14TH SEMINAR FOR NATIONAL JUDGES

Balancing regulatory certainty and investment in the Digital Era

Brussels, 24th January, 2020

Seminar Proceedings

Introduction

The 14th edition of the Seminar for national judges who deal with electronic communications issues took place in Brussels on 24th January, 2020, at the European Commission's premises. Participants included 31 judges from 19 Member States, and 33 officials from 21 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 CONNECT of the European Commission.

Mr. Terävä (European Commission, DG CONNECT) launched the event by welcoming the participants and introducing the topics that would be discussed during this year's Seminar.

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

Keynote Speech

The evolution of EU case law in electronic communications in 2019

Paul Nihoul | General Court of the European Union

Judge Paul Nihoul opened the Seminar with the discussion of the *VodafoneZiggo* case (T-660/18)[1] in which the Dutch Authority for Consumers and Markets (ACM) proposed a draft decision concerning specific regulatory access obligation imposed on Vodafone, which was found to have significant market power (SMP). Central to this case was Article 7 of the Framework Directive. The question that arose was: when can companies concerned with a draft measure that NRA intends to adopt about either the designation of a firm as having SMP, or the imposition of specific access-related obligations, act to challenge such a measure? In particular, are they in a position to challenge it on the basis of Article 7(3), or do they have to wait for a decision from the Commission and challenge it on the basis of Article 7(4)? Judge Nihoul recalled that, in accordance with Article 7(3) of the Directive, a given NRA must, in certain cases, send its draft decision to other NRAs and BEREC, so that they can express their observations. Article 7(4), in turn, provides that if the draft measure poses serious concerns about its compatibility with Community law and, in particular, with the objectives referred to in Article 8, the Commission has the right to take a decision ordering the NRA not to adopt the draft measure.

The General Court held that only the decisions taken on the basis of Article 7(4) can be challenged before a European Court (in this case the General Court, and on appeal, the Court of Justice, CJEU). In contrast, a measure taken by the NRA and challenged on the basis of Article 7(3) would have to be heard by a national judge who, in specific circumstances, would be in a position to ask fora preliminary ruling from the CJEU. Judge Nihoul explained that this institutional patchwork results from the division of powers, whereby national judges decide national matters, while EU courts deal with matters that have possible effects on other member states.

Next, Judge Nihoul moved to discuss two cases that illustrate the treatment of taxes levied by the Member States on operators in the context of the Authorisation Directive, which considerably limits the types of financial burdens that can be imposed on operators before they can start exercising their activities. In the first case (C-119/18), Spain imposed on telecom operators a yearly financial contribution that was meant to finance the public broadcaster.[2] The question that was raised was whether this could be considered to be an administrative charge, under Article 12 of the Authorisation Directive. The Court reminded that there are only four areas that can be financed through taxes imposed on the operators, and they relate to the provision of the authorisation as well as the management, the control and the implementation of the authorisation regime. The Court ruled that the tax, in this case, was not related to the authorisation as such but, rather, that it was a general contribution that had been imposed on telecom operators in order to provide money to the public broadcaster (Para. 28 of the judgment). The second case (C-360/15) concerned a fee that the municipality of Amersfoort (Netherlands) asked company X to pay in order to deal with its

1 Case T-660/18, *VodafoneZiggo Group BV v European Commission*, ECLI:EU:T:2019:546.

2 Case C-119/18, *Telefónica Móviles España SAU and Others v Central Economic-Administrative Tribunal,* ECLI:EU:C:2019:231.

applications.[3] X was entrusted to build a fibre-optics network in that municipality, and for that purpose it made an application for authorisation to the municipal council with respect to the location, the timing and the conditions for excavation works, for each part of the network. The question that was raised was whether the fee paid by X was an administrative charge or a 'fee for rights of use and rights to install facilities'? According to the CJEU, it was not apparent that the fee in question was intended to cover the overall administrative costs relating to the activities mentioned in Article 12 of the Directive. According to X, the dispute could not fall under the scope of Article 12 of the Authorisation Directive also because the municipality of Amersfoort had never been designated as an NRA within the meaning of that, as well as of the Framework Directive. However, as the Court explained, this does not preclude the need to apply to the fees which X was required to pay, the criteria that are laid down in Article 13 of the Authorisation Directive. It follows that, in accordance with Article 13, as distinct from Article 12, the ability to impose fees for the rights to install facilities on or under public or private property is granted to 'the relevant authority', and not necessarily to an NRA.

Next, Judge Nihoul proceeded to discuss the *Polkomtel* case (C-277/16), which concerned the application of the Access Directive.[4] In that case, the Polish NRA, UKE, imposed on Polkomtel, a mobile operator found to enjoy SMP in the market for voice call termination services on its network, an obligation to set fees on the basis of costs. As UKE disagreed with the firm's calculations, claiming they were too high, it imposed a lower termination fee. Asked whether the NRA could set the rate below that requested by the company, the CJEU replied affirmatively.[5]

The next case discussed by Judge Nihoul, C-560/16, concerned the allocation of digital frequencies in Italy, which was stopped by the Minister of Economic Development as there was only one tenderer for some multiplexes.[6] The CJEU found that conduct such as that of the Italian Ministry could jeopardise the independence of the NRA, thereby confirming the importance of their independence *vis-à-vis* the political authority. Another question raised in this case was whether auction procedures have to be fee-based, or whether they can be free of charge.[7] The Court held that there is enough margin of appreciation left in that regard to the Member States, hence it is up to them to decide. The last question which Judge Nihoul mentioned with respect to this case was whether Europa Way, the only operator to apply for one of the multiplexes concerned in the first auction, could challenge the second auction, arguing that it had acquired a legitimate expectation of a certain outcome. In para.

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3 Case C-360/15, *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV and Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam*, ECLI:EU:C:2018:44

4 Case C-277/16, *Polkomtel sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej (UKE)*, ECLI:EU:C:2017:989

5 In para. 39 of the judgment, it held that "*NRAs may, after having monitored the compliance of the operator concerned with the obligation to cost orient its prices and decided that it is necessary to require those prices to be adjusted, oblige that operator to set the rate at a level lower than that of the costs incurred by it if those costs are higher than the costs of an efficient operator, it being necessary for those latter costs to include the reasonable rate of return and adequate capital employed by it*".

6 C-560/15, *Europa Way Srl and Persidera SpA v Autorità per le Garanzie nelle Comunicazioni (AGCOM) and Others*, ECLI:EU:C:2017:593

7 In contrast to the first procedure, which was a free 'beauty contest', the second one was a fee-based public selection procedure, in which the award was given to the highest bidder, in accordance with priorities and criteria laid down by NRA.

