SEMINAR
The Role of the Judiciary in the Changing Digital Single Market
Brussels, 20 January 2017

Seminar Proceedings

Introduction

The 11th edition of the Seminar for national judges and regulators dedicated to the electronic communications issues within the European Union took place in Brussels the 20th of January 2017, at the European Commission premises for 39 judges from 20 EU Member States and 38 representatives from 24 National Regulatory Authorities (NRAs). The event was organized 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.

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 dealing with electronic communication issues and national regulators to exchange experiences and views on recent policy and legislative developments.

Prof Parcu (EUI, FSR C&M) also welcomed the seminar participants, and briefly presented the FSR C&M and its research, policy and training activities; in addition, Prof Parcu introduced the Seminar topics, explaining the focus of each session.

Recent Developments on the EU case-law on Electronic Communications and Related Fields

Anthony Michael Collins | General Court

The event started with Judge Collins providing a comprehensive overview of the most recent EU case law developments occurred in the relevant sectors. This round up of cases gave the opportunity to debate about various legal issues that create challenges for stakeholders.

By way of example, two cases[1] questioned the impact of certain Member States' measures on the independence and impartiality of the NRA. The first dealt with the merger between a NRA and another authority, which in principle lays within the Member State's autonomy over the organisation and structure of the NRAs. The second concerned the imposition, on the NRA, of specific provisions relating to limiting and streamlining expenditure incurred by

[1]Case C-424/15, Garai & Almendros v. Administación del Estado; Case C-240/15 Agcom v. Istat & Others.

public administrative authorities. In both cases, the Court reached the conclusion that the independence and impartiality was not put in danger by the State's intervention.

The KPN case[2] brought the attention, among others, on how to protect the interest of the end users. As they are not represented in courts, one could wonder whether it is within the tasks of the judiciary to check if Article 8 of the Framework Directive has been duly paid attention to. In other words, the challenge is to establish to what extent the Court has the right or the duty to raise consumer protection issues if they are not raised by any parties of the proceedings.

Another issue discussed concerned the source of the NRA's power to impose obligations. In the Polkomtel case[3], the Court of Justice reminded to take into account the entire system set by European rules; in fact, the powers and obligations of the authorities stem from, and should be interpreted looking at, the entire framework set by the different directives, rather than from a single one.

Furthermore, the TDC v. Teleklagenaevnet judgment[4] gave the opportunity to discuss about compensation mechanisms in cases of universal services. The Court recalled that each mechanism is to be considered independently, and that the same proved true for costs; and it also reminded that the Universal Service Directive[5] establishes that compensation mechanisms involving specific undertakings has direct effect; as a consequence, Article 32 can be relied upon by market operators in actions for compensation.

Finally, Judge Collins also referred to a ruling by the EFTA Court on a case concerning the hacking of a web-SMS service provided in Iceland by the operator Fjarskipti[6]. The judgment contains indications concerning the definition of key concepts like "electronic communications network", "electronic communications services" and "public communications network". The Court interpreted those concepts in a quite extensive way, and one can wonder if this is in line with the approach followed by the European Commission in its proposal for an European Electronic Communications Code (hereinafter, the Code)[7].

[2] Case C-28/15 KPN v. ACM.
[3]Case C-231/15, Puke & Petrotel v. Polkometel.
[4]Case C-327/15 TDC v. Teleklangemaevnet.
[5] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).
[6] Case E-6/16 Fjarskipti HF v. Icelandic Post & Telecom Administration.
[7] Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) - COM(2016)590, available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=comnat:COM_2016_0590_FIN

Session I: National Experiences in the Field of Electronic Communications

Moderator: **Alexandre de Streel**

Carlos Manuel Gonçalves de Melo Marinho| Court of Appeal, Lisbon

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

William McKechnie | Supreme Court, Dublin

Adam Scott | CAT, London

Anthony Whelan | European Commission

The first panel was dedicated to the analysis of the scope of judicial review of decisions issued by the NRAs. As this is, at least in part, left to the procedural autonomy of the Member States, different jurisdictions might provide for different standards. As a starting point, it was recalled that Article 4 of the Framework Directive[8] establishes the right of appeal, and specifies that, during the procedure, the merits of the case have to be duly taken into account. Article 31 of the Commission's legislative proposal for a Directive establishing the European Electronic Communications Code does not change the content of such a right. Therefore, the national practices discussed at this Seminar are expected to remain valid in the future.

