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## 12<sup>TH</sup> SEMINAR FOR NATIONAL JUDGES

### Enforcing EU Electronic Communications Rules: Experiences and the Challenges Ahead

*Brussels, 19th January, 2018.*

#### Seminar Proceedings

##### Introduction

The 12th edition of the Seminar for national judges who deal with electronic communications issues took place in Brussels on 19 January 2018, at the European Commission premises. Participants included 25 judges from 17 EU Member States, and 27 representatives of 20 different 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) opened the event by welcoming the participants. He provided a general overview of the topics for discussion at this year's Seminar and introduced the distinguished panellists, moderators and officials, who came from several services of the European Commission.

**Prof. Parcu** (EUI, FSR C&M) expressed his pleasure in organizing this Seminar and also welcomed the participants. He briefly presented the FSR C&M by giving an overview of the research, training and policy activities that the FSR C&M organizes; he also reminded the participants of the opportunities that are offered by the online platform for interaction beyond the present Seminar and to bridge the dialogue to the next one. Lastly, Prof. Parcu presented the Seminar's topics in greater detail, explaining the focus of each session.





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## Keynote Speech

### The evolution of EU case law in electronic communications in 2017

Anthony Michael Collins | General Court of the European Union

The seminar started with **Judge Collins** providing an overview of a number of the important decisions handed down in the field of EU electronic communications law by the Court of Justice of the European Union (CJEU) in 2017. One of the cases discussed involved the rate applied by Comtech GmbH, a German company retailing electronic and electrical equipment, to telephone calls for after-sales services. The dispute arose as the charges for calls to the non-geographic telephone number provided to customers for that purpose were much higher than the charges for a standard call. The Regional Court of Stuttgart made a reference for a preliminary ruling<sup>1</sup> to the CJEU on the interpretation of Article 21 of Directive 2011/83/EU of 25 October 2011 on consumer rights.<sup>2</sup> In its judgment, the CJEU equated the term ‘basic rate’ in that provision with that of a charge for a standard telephone call, thus holding that charges for calls to access after-sales services must not exceed the cost of such standard calls.

Judge Collins proceeded to discuss whether the actions of the Executive and the Legislature of a Member State<sup>3</sup> to suspend a national procedure to allocate the ‘digital dividend’ are compatible with EU law.<sup>4</sup> In the context of the request for a preliminary ruling from the Italian Council of State, the CJEU took the opportunity to hold that NRAs cannot receive any instructions from other bodies with regard to their performance of regulatory duties conferred upon them by EU law. In particular, the allocation of digital radio frequencies based on a selection procedure constitutes a task, in the performance of which the independence of NRAs is protected by Article 3 of the Framework Directive.<sup>5</sup> At the same time, the CJEU held that a fee-based selection procedure for the allocation of radio frequencies meets the requirements of EU law where it is based on objective, transparent, non-discriminatory and proportionate criteria and it is ensured that such allocation operates to promote both competition on the television market and media pluralism.

Judge Collins also enriched the discussion by analysing a case arising from commercial practices by Wind to market SIM cards containing internet enabling and answering services without informing consumers and obtaining their consent for the costs involved. The Italian Competition Authority

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<sup>1</sup> Case C-568/15, *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v comtech GmbH*.

<sup>2</sup> Directive 2011/83/EU of 25 October 2011 of the European Parliament and the Council of 25 October 2011 on Consumer Rights (OJ 2011 L 304 p. 64).

<sup>3</sup> The allocation concerned frequencies that were newly available as a result of technological progress and that were not reserved from the outset for operators already active in the market.

<sup>4</sup> Case C-560/15, *Europa Way Srl and Persidera SpA v. Autorità per le Garanzie nelle Comunicazioni (AGCOM) and Others*.

<sup>5</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).