82 of the judgment, the Court held that *"the mere fact that an operator is invited to tender for the allocation of digital radio frequencies, such as the 'beauty' contest' at issue in the main proceedings, is not capable of leading him to entertain reasonable expectations. That is the case even in a situation where the operator participates in the procedure as the sole tenderer for the award of a multiplex".*

Judge Nihoul closed his speech by referring to the *Persidera* case (C-112/16),[8] in which the Italian NRA, AGCOM, imposed the conversion of analogue frequencies to digital frequencies, but in so doing it took into account unlawfully managed analogue channels, and used a conversion rate that had led to disproportionate results between broadcasters. The case was decided on the basis of the Competition Directive 2002/77/EC. The CJEU held that unlawfully operated channels could not be taken into account, and that with respect to the conversion rate, the principle of equality must be respected.

During his keynote speech, Judge Nihoul also engaged in a lively discussion with the audience. One of the questions that was more intensely debated was whether the Commission's comments, issued on the basis of Article 7(3), are legally binding, or whether NRA can deviate from them. Judge Nihoul noted that while such comments may not be legally binding, factually they may be difficult to set aside. One of the judges remarked that for courts that may fail to grasp all the technicalities of the telecommunications cases before them, the Commission's opinions have become evidence, which they can often regard as persuasive. It was also pointed out that while, constitutionally, the answer may be straightforward, practically, it may be country-specific, which means that the ultimate result may depend on the extent to which the national court may be protective of its own sources of law. For example, in a common law country, judges may spend more time deciding on the admissibility and evidential weight of a given document. Judge Nihoul summarised the discussion that took place by stating that the variety of opinions expressed by national judges actually reflects the jurisprudence of the European courts. As a matter of principle, a given act can be challenged directly before the General Court only if it is legally binding. However, there are circumstances in which the Court has gone beyond the mere declaration of whether a given opinion was legally binding or not and has considered in detail the facts included in it.

Session I – Panel I: Enforcing electronic communications law
Moderator: Marie Baker |Supreme Court of Ireland
Marc Bosmans and Anne Marie Witters | Market Court, Brussels
Hendrik Kerkmeester | University of Antwerp, Court of Appeal Trade and Industry, The Hague
Jovita Einikienė| Regional Administrative Court, Vilnius

Judge Marc Bosmans reported that in 2019 there were 28 new appeals before the Market Court, and 9 of them concerned telecommunications. He explained that the presentation that he and Judge Anne Marie Witters would deliver covered three selected cases which illustrate the application of some of the legal principles that are relevant in the electronic communications sector. The first case concerned the decisions taken by the CRC in June, 2018, in which the CRC decided that Proximus (a fibre

[8] Case C-112/16, *Persidera SpA v AGCOM & the Ministry of Economic Development, Infrastructure and Transport*, ECLI:EU:C:2017:597.

operator), and Telenet, Brutélé and Nethys (all cable operators) should open their respective networks to new competitors, such as Orange, in respect of a number of obligations imposed on them, and that they should charge fair prices for the services they offered. All of the cable operators lodged separate appeals, arguing that they did not have SMP and, accordingly, should not be subject to the conditions imposed on them. The Court joined all three appeals and, in its judgment of September 2019, it ruled that all of the appeals were unfounded.

Legal principles that were at the core of this decision concerned conditions under which a court can suspend or annul an NRA's decision. The Court held that to justify a suspension, or the execution of the contested decision, the appellant must demonstrate blatant, i.e., *prima facie* errors of facts or judgment, whereas in order to justify an annulment, the appellant must demonstrate manifest errors of facts or judgment. The Court also held that while corrective measures, in respect of the principle of the separation of powers, are, in general, within the discretionary power of the NRA, it would verify whether the NRA had committed material errors by imposing them. In the present case, the Market Court upheld the NRA's decision and its definition of the relevant market. It also confirmed that the NRA had not committed any material error by imposing corrective measures, such as the new obligation to ensure access for Internet-only offers. Judge Bosmans concluded his part of the presentation by explaining that while the Market Court has full jurisdiction to replace the NRA's decision with its own, until now it has been very prudent in executing it.

Next, **Judge Anne Marie Witters** discussed the *Proximus* case, in which the Market Court had to decide whether it had the power and the jurisdiction to hear the case, which concerned retribution imposed by the government and invoiced through the NRA on the NRA's company letterhead. The question that arose was whether such a letter constituted a decision that could be reviewed by the Market Court. The Court found that since, in this case, the NRA had no discretionary power, the letter did not constitute a decision. Second, the Court ruled that, in this case, it was the Commercial court that had jurisdiction. In contrast, in the second case, from January, 2020, the Court held that it could review a decision issued in the form of a letter signed by two directors of the NRAs, as the NRA exercised its discretionary power, and no other court would hear the case. That second case concerned a determination of whether a given trunked network was public or private. Prior to the change in the Belgian law, both Total and BASF operated in Belgium as telecoms operators. According to the NRA, after the change in the law, according to which trunked networks were to be considered to be private, the operators of such networks would no longer qualify as telecommunications operators. Upon an appeal that was lodged by the companies, the Court annulled the decision of the NRA and ruled that it should not rely solely on a standard questionnaire that was sent out to firms, but that it should also have carried out a full review of the network and its technical aspects, and, in particular, whether the network was indeed trunked (i.e., whether the group of users of the network was open or closed). According to the Court, the NRA should have also considered best practices in other European Member States, given that some of them, namely, the Netherlands, the United Kingdom and France, considered operators of trunked networks as telecommunications operators. Last, but not least, the Court held that the NRA should apply the principle of equality and compare how other operators of trunked networks in Belgium were treated. As noted by BASF, the airport in Liège, which also operated a trunked network, was considered a telecommunications operator.

In the last case, discussed by Judge Witters, the NRA imposed on Skype the maximum fine possible for its failure to register as an operator, on the basis of the Revised Commission Guidelines for setting fines in antitrust cases. Skype challenged the decision, arguing that the fine was disproportionate and pointing out that another company (Telenet) was not fined. The Market Court ruled that the NRA should not have used antitrust guidelines to determine a fine in a telecommunication case. Rather, it should develop its own guidelines and, in its absence, apply objective criteria. In particular, fines should be proportionate, considering the seriousness of the violation, and they should not be imposed in an arbitrary manner.

Judge Hendrik Kerkmeester focused on the timely topic of collective dominance, which was at the core of the *VodafoneZiggo* case. The case at hand concerned a decision taken by the Dutch ACM in September, 2018, with respect to the analysis of the wholesale fixed access market (relevant markets 3(a) and 3(b)). Judge Kerkmeester explained that the decision is remarkable, because ACM has pursued a rather ambitious "all-or-nothing" approach whereby, rather than settling for regulating just the incumbent operator, KPN, on the 3(a) market, it sought to also regulate VodafoneZiggo, a joint venture between a mobile operator and state-wide operator of a cable network, on the 3(b) market.[9] The decision was appealed by the regulated companies, as well as by T-Mobile and Tele2.[10] According to the ACM, the joint venture between Vodafone and Ziggo called for a new market analysis, which the ACM carried out. In its view, the relevant wholesale market was composed of the combined markets 3(a) and 3(b), and on such a defined market, KPN and VodafoneZiggo had the incentive and opportunity to engage in collusive behaviour.