The recent Portuguese case law[9], presented by Judge Gonçalves de Melo Marinho dealt with the non-payment among telecoms providers concerning the portability obligation and the disrespect of the time delay fixed by regulation related to the latter.

These judgments gave the opportunity to reflect upon the relevance of the NRA's decisions for the functioning of the economy and for end users. The NRA has the responsibility to promote competition and to contribute to the internal market; furthermore, the NRA also has the duty to ensure that consumers get the best choice in terms of prices, quality etc., and, therefore, it could be argued that the consumer's welfare should be taken into account when deciding about the imposition of obligations on operators.

Moreover, it was suggested that the NRAs should not act alone; rather, they should coordinate among themselves in order to implement common policies and with the aim to contribute to the establishment of a transparent, effective and undistorted internal market. In other words, an NRA cannot act outside the parameters imposed in similar cases by other NRAs or the internal market will be put at risk and competition will be distorted.

Another issue debated concerned the efficacy of pecuniary sanctions. Consensus was expressed with regards to the fact that appreciable monetary payments for non-compliance

[8] Directives 2002/21/EC on a common regulatory framework for electronic communications, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.
[9] Public Prosecutor Office v. NOS Comunicaçoes S.A, judgment of the Constitutional Court n. 138/2016 of 3 August 2016.

are indeed a suitable tool to compel business actors. Finally, a number of procedural aspects related to the Portuguese cases were debated.

Judge Kerkmeester spoke about the Dutch experience focusing on the FTA-MTA case[10]. He started by explaining that the Dutch Court of Appeal for Trade and Industry (CBb) tends to take into account the merits of the case thoroughly while reviewing a decision. The case law he presented concerns the interaction between the CBb and the Court of Justice in the context of a preliminary ruling procedure, and concentrates on the value that national courts have to attribute to EU soft law. The issue is not novel to the EU judiciary and it is clear that soft law is not legally binding on national judges. However, the specific circumstances of the case at stake raised a few points that casted doubt on how the CBb had to interpret EU law.

In more detail, the CBb sought guidance on the role to be attributed to the facts of the individual case and in particular to the specific characteristics of the market of the Member State in question. The Court of Justice's view was that also a court has to take into account a Commission recommendation while specific characteristics might justify a deviation from what is recommended by the European Commission.

The CBb also asked if the national court, when reviewing an obligation imposed by the NRA, has to take into account whether this obligation attains the objectives set out in Article 8 of the Framework Directive. The Court of Justice declared that, on the one hand, the court can assess the proportionality of the measure in light of Article 8. On the other hand, it is not possible to require the NRA to demonstrate that the measure imposed has the effect of promoting interests of end-users in a different market, especially when that effect would be realised in the future. Indeed, in the latter case the standard of proof would be too high for the NRA. Judge Kerkmeester informed that this is also the case under Dutch law, where the NRA never has the obligation to meet such high standards.

The debate then concentrated on how to reconcile the guidance given by the Court of Justice with different national procedural laws. In fact, the declarations of the Court leave some degree of uncertainty concerning what can or should be asked from the parties with regard to proving the facts of the individual case and in particular, the specific characteristics of the market under attention. In other words, it is not clear which standard of proof is imposed on the parties and what is to be done in case such standard differs from the one imposed by national procedural rules (as is, for example, the case for the Netherlands).

Judge McKechnie started his intervention recalling that the concept of judicial review usually implies to look at the legality or rationality of the judgement. Nevertheless, Article 4 of the Framework Directive does not impose any qualification on the nature/scope of appeal other than the requirements that it is effective and that "the merits of the case" are taken into account.

It follows that the exact terms under which the court is deemed to act in the review process are mainly mandated by national law. The question that rises, then, is how to harmonise likely national differences with EU law.

[10] Case C-28/15 KPN v. ACM, cit.

On the one hand, there are specific bodies towards which national courts should have some deferential respect. This represents a trend across the EU. However, it was argued that, in order for the deference to be justified, it has to be very clear that the body in question has the required expertise to act.