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(AGCM) fined Wind, but the company successfully challenged this decision before the TAR Lazio, alleging that Article 3(4) of Directive 2005/29 on unfair commercial practices<sup>6</sup> prevented AGCM from exercising power in areas that fall under the competence of the Italian NRA, AGCOM. The CJEU's answer to the questions subsequently referred for a preliminary ruling<sup>7</sup> by the Council of State will clarify whether Wind's activities represent an 'aggressive commercial practice' or a failure to provide information contrary to the Universal Service Directive.<sup>8</sup> It will also examine the *raison d'être* of the Directive on unfair commercial practices in the context of the operation of the speciality principle enunciated in Article 3(4) of the Universal Services Directive.

### **Session I – Panel I: Principles applied in electronic communications law**

**Moderator: Alexandre de Stree**

**Marie Baker** | High Court, Dublin

**Stéphane Hoyneck** | Council of State, Paris

**Rosa Perna** | TAR Lazio, Rome

**Adam Scott** | CAT, London

**Hendrik Albers** | Court of Appeal for Trade and Industry, The Hague

**Luminita Nicolae** | European Commission, Legal Service, Brussels

The first session started with **Judge Baker's** speech on the interplay between the EU and US personal data regimes. It was remarked that in the milestone preliminary ruling, *Schrems I* dated 6 October 2015, the CJEU had to deal for the first time with the regulation of cross-border flows of personal data from the EU to a third country.<sup>9</sup> In this respect, Article 25 of Directive 95/46<sup>10</sup> provides a strict regime that allows the transfer only if the recipient can ensure an adequate level of protection. The judgment originated from Mr. Schrems' complaint to the Irish Data Protection Commissioner (DPC) regarding a cross-border transfer from the Irish subsidiary of Facebook to its parent company, which is based in the US. Notably, it produced the result of invalidating the "Safe Harbour arrangement" that regulates EU-US data transfers.

Following this decision, Facebook decided to place reliance on the three Standard Contractual Clauses' (SCC) decisions that were adopted by the European Commission to validate transfers of personal data outside the EEA region. In the meantime, Mr. Schrems decided to reformulate his complaint and to question data transfers once again. In the course of this investigation, the DPC

<sup>6</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ 2005 L 149 p. 22).

<sup>7</sup> Case C-54/17, *Autorità Garante della Concorrenza e del Mercato v. Wind Telecomunicazioni SpA*.

<sup>8</sup> 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 (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

<sup>9</sup> Case C-362/14, *Schrems v. Data Protection Commissioner*.

<sup>10</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 p. 31).



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challenged the SSC's decisions validity and instituted a proceeding before the Irish High Court. On 3 October 2017, the High Court issued its ruling, acknowledging the mass use of indiscriminate processing of data by the United States' government agencies. Above all, it found that the DPC had raised very well founded concerns in reference to US surveillance of Facebook. Finally, it was held that the absence of effective remedies available to EU citizens to address infringements of their privacy rights when personal data is transferred to the US, may violate European fundamental rights under Articles 7, 8 and 47 of the European Charter of Fundamental Rights. The Court thus determined questions to be referred to the CJEU for a preliminary ruling<sup>11</sup>; this decision may have a significant effect on US electronic communications service providers and their use of standard contractual clauses in order to transfer data from the EU.

Next, the discussion focused on the most recent developments that had occurred in France. **Judge Hoyneck** presented two of the main cases, which shed light on the justification of the different regulatory treatment that is applicable to different technologies. First, he recalled that the Ministerial Order of 3 December 2013 establishes a set of requirements that only cover copper networks (xDSL), according to which operators must inform consumers about, *inter alia*, the technical features of landline internet access. In its decision, dated 11 May 2015,<sup>12</sup> the French Council of State, who were called upon to assess the validity of the above-mentioned Order, based on an operators' complaint, pointed out that technological constraints are different for copper and cable networks, respectively, and that this therefore put consumers in different situations. The main conclusion was that the Government had fulfilled the objective of improving consumer information, while respecting the technological neutrality principle as much as possible. The same line of reasoning can be found in another decision of the Council of State that involves the validity assessment of the Ministerial Order dated 1 March 2016, which regulates internet offers using the term 'fiber'. The Order states that FTTB (Fiber to the Building) internet providers are not forbidden to use that word (although they offer lower internet speed than FTTH, Fiber To The Home) does, provided that they give additional information to the end-users.<sup>13</sup>

Another strand of the debate focused on the question of whether the principle of technological neutrality may be superseded by other instruments. On the one hand, the principle is contained in Recital 18 of the Framework Directive. On the other hand, however, in Article 8, technological neutrality appears to be at a lower level than other regulatory objectives. In addition, the framework allows NRAs to impose regulation on a particular type of technology if the three criteria test for market analysis is passed; furthermore, the non-neutral allocation of spectrum is allowed, in accordance with ITU radio regulations.