Judge Kerkmeester explained that four issues arose in the case. The first question was whether the ACM had violated the General Administrative Law by sending only some, and not all, of the requested documents to the court. According to Article 8:31 Awb, if a party fails to comply with the obligation to submit documents, the court may draw conclusions from this as it sees fit. As the ACM did not comply immediately with the court's request, but submitted some documents just before the hearing, the Court will have to decide whether to accept all the documents, and, if yes, whether it should nonetheless punish the ACM, even if only symbolically. The second question concerned the modified greenfield approach, and, in particular, whether the ACM should take into account that KPN entered into long-term contracts providing access, and thereby eliminating the risk of access refusal. According to the Court, while such contracts are relevant, they did not alter the outcome of the ACM's decision, in which the ACM downplayed their importance, remarking that KPN would not have entered into these contracts if it were not for the threat of regulation. Judge Kerkmeester added that the contracts could be relevant if the court decided to annul the ACM's decision concerning the regulation of the wholesale fixed access market.

[9] KPN was regulated on the 3(a) market – unbundled local loop, but not on the 3(b) market for wholesale broadband access.

[10] The latter two, who have merged in the meantime, essentially agreed with the ACM, but appealed the decision to seek stricter regulation. Also six small parties, who sought access for some special purpose, appealed the decision.

The third question was whether the ACM's determination that the relevant market was composed of the combined markets 3(a) and 3(b) was correct. The fact that no other EU Member State has defined such a market is not in itself decisive, since each authority has to define the relevant market on the basis of the factual situation in its own country. Another important issue was that the ACM defined the relevant market on the basis of product-characteristics, and not the SSNIP-test. In some past cases, the court required this test, but only if regulated parties themselves had used it to undermine the qualitative market analysis of the ACM. Judge Kerkmeester explained that the ACM could have simply regulated market 3(a) again, but, instead, it opted to risk the annulment of the market definition, which would lead to a complete annulment of regulation in the market for wholesale fixed access.

Judge Kerkmeester next pointed out that, should the court uphold the ACM's market analysis, the question that it will have to ponder upon is whether KPN and VodafoneZiggo are jointly dominant, and, consequently, whether they can tacitly coordinate their anticompetitive behaviour. This will be judged according to a variation of the *Airtours* criteria, and the following conditions will be taken into account: symmetry, transparency, the presence of a disciplinary mechanism, and the absence of destabilizing external factors. An important issue that the court will have to analyse is whether there can truly be symmetry between KPN and VodafoneZiggo, given that KPN already provides access to its network, while VodafoneZiggo does not. Judge Kerkmeester concluded his presentation by informing the audience that the judgment in this case would be delivered on 18 February.

Judge Jovita Einikienė started her presentation by remarking that, in recent years, Lithuania had not had many cases that are related to the application of telecommunications law. The first of the three cases that Judge Einikienė wished to present concerned a review of the legality of a regulatory act that laid down conditions for number portability. This review was triggered by a request from a Member of Parliament, who argued that the act contradicted higher acts, namely, the Law on Electronic Communications, the Law on Competition, and the Constitution, and that the RRT adopted a central database administration model without having the discretion to do so. In its judgment of April, 2014, the Supreme Administrative Court pointed out that the Universal Service Directive, which includes provisions concerning number portability, lays down requirements for the portability and organisation of the porting system without specifying detailed arrangements. Considering that the field covered by the Directive falls under the shared competence of the EU and its Member States, the latter are free to determine those aspects of the organisation of number portability which are not regulated by the Universal Service Directive. This means that the choice of a method to implement number portability is left to the Member States, and that, consequently, the choice of a particular model cannot be considered as being either appropriate or inappropriate within the meaning of the Directive.

The second case from Lithuania revolved around the grant of exclusive rights for the supply of a public data communications network service (SSDCN) to a state-owned company, instead of buying such services via public procurement procedures.[11] According to the Court, while the Ministry of the Interior had the power to adopt a legal regulation concerning the establishment of a secure public data transfer network, it did not have the power to appoint the manager of the network. By awarding

[11] Court of Cassation (Lithuania), Civil case No. e3K-3-149-696/2017 on the validity of transactions, public procurement, procedures of electronic services.

an exclusive right through investigative orders to the state-owned enterprise to manage such a network, the Minister of the Interior had exceeded his remit and approved a regulation that had substantially restricted the freedom of economic activity.

The last case presented by Judge Einikienė concerned the failure to implement Article 26(5) of the Universal Service Directive, in which the Lithuanian Emergency Response Centre was unable to locate a person seeking help due to the lack of appropriate equipment.[12] Relatives of the deceased person brought an action before the court, demanding compensation from the State for the non-pecuniary damage suffered by the victim and by themselves. The Court ruled that "*where, in accordance with the domestic law of a Member State, the existence of an indirect causal link between the unlawful act committed by the national authorities and the damage sustained by an individual is regarded as sufficient to render the State liable, such an indirect causal link between a breach of EU law attributable to that Member State and the damage sustained by an individual must also be regarded as sufficient for the purposes of rendering that Member State liable for the breach of EU law*".

Session I – Panel II: Stimulating investment in networks and 5G: national developments
Moderator: Erik Bohlin | Chalmers University
Andreas Geiss | European Commission
Annegret Groebel | BNetzA, Germany
Adam Scott | CAT, London

Mr Andreas Geiss, Head of the Radio Spectrum Policy Unit at DG CONNECT, European Commission, opened the second panel, which was dedicated to the challenge of stimulating investment in networks, and, in particular, in 5G. First, he presented measures that had been adopted in order to stimulate investment in 5G at the EU level. Article 49 of the EECC lays down a harmonised 20 years duration for individual rights of use for the radio spectrum, for which harmonised conditions have been set in order to enable its use for wireless broadband electronic communications services, which helps to increase predictability, and thereby should help to promote investment. Second, Article 50 of the EECC provides a more transparent and timely process for renewals of individual rights of use for the harmonised radio spectrum, by granting the competent authority the possibility to assess upon the request of the rights holder, whether there is a need to renew such rights for a period to up to 5 years. Third, Article 51 of the EECC provides support for trading and leasing in order to ensure efficient use of the spectrum. Fourth, the Code harmonises the timing for spectrum licensing across the EU, and it specifically refers to certain frequency pioneer bands for 5G: 700 MHz, 3.6 GHz, and 26GHz, which should be licensed by 2020. The aim here is to provide a harmonised deadline in order to give a clear indication to the market about the market size, and to ultimately promote the early adoption

[12] Administrative case No. I-27-289/2019 on the civil liability of the state in the field of electronic communications (judgment of the Court of First Instance). According to Article 26(5) of the Universal Service Directive, Member States are required, subject to technical feasibility, to ensure that the undertakings concerned make caller location information available free of charge to the authority handing emergency calls for the single European emergency call number, '112', as soon as the call reaches that authority, including in cases where the call is made from a mobile phone which is not fitted with a SIM card.