On the other hand, national rules might provide for different ways of intervening, each with different meaning. Some appeal reviews can be limited to point of laws, others look at the rationality of the content and so on. Thus, the wording used in the statute provisions concerning revision is varying and it often differs from the wording used in sector specific regulation.

The presentation of the Irish Vodafone case[11] gave the opportunity to discuss the difference among the concepts of lawfulness or unlawfulness and rightness or wrongness. The former and the latter represent different standards of review; in a nutshell, it is a matter of identifying the thresholds to be met.

The Irish case law showed that, in general, for a decision to be quashed, a series of significant material errors making the implementation of the decision incompatible with the regulator's aim, has to be proven. If this is not the case, some aspects can be challenged but the court will nonetheless uphold the decision. Here, a major role is played by the level of deference to the NRA set by the national legislator.

A number of other factors matter in the review process of an NRA's decision. First, the subject matter of the decision under appeal. Second, the level of expertise deployed by the relevant decision maker. Third, the extent and quality of any consultation process. Fourth, the level of appropriate expertise available at the review court.

Concerning the latter, there appeared to be conflicting opinions. On the one hand, Article 4 of the Framework Directive, as well as Regulation 4, embody an expectation that the High Court will, if necessary, exercise a more extensive degree of scrutiny of substantive aspects, including of merits, of an NRA's decision, due to the requirement that the Court has access to appropriate expertise. However, this contrasts with the assumption made by Keane C.J. in the *Orange Limited* case[12] that noted that the relevant areas of expertise would not be available to the High Court.

Judge Scott brought the UK experience to the table, underlining a couple of lessons we can deduce from the relevant and recent case law. First, he recalled that, under the UK system, the Competition Appeal Tribunal (CAT) constitutes a specialised court, which implies that it is expected to scrutinise regulatory decisions in a profound and rigorous manner. If this is true, then the court must have the specific competences to perform such scrutiny.

The CAT hears the appeal "on the merits". This gave again the opportunity to reflect about the difference between an appeal on the merits and a judicial review and to differentiate the standard and scope of the court's activity.

[11] Vodafone Ireland Limited v. Commissioner for Communications Regulation, judgment of 14 August 2013.
[12] Orange Ltd. v. Director of Telecoms (No. 2) [2000] 4 I.R. 159.

However, the point that raised most attention is the possibility, for the CAT, to act as regulator and/or to indicate to the NRA what to do next. In other words, the court not only has to assess whether the decision adopted was the right one, but in case it decides against the decision, it has to give a mandate to the NRA concerning its next steps. Apparently, these features will be maintained with the Digital Economy Bill, presented by the House of Lords and currently under debate in the UK. The Bill, in fact, provides that "where (the Tribunal) quashes the whole or part of that decision, (it may) remit the matter back to the decision-maker with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal".

As a conclusion of this session, and taking into account the different points of discussion raised after each presentation, Mr Whelan noted that, if a question on the impact of the EU regulatory framework on judicial review was asked 10 years ago, the answer would have been that there is little impact. However, nowadays we see that the EU regulatory framework does have an impact, and a quite significant one, and that there are indications to believe that, next year, there will be even more to discuss on this topic.

This can be considered as an important achievement for the EU. Among others, it shows that the European Commission has been able to stimulate a profitable dialogue among not only the NRAs, but also the national courts, which no doubt have an essential role in the establishment of the DSM. Finding a balance between, on the one hand, the recognition and safeguard of the characteristics of the national legal systems and markets, and, on the other hand, the need for harmonisation in order to deploy an effective common space for the development of electronic communications and other digital services in the EU has never been an easy task. However, it emerged from the debate in session I that we are on a good path.