The first session was enriched by **Judge Perna's** speech, which dealt with a recent Italian case concerning the assignment of the rights to use radio frequencies for digital terrestrial television broadcasting, for which a reference for a preliminary ruling to the CJEU was made. First, it was remarked that the main proceedings took place in the context of the transition from analogue to

<sup>11</sup> Case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*.

<sup>12</sup> *Société Free* no. 37548.

<sup>13</sup> *Société NC Numericable and SFR* no. 398822.



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digital frequencies of terrestrial television in Italy, which occurred between 2008 and 2012. It was thus pointed out that Telecom Italia Media Broadcasting (TIMB) brought a complaint before TAR Lazio seeking the annulment of AGCOM's decision 181/09/CONS of 7 April 2009<sup>14</sup>, which allocated multiplexes on the grounds of the violation of constitutional and EU legislation provisions, wrongly taking into account analogue networks unlawfully operated pursuant to the antitrust law. As the appeal was dismissed, the company, which had become *Persidera* in the meantime, lodged an appeal before the Council of State, alleging that there was the application of a 50% conversion ratio against a ratio of 66.67% for the market leaders, Rai and Mediaset, and challenging the criteria that were applied to the conversion. The CJEU's ruling in the *Persidera* case<sup>15</sup> clarified that the EU legislation, and Article 9 of the Framework Directive on the management of radio frequencies, in particular, must be interpreted so as to preclude a national provision that leads to an unfair competitive advantage being prolonged, or even reinforced. Moreover, it was held that the two principles of non-discrimination and proportionality lead to the same result when the above-mentioned provision entails a "*proportionately larger reduction in the number of digital networks assigned compared with the number of analogue channels operated, to the detriment of one operator compared to its competitors, unless it is objectively justified and proportionate to its objective*". As the main proceedings are still pending, Judge Perna suggested that it remains to be seen how the remitting judge will solve the different technical aspects that are associated with the assignment of multiplexes.

**Judge Scott's** contribution raised a very interesting debate on market definition issues, with specific reference to an appeal brought by British Telecommunications (BT) against the final statement in the Business Connectivity Market Review of April 2016, which was conducted by the UK Telecoms Regulator (Ofcom), claiming that the latter had failed to identify a separate product market for Very High Bandwidth (VHB) services of 1 Gbits and above, and that it had also provided an incorrect approach to geographic market definition and to the identification of the boundary between the competitive core and terminating segments of BT's network. On 27 July 2017, the Competition Appeal Tribunal (CAT) quashed the Regulator's decision, stating that Ofcom had provided incorrect market definitions with the main result of determining a revoking of any instrument giving effect to such a decision, and remitted the matter to Ofcom. A final point of this part of the debate focused on the new UK standard of review which is applicable to appeals against Ofcom's decisions by virtue of Section 87 of the Digital Economy Act 2017 amending the Communications Act 2003. It was remarked that how this case would have been decided under the new standard of review, which is now supposed to speed up the appeals process while ensuring that consumers' interests are prioritized, was not clear.

**Judge Albers** focused on the difficult balancing exercise between the observance of the principle of non-discrimination and the respect for privacy, providing a detailed analysis of a recent case in which the CJEU has had the opportunity to clarify the scope of application of Article 25(2) of the

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<sup>14</sup> AGCOM's decision 181/09/CONS was subsequently converted into Law No 88 of 7 July 2009.

<sup>15</sup> Case C-112/16, *Persidera SpA v Autorità per le Garanzie nelle Comunicazioni, Ministero dello Sviluppo Economico delle Infrastrutture e dei Trasporti*.