of 5G technology in Europe.[13] The speaker next discussed the appropriate duration of rights of use that Member States should grant now (before the transposition of the Code), in light of the settled case law, which says that Member States should refrain from taking any measures liable to seriously compromise the result of a Directive and should take all measures necessary to ensure that the result prescribed by the Directive is achieved at the end of the transposition period. In that regard, Article 49 of the Code indicates that an appropriate period would be 20 years.[14]

With regard to the issues that are related to the prices for spectrum, Andreas Geiss referred to a study from 2017 on Spectrum Assignment in the European Union, in which prices from 5G auctions were broken down to MHz per population to make them comparable across the Member States. He remarked that the difference of €84 billion obtained by comparing the highest and the lowest prices observed in these auctions, makes a tremendous difference in terms of the future deployment of 5G networks. In his view, lessons learnt from the deployment of 4G offer important insights. As the same study revealed, three elements, in particular, turned out to be relevant: low reserve prices, market-led coverage obligation, and long licenses put into the award. All these have helped achieve a wider network roll-out, better quality and a better choice of services, higher take-up of services, and greater competition.

To illustrate the problem that is posed by high local reserve prices, Mr Geiss referred to the decision of the Italian Ministry of Economic Development (MISE), which was issued in July, 2018, and the following related judicial proceedings. MISE's decision established that the price to be paid for the extension of the existing rights of use in the 3.4-3.6 GHz band, originally intended for wireless broadband access, should have been the same as the reserve price set for the assignment of the rights of use for the 3.6-3.8 GHz band, in the context of the almost concomitant 5G auction. Both the decision by the Ministry and by the NRA (AGCOM), on which the government's decision was based, were challenged before the Italian Administrative Tribunal (TAR). In November, 2019, the court held that while the extension itself was lawful, the price to which such an extension should have been granted had to be adjusted to the market value of the frequencies as it resulted from the outcome of the 5G auction, which had turned out to be significantly higher than the reserve price.[15]

Mr Geiss stressed that identifying the market value of spectrum is problematic. One might assume that the price paid in the auction reflects the market value. However, if there is a scarcity of spectrum

[13] Radio Spectrum Policy Group through Radio Spectrum Committee clarifies the technical harmonisation conditions within these frequency bands. Also, the new peer review mechanism is expected to provide more consistency in the authorisation procedures among the Member States, and to promote the exchange of best practices.

[14] Mr Geiss explained that Article 49 EECC, in its general part states that: *"where Member States authorise the use of radio spectrum through individual rights of use for a limited period, they shall ensure that the right of use is granted for a period that is appropriate in light of the objectives pursuant in accordance with Article 55(2)".* The second paragraph of the Article concerns, in particular, spectrum that is harmonised for wireless broadband and requires Member States to ensure regulatory predictability for right holders over a period of at least 20 years. While the article also mentions '15 plus 5 years', what is important is that it gives a legitimate expectation, in terms of an extension of the licences to up to 20 years.

[15] The decision is expected to be challenged before the Italian Supreme Administrative Court by the Italian NRA, AGCOM.

at the auction, as was the case in Italy, where the 20% used by the military had been withheld, the reduced amount of spectrum will likely lead to higher prices. In other words, scarcity of spectrum leads to an upward spiral, which results in higher prices for spectrum awards, and, ultimately, to less money for the deployment of the new networks. Mr Geiss concluded by stating that 5G constitutes a huge opportunity for the EU, but that investment necessary to deploy these networks can be hampered, in particular, by uncertainty concerning the license duration and high auction prices. He then reminded his audience that Member States should take all of the measures necessary to ensure that the result prescribed by the EECC is achieved at the end of the transposition period, namely, 21st December, 2020.

In the second intervention of the session, **Dr Annegret Groebel**, Head of the International Relations Department at BNetzA, discussed the steps that Germany had taken to stimulate investment in 5G. She started by depicting the German mobile market as it was before the auction, in which DT (T-Mobile), Vodafone and Telefónica were present.[16] Dr Groebel explained that Germany organised an auction for mobile operators for publicly available electronic communications services (ECS), where 420 MHz were made available in 41 blocks in 2GHz and 3.4-3.7 GHz bands, which is considered to be the best for 5G, and it had also run an awards procedure with an additional 100 MHz in the 3.7-3.8GHz band for the local licenses, in particular, for the so-called industry 4.0, which requires highly reliable spectrum with a short reaction time. The preparations for the launch of the auction procedure started in May, 2018, before the Code was published. However, to ensure that it would be taken into account, BNetzA had run public consultations with stakeholders in order to ensure the certainty and predictability that should facilitate investment decisions. Moreover, to assess demand, BNetzA carried out a market test in which it asked the operators how much spectrum they needed. As a result, it decided to run an auction, as it was the best method for allocating scarce spectrum efficiently. With respect to the qualification procedure, BNetzA had laid down certain criteria designed to eliminate fake bidders. The auction took place between March and June, 2019, and the assignment started as of September last year. Dr Groebel explained that the main objective of BNetzA with respect to the 5G auction was to ensure a level playing field in terms of competition, and not to maximise revenues, which go to the Ministry of Finance. The speaker also acknowledged that intense discussions had taken place about the obligations that should be included in the award, in particular, about the coverage and national roaming.[17] In order to take an informed decision, BNetzA had looked at the actual coverage of LTE, which was around 90%, and much better than had been perceived by the public. Still, to close the "gap", it was necessary to impose a rather demanding coverage obligation for 5G while allowing infrastructure sharing. It was also discussed whether BNetzA, or the legislator, could transpose the provision of Article 52 of the EECC before transposing the entire Code. However, the conclusion was reached that it is not possible to pick and choose articles to be transposed.

[16] The latter bought E-plus a few years ago, and they are still under commitments that were imposed when the merger was cleared.

[17] A virtual operator suggested the inclusion of a national roaming obligation in the award. However, BNetzA considered that it could not impose such an obligation under its current law and limited itself to impose only an obligation to negotiate it.

Next, Dr Groebel stated that three out of four operators admitted to the auction went to court to challenge the obligations that BNetzA decided to impose, namely, the softened obligation to negotiate roaming and the coverage obligation. In December, 2018, the Administrative Court in Cologne decided in favour of BNetzA, ruling that its decisions imposing these obligations were justified and proportionate.

In her conclusions, Dr Groebel argued that, in her view, the 5G spectrum auction in Germany was successful, and that BNetzA has done everything on the regulatory side to enable a quick and cost-efficient roll-out of secure 5G networks. Three existing players and one new-comer were awarded spectrum, which should lead to more intensive competition for the benefit of consumers. Likewise, the high coverage obligation included in the award, albeit lighter for the newcomer, should ensure that all consumers profit from the 5G roll-out. In fact, the first 5G trials have already been run, and the first 5G offers have already been launched. Last, but not least, considering the importance of ensuring the security of 5G networks, BNetzA, together with the BSI (the German Federal Office for Information Security) published jointly the updated catalogue of security requirements for consultation.