Session II: National Experiences in the Field of Electronic Communications

Timeliness of judicial review and retroactive effect of appeal decision

Moderator: **Adam Scott, Competition Appeal Tribunal, London**

Ingo Weustenfeld | European Commission

Stephane Hoynck | Council of State, Paris

Konstantinos Koussoulis | Council of State, Athens

Dawid Miasik | Supreme Court, Warsaw

The session opened with the intervention of Mr Ingo Weustenfeld, who presented the EU Justice Scoreboard[13], an annual information tool, which provides a comparative overview of the independence, quality, and efficiency of the justice systems in the EU Member States. Its main goal is to assist the EU and its Member States in achieving more effective justice systems by identifying, among others, potential shortcomings, improvements and good practices. The indicators used to assess the effectiveness of a judicial system include

[13] See EU Justice Scoreboard, available at: http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm

efficiency, quality and independence of the judiciary, and they measure the length of proceedings for civil, commercial and administrative cases as well as the capacity of the courts to handle their workload. It was noted that the latest 2016 Justice Scoreboard confirmed the previously reported positive trend in terms of length of litigious civil and commercial cases, which was observed also in several countries that faced particular challenges due to a high number of pending cases. In terms of quality of the national justice systems, the 2016 edition added new indicators concerning legal aid and training of the judges to already analysed indicators such as easy access to justice, adequate resources, and effective assessment tools. Also, for the first time, the Scoreboard presented the results of two Eurobarometer surveys on perceived judicial independence from the point of view of citizens and businesses.

Following the presentation of the EU Justice Scoreboard, Judge Stephane Hoynck discussed the French case in which the question of retroactivity arose in the context of the regulation of ex-Market 18, the market for broadcasting transmission services to deliver broadcast content to end users[14]. According to EU law, market analysis should be carried out maximum every three years. Given that wholesale contracts between the incumbent and competitors were typically of 5-year duration the question arose as to whether new remedies (i.e. remedies imposed under a new market analysis) should be imposed to existing contracts. Such question was raised as according to the French law, it is usually considered that the parties to a contract decide which law governs their contract. Such choice, it was argued, would protect the parties from having their contractual relationship altered by a new regulation that would modify the legal regime originally chosen.

The dispute between TDF, an SMP undertaking, and Towercast, a new entrant in the market, concerned the applicability of new regulatory measures implemented due to successive market analysis to existing commercial agreements as TDF refused to modify its contract with Towercast. While the French law does not explicitly grant the NRA the power to modify contracts, in the decision implemented after the third cycle of market analysis, the NRA explicitly stated that new remedies were applicable to existing contracts. TDF challenged the NRA's market analysis directly before Conseil d'Etat, which interpreted the relevant provisions of the French law in light of the EU Directives. According to the Court, the EU and French law have to necessarily be interpreted as granting ARCEP (the French NRA) the power to impose on undertakings with SMP the obligation to modify existing contracts, when such a modification derives from an outstanding public interest relating to the establishment of competitive conditions in a given market.

Judge Koussoulis focused his presentation on the discussion of the Greek wiretapping case, in which two independent authorities, ADAE[15] and EETT,[16] imposed sanctions on Vodafone on the basis of the same facts, which concerned violation of privacy of communication. While the decision of ADAE was appealed before the Council of State, the decision of the EETT was first challenged before Athens Administrative Court of Appeal, and in the second instance before the Council of State. In the latter case, the Council of State decided to

[14] *TDF, Towercats and Multiplexe R5 v. ARCEP*, judgements of the Conseil d'Etat n. 363920 , 363949, 365455 of 11 June 2014.
[15] *Vodafone-Panafon S.A. v. Greek Communications Privacy Protection Authority (ADAE)*, judgement of the Council of State n. 4309/2015 of 4 December 2015.
[16] *Vodafone-Panafon S.A. v. Greek Telecommunications and Post Commission (EETT)*, judgment of the Athens Second Instance (Appeal) Administrative Court n. 1237/2011, of 18 April 2011.

postpone the hearing to allow the parties to present their arguments concerning the timeliness of the appeal.

It was explained that relevant provisions of the Greek law state that in cases concerning petition for annulment of the NRA's decisions, the Court can set a deadline for the authority by which procedural irregularities have to be restored or it can decide that the challenged acts is quashed on a date other than that of the challenged act, but not after the publication of the judgement. So far none of these options have been used in cases arising in the context of digital markets.

According to the Council of State, the NRA has to issue a decision within a reasonable time after hearing the case; and in its view 12 or 16 months after the hearing cannot be considered as reasonable time.

