three cumulative conditions, which are the guiding principles to determine what is going to be *ex-ante* regulation and what is to be left to competition law, and he spoke about the boundaries between the two. Among other subjects, he spoke about the access directive, the market structure and tight oligopolies, technological neutrality, the distribution of content and the networks' developments as well as net neutrality.

Judge Anthony M. Collins, from the General Court, closed Session I with a keynote speech on recent developments in the EU case-law on electronic communications and related fields. In particular, he focused on a number of key issues by presenting the relevant case law, namely, the independence of NRAs and the appeal bodies, appeal mechanisms, access, authorisation and universal service obligation. For each case, he presented the Courts' findings and the guidance that can be derived from them extensively.



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## **Session II: Applying Law in the Digital Single Market:**

### **New Challenges for National Courts**

**Moderator: Eva Edwardsson, Administrative Court of Appeal, Stockholm**

**Heico Kerkmeester** | University of Antwerp, Court of Appeal for Trade and Industry, The Hague

**Adam Scott** | Competition Appeal Tribunal, London

**Gabriella Vella** | Administrative Review Court, Malta

**Yves Doutriaux** | Council of State, Paris

**Alexandre De Streel** | University of Namur

The session was opened by the intervention of Judge Heico Kerkmeester, followed by the presentations by Judge Adam Scott, Magistrate Gabriella Vella, Judge Yves Doutriaux, and it ended with a presentation by Prof Alexandre De Streel.

Judge Kerkmeester focused his presentation on the dilemma between the harmonisation of EU regulation and specific national circumstances, presenting two cases relating to the Dutch market, the first one on FttO (Fiber to the Office) and the second one on HQWBA/LL.

Judge Scott started his presentation by talking about the tasks of the Competition Appeal Tribunal (CAT) and the complexity of the UK appeal system. He then spoke about two cases relating to mobile termination, Hutchinson 1 and Hutchinson 2. Among others, the issues raised in these cases concerned the standard of proof and the level of scrutiny in appeals on the merit.

Magistrate Vella presented the Melita case, which was on bundling. Essentially, the major challenge in this case was that the Administrative Review Tribunal (ART) had to take a position on how far the Authority should go into, consider and regulate unreasonable bundling when bundles are made up of both regulated and unregulated products.

Judge Doutriaux presented the Bouygues Télécom v. Government of France case, which was decided upon by the French Council of State in December 2014, and the Judge debated its underlying aspects. With its ruling, the Conseil d'État annulled, on the basis of articles 13 and 14 of the EU Directive 2002/20, an important increase in the amount of fees to be paid by a telecommunication operator to the State for access to radio



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frequencies (for 4G development). The major issue debated concerned the judicial control of the proportionality of fees for the right to use radio frequencies.

After an intense afternoon of discussions on national experiences, Prof De Streeel concluded the session with an overview of the major challenges to the law and to judges that are raised by the Digital Single Market. He suggested a number of the characteristics of the digital sector that should be taken into account carefully while designing and applying the relevant laws. He added that the decision chain model includes rules that are based on principles rather than details, while the implementation is carried out by NRAs, with courts being in charge of the judicial review of decisions. He also spoke about technological neutrality and its consequences for a level playing field among the different players. Furthermore, he touched upon a number of fundamental issues, like the general principles of proportionality and subsidiarity, the country of origin principle, the growing importance of taking into account people's fundamental rights that are related to the use of ECS, the role of soft law, the importance of a consistent application of the rules and the level of scrutiny of judicial reviews.

### **Final Remarks**

#### **Pier Luigi Parcu & Wolf-Dietrich Grussmann**

In the last part of the Seminar, Prof Parcu summarised the main issues that had been raised during the day, highlighting a number of points to be carried over from the event. He stressed the importance of Mr Viola's explanation of the complex reform that was being undergone, which will affect and modernise the electronic communications framework, but not just that. Copyright, e-commerce, privacy, and media regulation will all be impacted upon as well. This is not a coincidence, because the Internet is a challenge that both our industry and our society have to accept. We have the resources to react, but we need a modernised framework with which to push towards a true digital single market in Europe. This is a necessity.

Furthermore, he stressed the importance of looking at the way that the value chain of the industry is changing and the consequences of this. He highlighted that the tension with the new digital native OTT companies is here to stay. In addition, he mentioned that a number of crucial issues, for instance the independence of the NRAs or the Universal Service Obligation, remain, because they are deeper than specific markets issues, and the case-



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law shows that access cases are presently probably the vital core of the existing regulation, and also this is likely to remain an issue for a long time.

Among other things, Prof Parcu recalled the possible declinations coming from the concept of a tight oligopoly, the challenges linked to an NRA's weak reasoning, the new themes, such as bundling and the extension of market power, and that convergence in the markets will always be proposed more often; and the direct economic dimension of some regulatory decisions, especially in regard to very valuable resources, like spectrum.

Finally, Prof Parcu listed a number of elements that the speakers had mentioned as being necessary for reform. He mentioned fundamental rights, the media directive and the re-regulation of the networks.

Mr Grussmann concluded the Seminar by providing an updating of the status of the study on the feasibility of establishing an EU wide inventory of national case law on telecom regulation that the Commission has commissioned from an external expert. Moreover, Mr Grussmann encouraged participants to provide their feedback and suggestions concerning the format of the Seminar and the topics to be tackled during the next edition of it. He reminded those present that the event is organised in order to provide national judges and regulators with a yearly opportunity to come together and discuss the most challenging issues in their daily jobs, with the aim of contributing to both the development of best practices that can be widely spread in the European Union, and the creation of a long lasting network for participants and, potentially, for all of the judges and regulators who deal with electronic communications. Afterwards, he thanked all of the speakers, moderators, participants and contributors for attending and supporting the event, and for the input of everyone during the debates, and he closed the Seminar.