Dr Adam Scott from the Competition Appeal Tribunal in the UK started his presentation by stressing that it is important to consider whether NRAs tend to run auctions among existing players, or whether they actively seek to encourage the participation of newcomers. He also noted that the concepts of 'availability' and 'usability' of the spectrum should be distinguished, considering, for example, that while spectrum may be available, it may not be usable, due to the lack of a developed ecosystem and adequate equipment. After these preliminary remarks, Dr Scott moved on to discuss the *Hutchison* case,[18] which concerned the award of radio spectrum for mobile operators. He started by explaining that while there were differences between usable and potentially usable spectrum holdings between the operators present in the market, the market had seemed to be working well.[19]

To ensure healthy competition not only during the auction, but also afterwards, Ofcom imposed a number of restrictions.[20] Hutchison argued that the imposed restrictions were insufficient, while BT claimed that they went too far. In contrast to both firms, Ofcom considered them to be balanced. Appeals against the Ofcom decision, which were heard before the Administrative Court, focused on the question of whether the decision was materially wrong. Considering that it was based on a number of imponderables about the future, the Court considered it necessary to modulate the intensity of review. At this point, Dr Scott focus on the three grounds on which the decision was reviewed. The first concerned logic, reasoning and the failure to take into account relevant considerations. Mr Justice

[18] There were appeals by both Hutchison and British Telecommunications (BT) [2017] EWHC 3376 (Admin).

[19] BT/EE had 42% of the useable spectrum, but only 35% of what was potentially useable. The numbers for Vodafone were 29% and 24% respectively, 15% and 29% for Hutchison 3G, and 14% and 12% for O2 (which is owned by Telefónica)

[20] Restrictions imposed in the auction prevented BT/EE from bidding in the 2.3 GHz band, restricted it also from winning more than 85 MHz in the 3.4 GHz band, and Vodafone from winning more than 160 MHz, and required BT/EE to lower its holding to 37% in the period after the auction.

Green[21] examined thoroughly the evidence's underpinnings Ofcom's approach, and found the decision to be justified, taking account of the merits. He also held that the margin of appreciation was highly factual and context specific, and a broad margin of discretion, in this case, was appropriate. With respect to the lack of due process, Mr Justice Green ruled that that there was a long consultation process that guaranteed interested parties ample opportunities to make comments, and that the process was, overall, fair. The third ground for review revolved around the merits and evidence that need to be provided to successfully challenge a regulatory decision. The Court found that while BT had two years to produce evidence, the evidence it submitted was limited, and it failed, both on the facts and on intrinsic merits. Moreover, it was extremely generalised, unsupported, and offered unattributed hearsay of limited probative value. As a result, the Court ruled that Ofcom's position was economically logical, properly reasoned, and based on sound evidential findings, hence, it was lawful.

Session III: Regulatory challenges: an overview

Moderator: Pier Luigi Parcu | European University Institute

Irene Roche Laguna | European Commission
Zoraida Frias | Polytechnic University of Madrid
Vesa Terävä | European Commission

The afternoon session of the Seminar provided an overview of selected regulatory challenges with a relevant impact on the electronic communications sector.

Ms. Irene Roche-Laguna (the Deputy Head of Unit for the implementation of the regulatory framework in DG CONNECT, European Commission), highlighted that while the Seminar typically focuses on telecoms and connectivity issues, the Commission's Digital Single Market (DSM) strategy contains also other important initiatives that may be relevant for telecoms operators, such as those concerning e-commerce and media. She then pointed out that the question that had received plenty of attention recently, and that will continue to do so in the near future, is whether, and to what extent, platforms should be regulated. Ms. Roche Laguna then provided a general overview of the main initiatives that were adopted during the Commission's last mandate, and of those that may be proposed in the near future.

First, she mentioned the recently adopted Sales of Goods Directive 2019/771 and the Digital Content Directive 2019/770, which include new rules on consumer protection. These rules are already relevant for telecoms operators in consideration of the progressive diffusion of the Internet of Things (IoT). In particular, these rules help to determine whether a particular product is a good or a service when digital content is embedded in it. The new Code also includes several provisions on consumer protection, but these remain *lex specialis,* with respect to the two directives mentioned earlier. Next, Ms. Roche Laguna referred to Regulation 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection (hereinafter, the CPC regulation), which was

[21] Sir Nicholas Green was Chairman of the Competition Appeal Tribunal; in 2018, he was appointed Chairman of the UK Law Commission and a Lord Justice of the Court of Appeal of England and Wales.

adopted 2 years ago, and which recently entered into force.[22] In the field of E-commerce, there is the Geo-blocking Regulation 2018/302 and the Market Surveillance Regulation 2019/1020. The first prohibits online sales discrimination based on customers' nationality, residence or place of establishment. It applies to physical goods, cloud services, e-books and software, but excludes from its scope electronic communication services. The second gives powers to authorities to require the removal of online content, and to ask ISPs to restrict access to the non-compliant websites.

Ms. Roche Laguna briefly mentioned three instruments that were adopted in the field of copyright: the Portability Regulation 2017/118, the Broadcasting Directive 2019/789, and the DSM Copyright Directive 2019/790.[23] Next, the speaker remarked that, with respect to platform regulation, a sectoral approach has been followed, whereby, instead of adopting an overarching instrument, several specific instruments were introduced. These include, in particular: the AVMSD Directive 2018/1808, Regulation 2019/1148 on Explosives Precursors, Directive 2019/2161 on the modernisation of consumer protection rules, the proposal for Terrorist Content Online (still under negotiation), and Platform-to-Business Regulation 2019/1150. The latter, which constitutes a first step towards platform regulation, has followed a light approach, as it has mainly introduced transparency measures and has been limited in its scope to business-to-business (B2B) relationships.[24] Ms. Roche Laguna added that while the new Commission intends to continue the work started under the last mandate, it also plans to focus on some new priorities, in particular, Artificial Intelligence and the Digital Services Act, which could potentially modify the E-commerce Directive. Other initiatives in the pipeline include: a potential revision of the Geo-blocking regulation, Platform-to-Business Regulation, as well as the topics of Machine-to-Machine (M2M) learning and big data, with a focus on the opportunities that these latter present for governments in terms of data collection and their use for the improved data-driven policy-making.

Ms. Roche Laguna mentioned the E-Commerce Directive and remarked that scale and technology have evolved significantly since the Directive was adopted. However, as some of its main provisions, in particular, those concerning intermediary liability that are included in Articles 12-15, continue to be at the core of the single market, they should be preserved. The speaker next referred to the interlinks that exist between the E-Commerce Directive and information society services (ISS), on the one hand,

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22 This regulation gives powers to consumer protection authorities to send removal orders to hosting service providers, and to domain registries and registrars, to delete domain names, but also the possibility for ISPs and other parties to block certain content.