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Universal Service Directive. The dispute arose when the Dutch Competition Authority (ACM) ordered the undertakings Tele2, Ziggo and Vodafone to make basic data available to the Belgian company, European Directory Assistance (EDA). These undertakings brought an action before the Administrative High Court for Trade and Industry, disputing whether it was necessary to leave the subscribers with the choice to give, or not to give, their consent, based on the territory in which the directory service was provided. The CJEU held that a telephone subscriber's consent to the publication of his data also covers its use in another EU Member State.<sup>16</sup> In particular, it was stated that the European regulatory framework is sufficiently harmonized to make it possible to ensure the same respect for requirements concerning the protection of personal data throughout the EU.

Finally, Ms **Luminita Nicolae** summarized the most relevant issues that had been presented during the first session and offered additional insights on the concept of the independence of NRAs with reference to the *Europa Way Srl and Persidera SpA v. AGCOM and others* case, which was presented by Judge Collins. It was underlined that the Framework Directive clearly establishes all the principles that underpin the operations of NRAs, and specifically holds that they “must be legally separate from and independent of all organizations providing electronic communications networks, equipment or services”. One of the final thoughts touched upon the novelties introduced through the proposal for a Directive establishing the European Electronic Communications Code. It was concluded that some of the remaining open questions regarding spectrum management will be answered in the near future.

### **Session I – Panel II: Market regulation: national developments**

**Moderator: Adam Scott**

**Marc Bosmans** | Court of Appeal, Brussels

**Hans Peter Lehofer** | Supreme Administrative Court, Vienna

**Ewa Stefańska** | Administrative Appeal Court, Warsaw

**Gabriella Vella** | Administrative Review Tribunal, Valletta

**Reinald Krueger** | European Commission, DG CNECT, Brussels

The second panel of the morning was dedicated to national developments relating to market regulation. The presentation of case law made possible the comparisons among national experiences and exchanges of best practices.

**Judge Bosmans** gave a summary of four recent verdicts<sup>17</sup> delivered by the Brussels “Special Bilingual *ad hoc* Chamber” of the Court of Appeal that replied to thirty appeals that had been promoted by different operators against eight decisions of the Conference of Regulators of the Electronic Communications Sector (CRC). In the contested decisions of 11 December 2013, the CRC had fixed the wholesale rates for cable operators, providing that the value of the minuses was valid until the

<sup>16</sup> Case C-536/15, *Tele2 BV, Ziggo BV and Vodafone Libertel BV v. Autoriteit Consument en Markt – ACM*.

<sup>17</sup> The judgments were delivered on 25 October 2017.





entry into force of a decision that would have reviewed them. Some of the operators in the Dutch, French and bilingual Community demanded the annulment of the decisions, arguing that the CRC had violated the obligation to state reasons contained in the Framework Directive.<sup>18</sup> Three operators in the German Community claimed that, having separate and independent company structures, they had not been correctly considered by the CRS's decision to be one single operator. The Court annulled the decisions on different grounds: because of the failure to comply with the obligation to give the motivation for every decision (regarding the appeals of the operators in the Dutch, French and bilingual Community), and because of the contradiction between decisions that considered the operators to be separate in some cases, and as being the same one in another case (regarding the appeal of the operators in the German Community). This annulment also voided the decisions of 19 February 2016, which were partially considered to be new decisions, partially based on previous decisions. The Court added that, in any case, the decisions of 11 December 2016 had to be annulled because Article 16.6(a) of the Framework Directive had not been respected. The Court decided that the lack of a market analysis less than three years old constitutes a ground for the annulment of the decision. The Court considered that the fact that the Framework Directive does not determine a specific sanction of nullity for the case when no new market analysis has been carried out within a period of three years, does not prevent the national Court, on a case-by-case basis, deciding to sanction for non-compliance with the rules. Nevertheless, the Court, considering that the annulment of all the decisions might lead operators to retroactively claim rates that were higher than those fixed in the annulled decisions, with the consequence that access for some operators might become rather difficult, or even impossible, decided that the annulment should come into effect as from the end of the sixth month following the judgment (*i.e.*, from 30 April 2018).