The last case discussed during the second panel concerned the dispute between a Polish mobile operator, Polkomtel and the President of UKE (the Polish NRA) and Petrotel. In 2008, UKE issued a Mobile Termination Rate (MTR) decision that determined the mobile termination rates which were to be applied by Polkomtel in its agreements with other telecoms firms. Polkomtel, however, challenged the decision before the Competition and Consumer Protection Court (SOKiK, a specialised court of first instance) in order to withhold its immediate effect. The Court rejected the motion, and Polkomtel appealed. While the appeal was still pending, smaller operators, including Petrotel, asked the NRA to issue decisions implementing the 2008 MTR decision. The NRA issued a number of executing decisions, which amended, among others, the interconnection agreement between Petrotel and Polkomtel. Polkomtel also challenged in court this executing decision.

The case revealed two peculiarities of the Polish judicial system. First, appeals against decisions of the NRA go through the courts of ordinary jurisdiction which apply rules of civil procedures. The civil procedure allows the court to modify the decision *ex tunc* from the day it was issued, and to quash the decision. While for many years, civil courts disregarded procedural irregularities in appeals against the decisions of the NRA, they recently started to examine them. In another case concerning the 2008 MTR decision, SOKiK, in fact quashed the NRA's decision on procedural grounds, namely lack of consultation with the EC.

After the case went through the Court of Appeal, it was eventually decided by the Supreme Court in December 2016,[17] after the EU Court of Justice delivered its preliminary ruling in October 2016.[18] According to the Supreme Court, the revocation of the MTR decision has an impact on the validity of the executing decision if the latter does not provide the courts with any substantive reasoning as to why mobile termination at a given rate should be applied. When the basic decision is revoked, the executing decision could only be upheld if the NRA provided either in the decision itself or during the judicial proceedings specific analytical and substantive arguments. In the absence of such arguments, the executing decision lacks its substantive part - the reasoning. In order to provide effective judicial control, the court has to revoke the executing decision and send it back to the NRA. Last but not least, the Supreme Court explained that, in its view, changes made by the court

[17] *Polkomtel vs. President of UKE and Petrotel*, judgment of the Supreme Court n. III SK 18/14, of 5 December 2016.
[18] Case C-231/15, President of UKE & *Petrotel v. Polkometel*

during an appeal against an immediately effective decision are applicable retroactively, i.e. from the entry into force of the appealed decision.

Session III: Recent Developments in the Electronic Communications Sector

Moderator: **Pier Luigi Parcu** | European University Institute

Claire Bury | European Commission

Steffen Hoernig | Nova School of Business and Economics, Lisbon

Soeren Nuebel | BNetZA

The third session was opened by Claire Bury's speech on the modernization of the electronic communications regulatory framework.

The European Commission on 14 September, 2016, proposed the new *European Electronic Communications Code and BEREC Regulation*, which overhauls the existing regulatory framework for electronic communications. The Code has been designed to take into account the latest changes occurred in markets, consumer trends and technology, all of which have significantly changed since 2009 when the framework was last amended. The proposal comes within the framework of the Digital Single Market (DSM) strategy, and represents one of the legislative proposals under the initiative entitled 'Connectivity for a European gigabit society'[19].

With reference to access regulation, it was pointed out that most of the significant amendments to the legal framework aim at reinforcing and improving the current SMP access regime as well as promoting infrastructure competition and network deployment by all operators.

In particular, it was stressed that NRAs would have to take into consideration commercial access agreements in their market analyses, in addition to any other regulatory obligation already imposed (e.g. symmetrical obligations). Moreover, their market analysis procedures would have to reflect the most valuable current best practices. Finally, access obligations would be imposed only when and where addressing retail market failures is necessary, and/or to ensure end-user outcomes. In addition to that, and for the purpose of sustaining the deployment of very high capacity networks throughout the EU, NRAs would have to survey the state of broadband networks and investment plans across their national territory.

During the discussion, it was clarified that the idea of ensuring advanced connectivity for all citizens and for EU economy is at the core on the provisions on spectrum. With a view to enhancing more predictability and legal certainty, minimum license duration for long spectrum usage rights (i.e. 25 years) and timing of authorization for the use of harmonized spectrum are targeted as key aspects of the new proposed body of rules.