23 The Portability Regulation can be seen as a counterpart to the Geo-blocking Regulation, but it applies only to copyright protected content, and only for temporary use. It ensures the ability to access such content abroad, which has been greatly facilitated also by the Roaming Regulation that allows people to use their data plan abroad. The Broadcasting Directive, which originally had a much broader scope, has been limited, in its final shape, to news and current affairs. Finally, the DSM Copyright Directive has become particularly well-known for two provisions: Article 15, which provides for the protection of press publications concerning online uses, and, more controversially, Article 17, which imposes obligation on online content-sharing service providers to negotiate with the rights holders to license their content. In a case where the rights holder does not wish to license content, the platform has to put in place mechanisms that would stop such content from appearing.

24 Transparency is required with respect to terms and conditions, delisting and the termination of accounts, ranking parameters, MFN clauses and differentiated treatment of own products by vertically integrated platforms, access to, and use of, collected data.

and the regulatory framework and electronic communications services (ECS) on the other. For example, the E-Commerce Directive prohibits prior authorisation schemes, whereas the regulatory framework for ECS foresees a general authorisation scheme. The new Code now includes within its scope also OTTs, which are, however, considered both as electronic communications and as information society services. According to the speaker, this may lead to controversies in the treatment of such services in some Member States.

After having presented the main legislative instruments, Ms. Roche Laguna focused her presentation on the case-law of the EU courts concerning the treatment of information society services. While the *Gmail*[25] and the *Skype*[26] cases are better known from the telecoms side, there are also other cases on information society services that are relevant. These include the *Airbnb* and *Facebook* cases, which have already been decided, but also the upcoming *Youtube*[27] and *Uploaded*[28] cases, in which the question is whether liability can be imposed on a platform if it shares copyrighted protected content.[29] Ms. Roche Laguna also briefly mentioned the *SABAM (*both *Netlog*[30] and *Scarlet*[31] cases) concerning an obligation to install a filtering system, and the *McFadden* case, in which the Court held that monitoring all of the transmitted information is contrary to Article 15 of the E-Commerce Directive.[32] She also mentioned the *Glawischning-Piesczek v Facebook* case,[33] in which the Austrian court asked the CJEU, under the preliminary ruling procedure, whether it could ask Facebook to remove content that was found to insult an Austrian politician, as well as equivalent content, and if it could ask Facebook to comply with such an order in Austria only, or globally.

Ms. Roche Laguna briefly discussed three judgments concerning information society services: *Ker Optika*,[34] *Uber*,[35] and *Airbnb*.[36] She explained that, in the first case, concerning a ban issued by France prohibiting the online sale of contact lenses, the Court clearly separated the online sale from the supply, and held that a prohibition could not be imposed on the online sale, because it is an information society service. The speaker stated that there had been an expectation in that the *Uber* case would have been decided along the same lines. However, this was not the case as, according to the Court, Uber had been inherently linked to the transport service, thereby becoming a transport

25 Case C-193/18, *Google v Germany*, ECLI:EU:C:2019:498.
26 Case C-142/18, *Skype Communications Sàrl v Institut belge des services postaux et des télécommunications (IBPT),* ECLI:EU:C:2019:460.
27 Case C-682/18, *LF v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH*.
28 Case C-683/18, *Elsevier Inc. v Cyando AG.*
29 The speaker reminded the audience that the E-commerce Directive prohibits the imposition of liability on mere conduits, and that this question had already been interpreted by the EU Courts with respect to ISPs, as well as domain registrars. See, for example, *Scarlet/Sabam* (ISPs), C-484/14, *McFadden* (Wifi hotspot), C-521/17, *SNB-REACT* (domain name registrars). By contrast, the prohibition to impose liability on caching services has never been interpreted by the EU courts.
30 Case C-360/10, *SABAM v Netlog NV*, ECLI:EU:C:2012:85.
31 Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM),* ECLI:EU:C:2011:771.
32 Case C-484/14, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, ECLI:EU:C:2016:689.
33 Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, ECLI:EU:C:2019:821.
34 Case C-108/09, *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete*, ECLI:EU:C:2010:725.
35 Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL,* ECLI:EU:C:2017:981.
36 Case C-390/18, *Airbnb*, ECLI:EU:C:2019:1112.

service itself[37]. As such, it exercised a decisive influence on the offline service, which had made a significant difference. In contrast, the question as to whether Airbnb provided hotel services or information society services, has been answered in the negative, as Airbnb did not exercise a comparable level of control over the offline (hotel) service. Consequently, the separation between online and offline services, similar to that established in *Ker Optika*, in the *Airbnb* case, was possible.

The speaker concluded by stressing that there are increasingly more platforms that provide services that fall under different legal instruments, and that when relevant rules are implemented it will be of critical importance to understand whether attention should focus on the service, or on the service provider.

The second presentation of the afternoon session was delivered by **Zoraida Frias**, Professor at the Polytechnic University of Madrid. It focused on the question of how to promote investment in high capacity networks while fostering competition, considering that there is an inherent trade-off in infrastructure-intense sectors between infrastructure and service-based competition. The first part of the intervention focused on the ladder of investment theory, which has guided regulation in the telecommunications sector since its liberalisation, providing the solution to the conflict between competition and investment. The second part examined the Spanish case concerning the deployment of Fibre-to-the-Premises (FTTP), which now features several overlapping networks and covers more than 80% of the territory.

To explain the ladder of investment theory, the speaker first explained that the telecommunications networks consist of three major parts: a high-level core network, the metro network, and, finally, the access network, which connects the end-user to the exchange point through different technologies. The important point is that while all these parts of the network are required to deliver a service, they exhibit completely different economics. In particular, while core networks are easy to replicate, access networks that connect individual premises and households are extremely capital-intense, and therefore hard to replicate. The ladder of investment theory accounts for these differences with the objective of encouraging investments by incumbents and new entrants, thus ultimately promoting network competition.[38] While this theory, in general, illustrates well the developments in the EU, it has some caveats. First, there are limits to infrastructure replicability. In particular, deployment of overlapping networks in certain areas, i.e., rural areas, is not feasible, as it is not economically viable. Second, the theory requires an adequate access policy design that would not eliminate the new entrant's incentive to climb the investment ladder by providing overly convenient conditions for access to the incumbent's network. Prof. Frias admitted that there are actually very few examples of operators that have deployed their own end-to-end infrastructure that would extend to the local loop.

[37] According to the Court, UBER exercised a decisive influence on the offline service because it (and not the driver) decided the price that should be charged, it created supply and demand, and exercised control over the quality of the service offered.

[38] The idea behind it is that new entrants can deploy their own infrastructure as they gain their own customers, but, at the same time, they can access the incumbent's infrastructure so that they can provide services to end-users from the very beginning. The assumption behind the theory is that new entrants will progressively climb the ladder of investment to ultimately have their own end-to-end infrastructure, which will allow them to offer more differentiated services, and hence to compete on parameters other than just price.