**Judge Lehofer** presented two recent cases that had been submitted to the Supreme Administrative Court in Austria. The first concerned “spectrum refarming”, following the decision of the NRA to liberalize the conditions for spectrum usage by Mobile Network Operators (MNOs). One mobile operator appealed the decisions that were addressed to its competitors<sup>19</sup>, but the Federal Administrative Court upheld the NRA's decision: referring to two decisions from the CJEU, the Court explained that, in these cases, there were no effects in relation to the rights of competitors, as there had been no change in the relative amounts of spectrum for the operators. The Supreme Administrative Court came, however, to a different conclusion, relying on the same judgments of the CJEU and referring to the rules contained in the Authorization Directive<sup>20</sup> and the Framework Directive, suggesting that there was a need to assess whether competition is affected by the NRA's decision. Since the NRA had established that refarming, *per se*, could have had an impact on the position of competitors, and since it has the responsibility to treat all competitors in an equitable manner, there has to be the possibility for competitors to ask for a revision of the decision's impact on competition.

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<sup>18</sup> Art. 7(7) of the Directive 2002/21/EC, as amended by the Directive 2009/140/EC.

<sup>19</sup> The NRA had issued separate decisions for each and every operator.

<sup>20</sup> Directive 2002/20/EC.



Judge Lehofer also briefly presented a case on Mobile Termination Rates (MTR). Some years ago, the Regulator changed the rates by adopting a pure BU-LRIC method, following the European Commission's Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.<sup>21</sup> One operator appealed to the Supreme Administrative Court, claiming that the legal issue that was of fundamental importance were the conditions under which a pure LRIC-approach was compatible with (*inter alia*) Article 13 of the Access Directive.<sup>22</sup> In addition, it was claimed that this change in the cost accounting methodology would have led to a 60% decrease in its revenues, contrasting with the principle of promoting regulatory predictability and a consistent regulatory approach. The Supreme Administrative Court suspended its proceedings in consideration of a pending judgement from the CJEU in a Dutch case, and, after the judgment was given,<sup>23</sup> resumed the proceedings and dismissed the appeal. The motivation was that the CJEU had already answered on the point of law: NRAs have, as a rule, to follow the guidance contained in the above mentioned Recommendation, and the operator shall specify and prove any special circumstances that could justify departing from it.

**Judge Stefańska** also brought a case on MTR in which the NRA decided on a cost-oriented MTR for Polkomtel, the national Polish operator with Significant Market Power (SMP), along with the obligation to set the price annually on the basis of the most up-to-date data on costs, and to submit the price thus set to the NRA, together with a cost justification, for verification before that price becomes applicable in the trade. When the NRA found the 2009's cost justification of the price to be incorrect, the operator appealed against the NRA's decision. The Competition and Consumer Protection Court (UOKiK) changed the decision of NRA by setting a different price, but the Court of Appeal amended the judgment of UOKiK by dismissing the operator's appeal from the NRA's decision. Polkomtel logged an appeal to the Supreme Court, which recurred to the preliminary ruling instrument to ask the CJEU to clarify to what extent, and under which conditions, the Access Directive empowers the NRAs to control the prices charged by telecommunications operators for the provision of access or interconnection services. The Court stated that NRAs may, in order to promote efficiency and sustainable competition, set the prices of the services below the level of the costs that are incurred by the operator in order to provide them, if those costs are higher than the costs of an efficient operator.<sup>24</sup>

**Judge Vella's** speech gave the opportunity to discuss another aspect that was related to proceedings on termination rates. She presented the case of a Maltese services' provider that appealed against a decision taken by the Malta Communications Authority (MCA) regarding non-compliance with termination procedure requirements and imposing a one-off administrative fine on the operator. Among the arguments of the appeal, it was mentioned that the decision of the MCA was not reasonable and proportionate, and that the MCA does not have the authority to impose fines.

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<sup>21</sup> EC Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU 2009/396/EC.

<sup>22</sup> Directive 2002/19/EC.