[19] More information is available at the following link: https://ec.europa.eu/digital-single-market/en/connectivity-european-gigabit-society.

Indeed, the Code's provisions include a wide array of revised measures, such as those aiming at stimulating investment in very high capacity networks and their take-up as well as changes to governance and the universal service regime, among others.

Notably, the whole reform has been based on the assumption that effective and sustainable competition drives efficient investment and fuels the development of the single market, ultimately serving the interests of end-users. In this framework, the new definition of electronic communication services (ECS) plays a key role by listing three different possible types of services categories(i) the Internet Access Services (IAS); (ii) interpersonal communications service (ICS), distinguishing between number-based and number-independent ICS, and (iii) services consisting wholly or mainly of the conveyance of signals, such as transmission services used for M2M communications and for broadcasting signals.

The Code also introduces updates of end user rules which focus on three main aims i) simplification and consistency of provisions that are outdated or overlap with general consumer legislation ii) to modernise and improve the sector specific provisions that are still needed and iii) to increase coherence and legal certainty for end-users and providers by introducing a full-harmonisation approach.

The proposed reforms also include the changes in the institutional set-up, by reinforcing the independence and the regulatory capacity of national regulators by establishing a common harmonised minimum set of competences for NRAs and enabling BEREC to have enlarged competences for matters with cross-border dimension.

Professor Steffen Hoernig's speech shed light on the most controversial economic and regulatory issues raised by the diffusion of new technologies. First, it was stressed that the trend towards markets' convergence is changing the way in which consumers use communication services. Nowadays, content is available on new platforms, as well as on numerous different devices, and it is often offered in bundles.

Then the debate concentrated on the technological and structural changes that occurred in the television and broadcasting sector with their consequent implications in terms of value chain and market structure configuration. On the one hand, in the upstream market, we witness the dominance of high-quality products and the emergence of talented market players, who act as "superstars" and treat infrastructures as a simple commodity. Therefore, revenues are passed upstream, platforms compete harshly and have to sustain high fixed costs. The outcome is a strong trend towards oligopolistic structures, which are reinforced where the network effects are particularly robust. Finally, the winner-takes-all dynamic is emerging in many markets, where we thus have only one large player.

After providing a categorization of platform types based on their main features, the speech focused on a description of the different ways of breaking up prices across buyers and sellers in two-sided markets; thus, it was explained how different price configuration matters for market outcome. The implications that the two-sidedness of a market has for regulatory intervention were also highlighted.

Special emphasis was also given to some elements of the new EU regulatory package, such as those concerning high-speed connectivity and investment as delivered through different levels of infrastructure competition (FTTCab and FTTH). It was highlighted that the main features consist of (i) prioritizing passive over active remedies, even though active remedies

are in place in many countries; (ii) encouraging the conclusion of commercial agreements. Furthermore, it was noted that the package is oriented towards providing a wider scope of access in order to include wholesale-only operators and co-investment; largely preserving, rather than tightening, the existing SMP framework and possibly extending symmetric regulation.

The debate was enriched by a speech provided by Mr Sören Nübel, touching upon one of the most prominent tasks of the Body of European Regulators for Electronic Communications (BEREC), which consists of having a formal consultative role in the procedure described under Articles 7 and 7a of the Framework Directive.

As known, within the Framework Directive, NRAs have to notify the Commission prior to the adoption of regulatory measures in the following cases: (i) definition and analysis of relevant markets; (ii) designation of operator(s) holding a SMP position; and (iii) proposed imposition or removal of regulatory remedies on providers of telecoms networks or services.

It was remarked that in any case BEREC, which has an institutional role in the procedure, is required to analyze the issue and submit its own opinion, in accordance with Article 7/7a, and to cooperate and work together with the NRAs.

Whenever the Commission finds that the intended measure is not compatible with the EU rules, it begins an in-depth review lasting up to three months. The final possible outcome of the process, to be conducted in close cooperation with BEREC, is that the Commission withdraws its observations; or as an option, that it issues a veto against the decision of the national regulator (however, this does not apply to the case of regulatory remedies ex Art. 7a, according to which the Commission may only issue recommendations requiring NRAs to amend the measure). In both cases, the BEREC opinion has to be taken into *utmost account* by the Commission and the NRA. In fact, BEREC is called upon developing a close cooperation among NRAs, and between NRAs and the Commission. Furthermore, it acts as an advisor to and assists them in their relations with third parties.