This raises the question of what can be rationally expected in the fibre-based environment and new generation networks (NGN), considering that fibre requires even more investment and, hence, having several overlapping networks may seem harder than having several copper networks. According to Prof. Frias, what makes the Spanish case interesting is the fact that the ladder of investment theory has worked very well in Spain for fibre-to-the-home (FTTH) deployment, which now has up to four overlapping private FTTH networks that cover around 25% of the country. At this point of her presentation, Prof. Frias moved on to discuss key factors behind the successful deployment of FFTH in Spain. She started by noting that, according to the data from the European Commission (taken from the Digital Scoreboard), the coverage of FTTP in Spain in 2013 was very similar to the EU average, but in the last five years it has dramatically increased, reaching 80% of premises. According to the latest data, only Latvia has surpassed Spain. According to Prof. Frias, the first characteristic that played a major role in the successful deployment of fibre networks was the fact that operators in the Spanish market are multi-national companies (*i.e.,* Telefónica, Vodafone, Orange), with strong financial capabilities that allow them to incur significant investments. Second, in the fixed market, cable has constituted the main technology for broadband connectivity, offering up to 100 Mbps and 60% coverage of households.[39] Third, the mobile market was competitive due to the strong and growing presence of MVNOs and a high degree of service bundling in the market.

Next, Prof. Frias briefly discussed the structure of the Spanish fixed and mobile market. With respect to the fixed market, she considered it worth mentioning that, in addition to the incumbent operator, Telefónica, there were two other categories of players: LLU- and cable-based. Main LLU-based operators were the biggest providers active in the mobile market, *i.e.,* Orange and Vodafone. In terms of market shares, Telefónica controlled nearly half of the fixed broadband market, and was followed by Ono, Orange and Jazztel. However, in the NGN broadband market, the main player was the cable operator, ONO, with a 60% market share, whereas Telefónica had only 18% of the market.

The declining market share of Movistar (owned by Telefónica) in the mobile market, since 2012, and competition faced by the incumbent in the fixed NGN market, has put pressure on the firm to develop a new competitive strategy. As the only player with a relatively good position in both the fixed and mobile markets, Telefónica decided to intensively invest in the deployment of FFTP networks, which were unregulated in Spain in 2013, and to launch bundled offers. The speaker briefly elaborated on the regulatory framework that was in place in Spain in 2013, and remarked that the fact that there was no virtual unbundled local access (VULA), and that Telefónica was under an obligation to grant bitstream access only up to 30 Mbps., essentially pushed all the providers to deploy their own fibre networks. This is because the limitation of 30 Mbps. implied that no operator would have been able to compete beyond that speed without its own fibre network. Given that fibre is expensive, operators started collaborating and signing network sharing agreements so as to share the cost of deployment: Telefónica, with Jazztel to deploy the final stretch of the FTTH network, and Vodafone with Orange to

[39] In comparison to other countries, cable networks in Spain were deployed very late (in the 90s) and were initially used only for Pay-TV services. However, due to late deployment, only minor upgrades were needed in order to use these networks for the provision of broadband connectivity.

deploy a joint network that would cover 3 million households.[40] Next, Prof. Frias moved on to discuss the situation in 2016, when CNMC, the Spanish NRA, reviewed markets 3(a) and 3(b). In terms of the regulatory framework, Spain had introduced VULA for fibre networks, and the geographical segmentation of the products.[41]

The speaker concluded her presentation by stressing that the Spanish case shows that FFTP deployment is possible, and that if the right conditions are put in place, it can be compatible with competition. In particular, an adequate regulatory framework and the kind of players present in the market, seem to be key elements behind the successful deployment of fibre networks.

In the final intervention of the afternoon session, **Mr. Vesa Terävä** (the Acting Director of Directorate B of DG CONNECT and Head of the Unit dealing with the implementation of the regulatory framework for electronic communications, European Commission), gave his presentation on asymmetric and symmetric access regulation, focusing on the novelties introduced in this respect by the EECC. He first remarked that the objective of the new Code is to provide the right incentives for the operators to invest in very high capacity networks (VHCN), while maintaining the objectives that are enshrined in the 2002 regulatory framework for stimulating sustainable competition and strengthening consumer rights. Mr Terävä also noted that the principles of access regulation have not substantially changed in comparison with the 2002 regulatory framework, as revised in 2009. In particular, the imposition of access obligations continues to be based on the concept of dominance, which requires the definition of the relevant market and significant market power (SMP) that must be held either individually or jointly. It should also comply with the Recommendation on Relevant Markets, which is currently under review and is expected to be adopted in December, 2020, and with the SMP Guidelines, which were adopted in April, 2018. Mr Terävä remarked that the three-criteria test, which has been used by the Commission to identify relevant markets susceptible to ex ante regulation, is now an integral part of the legal framework (Article 65 of the EECC). The criteria, which are cumulative, remain the same, and require: (i) the existence of high and non-transitory barriers to entry; (ii) a market structure that is not conducive to effective competition within the relevant time horizon, and (iii) the insufficiency of competition law to address identified market failure.

Other access-related novelties in the Code concern price regulation and access to civil engineering. Concerning the former, Article 74 of the Code provides that price regulation may not be appropriate

[40] Considering that Telefónica's strategy (of deploying FTTP and providing increasingly attractive bundled offers) was extremely successful and that FFTP deployment is time consuming, Vodafone and Orange decided to acquire the most relevant players in the fixed market: Ono and Jazztel, respectively. The merger between Orange and Jazztel, the 3rd and the 4th players in the fixed market, with networks overlapping to some extent, was made subject to some conditions. In particular, the merged firms had to divest their overlapping fibre network to a new entrant, and wholesale commitments were imposed on their copper and mobile infrastructure.

[41] For physical access, the NRA defined as competitive areas with at least one exchange that was NGA-competitive, which required the presence of at least three NGA networks, each providing a minimum coverage of 20%. As for the indirect access, competitive areas were defined as those where there were at least two providers other than Telefonica, each having a market share of at least 10%, and Telefonica's market share is below 50%.

in the presence of a demonstrable retail price constraint, or of effective and non-discriminatory access. As for the latter, Article 72 of the Code puts emphasis on access to civil engineering, such as masts, ducts and cabinets, to lower deployment costs and stimulate infrastructure-based competition. NRAs should consider whether such a remedy would be sufficient, before they consider imposing any other access obligations, which means that access to civil engineering could be imposed as a stand-alone remedy on SMP operators.

Next, Mr Terävä focused on the importance of co-investment, which is acknowledged by the Code, both in terms of facilitating the roll-out of networks and ensuring competition. In order to incentivise investment, the Code introduced a new provision relating to co-investment agreements, which, subject to certain conditions, would imply the deregulation of operators with SMP if they enter into such agreements with at least one other operator. The whole process is managed by the NRAs (Art. 79 EECC), which assess operators' commitments, also through market tests, and make them binding if they decide to deregulate co-investing firms. NRAs' assessments are subject to a double-lock veto mechanism, which the Commission can exercise only if BEREC agrees with its opinion.