<sup>23</sup> Case C-28/15, *Koninklijke KPN NV and Others v Autoriteit Consument en Markt (ACM)*.

<sup>24</sup> Case C-277/16, *Polkomtel sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej*.





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However, the Tribunal reaffirmed the sanctioning power of the MCA in the case of an infringement of any laws/regulations, which the MCA is entitled to enforce, as well as in the case of non-compliance with an MCA decision, and stated that, in those cases, the MCA can, at its discretion, impose sanctions or penalties. As for the extent to which the exercise of the Authority's discretion was proportionate and reasonable in this particular case, the Tribunal judged the MCA's administrative fine to indeed be proportionate and reasonable having considered the nature and extent of the infringement, its duration and its impact on the market and consumers and given that the operator infringed the regulations related to contractual and legal obligations towards customers for service termination.

As a conclusion to this session, **Mr. Krueger** offered an overview of the trends and future challenges with regard to SMP-based regulatory measures in electronic communications markets. Starting from the observation that the deregulatory trend continues, and currently concerns already about 70% of all of the telecoms markets in the European Union which the Commission has ever recommended for *ex ante* regulation, he observed that while regulatory cases brought by national regulators are decreasing in number, their complexity is increasing. Mr. Krueger mentioned some of the key issues that are currently under discussion between the European Commission and the regulators. One is the question of identifying the correct approach in situations where, at the retail level, different platforms compete head to head. Another concerns the geographic market definition, which raises challenges in situations where certain operators, cable in particular, are not homogeneously present across the entire territory of the Member State in question, and thus do not overlap, or are not substitutes for each other in every part of the country. In such cases, inappropriate regulatory intervention might lead to the establishment of niches that are permanently regulated. Another challenge concerns the transition from monopolistic situations to (rather) narrow oligopolies: discussions are focused, in these cases, on the identification of the parameters that are used to assess whether competition is effective at the retail level, and given absent regulatory intervention at the wholesale level. All these issues, Mr. Krueger anticipated, are the objects of the current review of the SMP Guidelines, which will be finalized in the second half of 2018.

## **Session II: What can we expect to see in the new Electronic Communications Code?**

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

**Anthony Whelan** | European Commission

**Alexandre de Streel** | University of Namur

**Wolfgang Feiel** | BEREC

The afternoon session was opened by **Mr. Whelan's** speech on the new European Electronic Communications Code (EECC). First, it was noted that there is a political consensus on the fact that the objectives which are well-embedded in the current framework (the promotion of competition, the end-users' interest and the promotion of internal market) should be maintained. However, an additional and more challenging objective, namely, the access to, and deployment of, very high capacity networks (VHCNs), should be added. The pursuit of this new objective implies that judges



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and NRAs will have to consider the trade-off between technological neutrality and other objectives, an exercise that does not necessarily lead to unequivocal outcomes. It was clarified that, in the European Commission's view, the tradeoff is not between competition and investment, as the two are seen to be complementary rather than alternative. Regulatory intervention will continue to focus on competition, however, a greater emphasis than had previously been made, should be given to sustainable infrastructure competition when balancing the short and long-term effects of regulatory intervention.

During his speech, Mr. Whelan explained that the points which are currently subject to political negotiations can be broadly divided into three categories:

- First, those where there is a consensus (for example, concerning the objectives of the regulation or spectrum provisions);
- Second, those where the consensus between the Council and the Parliament has still to be reached (for example, the likelihood of recognising a stand-alone remedy for access to civil infrastructure);
- Third, those referring to concepts, which are commonly known, and which have so far not been codified, but which could acquire a clearer scope if included in the regulatory framework (such as the codification of the three-criteria test to define the relevant markets).

Next, Mr. Whelan referred to the ongoing debate concerning oligopolistic markets and the adequacy of the collective dominance concept in addressing the market failures that are created by oligopolies. As there are widely divergent points of view, it is hard to determine what the final solution will be. However, the European Commission's position concerning the possibility of expanding symmetrical access regulation requirements outside the known territory of collective dominance is that it is likely to greatly diminish legal certainty for businesses, and thus may constitute a significant deterrent to infrastructure competition. The review of the SMP Guidelines, which revolves to a great extent around these issues, is certainly offering the possibility for analyzing the case law relating to antitrust and merger control, which has been developed in a variety of different sectors, with a view to identifying the most relevant challenges that *ex ante* regulation is expected to raise.