It was observed that the Articles 7 and 7a procedures have played an essential role in the EU regulatory system for electronic communications. First, they strongly contribute to the consistency and development of the internal market and to the establishment of effective competition as well. Moreover, if on the one hand, the co-regulation procedure allows for flexibility for remedies, on the other hand, it has brought a shift in the balance towards the European level. Therefore, looking at the future of the electronic communication frameworks, it appears important to make sure that the triangular relationship among the NRAs, BEREC and the European Commission maintains its balance, in order for the DSM to be properly realized.

Final Remarks

Pier Luigi Parcu & Wolf-Dietrich Grussmann

During the final part of the Seminar, Professor Parcu summarised the main issues raised during the event. In his opinion, EU Courts have sent a modern message in terms of effective judicial protection and effective judicial review: in both cases, their decisions should align

with the most recent technology developments. Another major point concerned the Commission's recommendations; notwithstanding the limits deriving from their non-binding nature, they have a strong role to play. Looking at end users, the most relevant development appears to be the need to take into due account their interests on any affected markets, not just the one, which is directly regulated. Finally, it was noted that State aid principles continue to act as a strong limit to undue public intervention.

Moreover, Professor Parcu recalled the fact that administrative actions and sanctions are very different from criminal procedures and sanctions. More in general, economic regulation is a peculiar set of rules, and this should be taken into account when applying it. For example, the objective of the regulatory system and the reasons behind the sanctions should be always considered while acting.

The discussions arisen during the Seminar revealed that the EU regulatory framework has had a substantial impact on national proceedings. One of the most debated questions concerns the effectiveness of regulation and the fact that in some instances regulation may need to prevail over contract law. This, in turns, raises the question of finding the right balance between public interest and individual freedom. Among the issues raised with regard to judicial proceedings, one of the most important seemed the retroactivity of the decisions. The national experiences exchanged on this topic confirmed that challenges associated with retroactivity are very complex and risky for companies and that, therefore, the best solution is to issue decisions which withstands the review process.

Subsequently, Professor Parcu highlighted that the Commission is strongly determined to move on with the Digital Single Market (DSM) project. In his view, national segmentation still remains an issue. Moreover, while, on the one hand, investment incentives are a driver that needs to be taken into utmost account, on the other hand, this task is particularly challenging for regulators, as it brings them closer to industrial policy and / or to politics.

Spectrum is another key element towards the realization of the DSM, and it is of great relevance not only for the Member States, but also, and especially, for the European industry, which will definitely benefit from similar assignment procedures dealt with similar rules. Here, the lessons drawn from the GSM story are to be remembered.

Furthermore, Prof Parcu observed that, while on the one hand the telecommunications framework was built on competition principles, on the other hand these principles are currently under stress by new and common market dynamics like, among others, the winner-takes-all. The problem is further aggravated by the fact that competition has become uncertain in the world altered by disruptive innovation. Consequently, as competition principles are no longer clear, regulation becomes even more challenging.

Moreover, oligopolistic situations often prove to be not satisfying. Here again traditional approaches are under pressure. Perhaps, in these situations symmetric regulation could be an instrument to improve competition on the market.

Finally, Professor Parcu mentioned a number of points arisen about the institutional aspect of the reform, which lead to conclude that the Commission wishes to strengthen the role of BEREC in order to make it more capable of contributing to the objectives of the DSM.

All in all, Prof Parcu concluded, there are three dimensions through which we can look at the changing DSM: (i) the major reform the European Commission is proposing; (ii) the dynamics of the economy (mergers' wave, new investments etc.) (iii) the contribution given by judges and regulators, who are definitely doing their best and in fact the importance of their role is increasing.

Mr Grussmann ended the Seminar by reminding 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 that arise in their day to day work, with the aim to contribute to both the development of best practices widely spread among the European Union and the creation of a long lasting network for participants and potentially for all judges and regulators dealing with electronic communications. Afterwards, he thanked all speakers, moderators, participants and contributors for attending and supporting the event and for everyone's inputs during the debates, and closed the Seminar.