Co-investment offers have to comply with all the following conditions: (i) access must be granted on fair, reasonable and non-discriminatory terms, allowing effective and sustainable competition; (ii) there must be flexibility, in terms of the value and timing of the participation of each co-investor, with the possibility to increase such participation in the future; (iii) after the deployment of the co-invested infrastructure, reciprocal rights must be awarded by the co-investors; and (iv) the offer must be made public at least six months before the deployment. The rights of access seekers who are not co-investors, are not as favourable as they are for co-investors. Initially, such access seekers would obtain access to a legacy network, which means that they would be offered at least the same quality, speed, conditions and end-users' reach, as those that were available before the deployment of the co-invested network. This implies that such access seekers would, initially, not have the ability to compete on speed, as those that can be reached on the newly deployed networks. However, over time, access conditions would improve via a mechanism of adaptation.

Mr Terävä next referred to Article 80 of the Code, which concerns the treatment of wholesale-only operators, i.e., operators that have no activities on the retail market. According to this provision, the regulatory treatment of such operators, even when they have SMP, should be lighter, as such a business model results in a reduced risk of certain anti-competitive behaviours. In such cases, NRAs may only impose obligations that are relative to accessing specific network elements, non-discriminatory or fair and reasonable pricing obligations.

Furthermore, Mr Terävä presented the new rule on symmetric obligations, which is laid down in Article 61(3) of the Code, and which addresses the issue of network replicability, without compromising the SMP regime. In particular, it provides that the imposition of access obligation can be extended up to the first concentration or distribution point (i.e., mainly in-house wiring, which represents the clearest case of technical or economic replicability). Such an extension of obligation is also subject to a double-veto mechanism (*i.e.,* the Commission can veto NRA's decision only if BEREC

agrees).[42] Another novel provision in the Code is that Article 61(4) empowers the competent authorities to impose infrastructure sharing or localised access agreements under strict conditions.[43] Obligations for the sharing of active infrastructure can be imposed only if the sharing of passive infrastructure is insufficient to address the problem. Finally, in accordance with Article 22 EECC, NRAs will be able to carry out geographical surveys and forecasts of network deployment in order to designate areas in which no operator has planned to deploy VHCN or to upgrade existing networks to at least 100 Mbps. This tool should provide investment certainty in less attractive areas. Mr Terävä concluded his presentation by stating that while the Member States are working on the transposition of the Code into national laws by the 21st December, 2020, the Commission and BEREC will continue to work intensely on developing guidelines to foster the consistent application of the Code, in particular, with respect to the novel provisions.[44]

Final Remarks
Pier Luigi Parcu & Vesa Terävä

In opening his concluding remarks to summarise the Seminar, **Professor Pier Luigi Parcu** first stressed that as soon as the EECC is transposed into national legislations, the new features of the Code will raise issues, firstly for the NRAs, and eventually also for the judges. He then moved to focus on a few topics that, in his view, will become prominent in the near future. The main theme that emerged from the morning session is the role of soft law and the related issue of the deference given to technical contributions, the opinions of the Commission, or analysis carried out by engineers and economists. The reason why such contributions will gain in importance is because both regulatory and judicial analysis will increasingly require the understanding and evaluation of technical issues. The first area in which such technicalities are likely to emerge is the SMP analysis. Based on strong and consolidated competition principles, this analysis is rather straightforward. However, the SMP test is under pressure, due to evolving market structures, both in the mobile and fixed markets. This evolution will lead to more cases, like that presented by Judge Kerkmeester in the morning session, in which NRAs will have to decide whether to continue regulating the market by regulating duopolies, which is much less clear than regulating single SMP positions. While there are rules that guide competition analysis in the case of joint dominance, there are many fewer cases and decisions, and more disagreement between economists. It will thus be very important to carefully analyse the first decisions and

[42] Wholesale-only operators are to be exempted from these extended obligations provided that they offer access on FRAND (fair, reasonable and non-discriminatory) terms

[43] These require that: (i) sharing or localised roaming must be directly necessary for the provision of local services; (ii) there must be no viable and similar alternative means of access to end-users on fair and reasonable terms and conditions; (iii) the possibility to impose sharing must be clearly provided for when granting the rights for the use of radio spectrum; and (iv) the market-driven deployment of infrastructure must be subject to insurmountable economic or physical obstacles.

[44] *Co-investments* (Art. 76, public consultation planned in Q3 2020, adoption planned in Q4 2020); *Performance criteria for Very High Capacity Networks* (Art. 82, public consultation planned in Q3 2020, adoption by 21st December, 2020); *Symmetric obligations* (Art. 61(3), public consultation planned in Q3 2020, adoption by 21st December, 2020); Geographical surveys and forecasts (Art. 22,public consultation planned in Q4 2019, adoption by 21st June, 2020).

developments in this field. A second issue that is expected to attract attention is that of network co-investment and network sharing, which is very much related to the trade-off between competition and investment. The Code stresses the importance of ensuring more investment in networks, however, there is a significant technological shift, particularly in respect of 5G, which brings to the fore also the question of sharing. This is likely to create tensions and raise controversy, both for the NCAs and the NRAs. Third, a growing tension is likely to arise between the E-Commerce Directive and the EECC. The former, which dates back to 2000, is likely to evolve just as the Telecommunications Framework, originally from 2002, has evolved. In particular, the relationship between platforms and telecoms companies, which has attracted lots of discussion, will raise many technical and regulatory questions.

Next, Prof. Parcu agreed with the comments made by some of the participants in light of recent experiences with spectrum auctions, and remarked that auctions should, first, not be designed only to maximise the proceeds, and, second, that they remain an indispensable tool to help decide on the best use of scarce resources, such as spectrum. Concerning the overarching theme of the need to balance investment and competition, Prof. Parcu noted that the Code has sent an important message in that respect, insofar as it is the first time that investment has really been made an objective for regulation. He explained that this is due to the fact that increased consolidation in the market (caused partially by mergers in the telecoms sector), had led various stakeholders to demand that some specific measures needed to be taken to ensure more investment in the industry. However, any time there is a trade-off between objectives, targets, or between legal instruments, it is unavoidable that such a trade-off will result in cases that will eventually come before judges.

The final point that Prof. Parcu wished to raise was actually not addressed during the Seminar, namely, the impact of artificial intelligence on the sector. It is now clear that, in the very near future, there will be more developments in this area, and that it will be impossible to foresee the final effect of the decisions that will need to be taken. Techniques such as deep learning or machine learning have already raised important questions with respect to social media, democracy, and elections, and they are expected to raise important questions also in telecoms and e-commerce. These issues, again, will eventually come before judges.

Mr Terävä ended the Seminar by reminding the participants that the event is organised 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 of contributing to both the development of best practices that are widely spread amongst the European Union countries, and the creation of a long lasting network for judges and regulators who deal with electronic communications. Afterwards, he thanked all of the speakers, moderators, participants and contributors for attending, organising and supporting the event, and closed the Seminar.