The other important pillar of the EECC, where the European Commission has set an ambitious agenda and seeks greater co-ordination, concerns spectrum. The current regulatory framework has already laid down a very sound structure for spectrum assignment, and the European Commission would like to ensure greater consistency in the assignment procedure while, at the same time, maintaining flexibility. Achieving this goal may prove challenging, given that not all of the NRAs in the EU have spectrum assignment competencies, and also given that these competencies are, at times, fragile, because they are not directly conferred by the regulatory framework. More generally, the role of both the NRAs and BEREC in shaping the assignment procedures is being significantly contested in the Council. Nevertheless, there are other spectrum-related areas in which consensus has almost been reached. This is, for example, the case with making RSPG recommended solutions for cross-border interference problems legally binding.



**Prof. de Stree**'s presentation focused on the increase in the number of oligopolistic market structures in the electronic communications sector, and the challenges that this circumstance raises for regulation. After providing an overview of the regulatory triggers that are relevant to symmetrical and asymmetrical regulation, Prof. de Stree remarked that with the emergence of more oligopolistic structures, both in the fixed and mobile markets, the notion of collective SMP has come to the forefront. The issue has, among others, led BEREC to adopt, in December 2015, a Report on oligopoly analysis and regulation<sup>25</sup> that aimed to address the question of whether there is a regulatory 'gap case' for tight oligopolies which needs to be coped with by the current review of the regulatory framework. At the political level, in the current negotiation process the Council has proposed the extension of symmetrical regulation, while the European Parliament has proposed the reintroduction of clarity about what constitutes collective SMP.

Next, Prof. de Stree provided an overview of the different rules that address the issue of collective dominance. Framework Directive 2002/21/EC clearly acknowledges the possibility that an undertaking may have SMP, either individually or jointly, while Annex II to the Directive provides an indicative list of the criteria that can be used to support assertions concerning the existence of joint dominance. The list, however, is neither cumulative nor exhaustive. This is confirmed by the European Commission's 2002 Guidelines on market analysis and the assessment of SMP. Prof. de Stree later discussed two important cases relating to collective dominance that were issued after the 2002 Guidelines: *Airtours*<sup>26</sup> and *Impala*.<sup>27</sup> It was noted that, in the latter case, the General Court explained that the requirements that need to be proven for the existence of collective dominance can be established indirectly, based on a number of very mixed series of indications. There is thus no checklist approach; rather, it is important to build a credible theory of collusion, which must be consistent with the economic theory.

Naturally, the most interesting and important question concerns the way forward. Prof. de Stree first recalled that collective SMP constitutes just one trigger, among others, for economic regulation, and due to the increasingly oligopolistic structure of various telecoms markets, this trigger is under increasing pressure. The collective SMP is based on competition law concepts and methodologies, but it has to take into account also the specificities of regulation and the characteristics of the electronic communications sector. Prof. de Stree therefore suggested that the determination of collective dominance should be based on an integrated analysis that combines both structural and behavioural elements. While structural analysis would focus on determining whether a given market exhibits characteristics that make it prone to collusion, behavioural analysis would examine whether market outcomes can be better explained by competition or by collusion. In the electronic communications sector, which is often subject to *ex ante* regulation, this is not always an easy task. In fact, the behavioural analysis is challenging because the observed behaviour could result from existing regulation. Last, but not least, it was noted that, given that economic assessment in cases

<sup>25</sup> BEREC (2015), Report on oligopoly analysis and regulation, BoR (15) 195.

<sup>26</sup> Case T-342/99, *Airtours plc v Commission*.

<sup>27</sup> Case T-342/99, *Impala v Commission*; Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)*.



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concerning collective dominance is complex, judicial control should be restrained only in as far as there is manifest error.

**Mr. Feiel** took the floor in the final part of the debate and discussed the role of BEREC and the NRAs in promoting and implementing net neutrality in Europe. First, Mr. Feiel presented the relevant legal framework and recalled that Regulation 2015/2120 laid down common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. In Mr. Feiel's view, there is no conflict between the Regulation and other relevant directives. However, should such a conflict arise, it could arguably be resolved by applying the *lex specialis derogat legi generali* principle.

To explain the role of BEREC and the NRAs, Mr. Feiel first remarked that unclear legal provisions require more guidance. In this context, one must bear in mind that Regulation 2015/2120 is the outcome of a political compromise. While the proposed solution may be imperfect, it is better than no solution at all as, despite its imperfections, it still contributes to the process of building a Connected Continent. For example, the Regulation's wording is vague and unclear at times, which is likely to give more leeway to the NRAs in their decision-making process, and may thereby result in case-by-case decisions. Consequent legal uncertainty would then persist until the CJEU has the opportunity to clarify the meaning of what would now be seen as vague and unclear wording. Second, BEREC and the NRAs have already taken active steps to foster a consistent approach to the implementation of net neutrality rules. For example, the issuing of the BEREC Guidelines was seen as being necessary in order to ensure the consistent implementation of the former by the NRAs. Moreover, the BEREC Strategy for 2018-2020 includes, amongst others, the task of fostering a consistent approach to net neutrality principles. In conclusion, BEREC and the NRAs certainly have the potential to make the implementation of the net neutrality rules a success. In particular, success will be achieved if the net neutrality Regulation were to be applied consistently by the NRAs throughout the whole of the EU. This, in turn, implies that NRAs should have a common view on whether a given service or technology infringes the Regulation. Given that net neutrality does not raise significant legacy issues, nor is it burdened by long national history, it is quite safe to expect that there will be a more harmonized approach among the NRAs concerning net neutrality than in other fields of electronic communications.

### Final Remarks

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

During the event's concluding session, **Prof. Parcu** summarized the main issues that had been presented by the panellists and discussed by the participants. As a starting point, Prof. Parcu recalled the observation, made during the keynote speech by Judge Collins, that fewer cases are being submitted to the CJEU in the electronic communications sector. This evidence can be explained in the light that the reduced competition leads to less litigation in the sector, but is also the result of a more consolidated regulatory environment. Another point which Prof. Parcu underlined, recalled the cases presented by Judge Baker and Judge Albers, regarded the expectation that, in the future, more



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cases will transcend a purely sectorial focus, requiring instead to be addressed by taking into account different regulatory frameworks, as in the cases concerning privacy, big data or consumer protection. This last topic, which may be among the topics for future editions of the Seminar, is becoming particularly relevant in the area of electronic communication regulation, to the extent that the products are becoming more sophisticated and convergent. Prof. Parcu also discussed topics that are related to rapid technological evolution mentioning, in particular, the importance of technological neutrality, which was framed during the first session of the Seminar as being the desired outcome of the system of electronic communications in Europe, and as a crucial component of the legal principle of non-discrimination. Several cases during the day addressed important technological changes, such as the *Persidera* case which was presented by Judge Perna. These cases, Prof. Parcu observed, remind us that competition needs to be reaffirmed, even in the context of rapid technological change, and that the latter should be supported also for its potential to increase competition in the market. The intervention by Mr. Whelan was also recalled, in order to suggest that we are facing a new phase in the European policies in the sector, one dominated by competition between different infrastructures, which, although not a novelty, implies emerging challenges for regulation. The same can be said for net neutrality, providing an important example of how the Internet is exercising pressure by imposing new tasks for the existing framework. Prof. Parcu closed his final remarks by reminding us that the EU has, in the past 15 years, built a very advanced and sophisticated system of rules, competencies and institutions that are potentially able to deal even with these new complex challenges, .

**Mr. Grussmann** ended the Seminar by reminding those present that the event is organised with the aim of providing national judges and regulators with a yearly opportunity to come together to 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 can be widely spread in the European Union 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, organizing and supporting the event, and closed the Seminar.