Seminar for National Judges (2010)

Recent developments in EU Telecommunications Rules

Proceedings

The 2010 seminar for national judges and representatives of national regulatory authorities (NRAs) was organised by the Academy of European Law (ERA) in association with the European Commission, Information Society and Media Directorate-General, on 29 November 2010. Following the adoption of the new EU rules on Telecommunications in 2009 and other important complementary harmonisation measures in 2010, this year's focus was on the impact of the revised regulatory framework and other harmonisation measures, namely the adoption of the Communication on a Digital Agenda for Europe, the Recommendation on Next Generation Access networks (NGA) and the role of the newly created Body of European Regulators for Electronic Communications (BEREC). While focussing on the latest policy developments, the seminar also dealt with the important role judges have in achieving a truly single market in the electronic communications sector, through the analysis of the major problems encountered in the application of the current regulatory framework and the challenges ahead stemming from the application of the new one adopted later in 2009. The 2010 seminar perfectly fitted into the series of seminars the European Commission co-organises every year, designed to establish a regular forum for relevant stakeholders where national and EU views are expressed, experience is exchanged, and visions are shared. In particular, the 2010 seminar constituted the natural follow up to the 2009 edition, which expressly focussed on the then recent adoption of the new regulatory package.

This year's seminar was attended by 31 judges from 21 Member States and 24 NRA representatives from 21 Member States.

The welcome words were delivered by Mr. Wolf-Dietrich Grussmann, Head of Unit at Information Society and Media DG of the European Commission, and Mr. Michele Messina, Course Director of the European Business Law section at ERA. Mr Grussmann welcomed participants, thanking them and expressing appreciation for the high level of attendance.
Mr Messina, on behalf of ERA, welcomed all the delegates from Member States, representing the national judiciaries, and the regulatory authorities, also highlighting how training seminars constitute one of the core activities of the Academy’s mandate. Mr Messina started by pointing out how, although in a different way, the last two years have been of key importance, in terms of hard-law and soft-law adopted with the aim of promoting and achieving a truly single market in the electronic communications sector. To that end, the adoption of the Communication on a Digital Agenda for Europe in May 2010 has been very important in setting out important priorities. Mr Messina also highlighted the adoption of other important complementary harmonisation measures to accompany the new regulatory package adopted later in 2009, such as the Recommendation on Regulated Access to Next Generation Access Networks

(hereinafter NGA), the proposal for a Decision to Adopt a Radio Spectrum Policy Programme, and a Broadband Communication, encouraging public and private investment in high and ultra-high speed networks. Mr. Messina continued by highlighting the role the new Body of European Regulators for Electronic Communications (hereinafter BEREC) will have in ensuring the further development of consistent regulatory practices in the telecommunications sector across Europe. Finally, Mr Messina concluded with the key role national judges have in achieving a truly single market in the electronic communications sector.

I. THE IMPACT OF THE REVISED REGULATORY FRAMEWORK AND OTHER HARMONISATION MEASURES

The session was chaired by Mr. Messina, who presented Mrs Lorena Boix Alonso, Deputy Head of Cabinet of Vice-President of the European Commission Mrs Neelie Kroes, as the first speaker of the day.

IMPLEMENTING THE DIGITAL AGENDA FOR EUROPE

***Mrs Lorena Boix Alonso**, Deputy Head of Cabinet of Vice-President Kroes, European Commission.*

Mrs Boix Alonso started her presentation by saying that, with the adoption of the Communication on a Digital Agenda for Europe, the European Commission intended to set the scene for future proposals outlining an action plan.
She highlighted that the most important issue concerns the network.
She referred to figure 1 of the Communication, which shows the virtual cycle of the digital economy, identifying the seven main bottlenecks and therefore challenges for the European Commission. All the legislative initiatives in the Digital Agenda will be touching upon different aspects of those seven challenges. To that purpose, every year a scoreboard will be drafted.
Mrs Boix Alonso went through the seven challenges. The first is the creation of a Digital Single Market, as across Europe there are still difficulties in obtaining online products cross border. The markets for content and media are still subject to fragmented legislation. To eliminate this, the Commission will adopt initiatives on access to content by simplifying copyright clearance. DG Internal Market and Services is already working on a framework Directive on collective rights management. A Green Paper addressing the opportunities and challenges of online distribution of audiovisual works and other creative content and a Directive on orphan works will have to be adopted, whereas revision is envisaged of the Directive on Re-Use of Public Sector Information and the eSignature Directive.
The second challenge involves the enhancement of trust and security. To achieve this, cybercrime should not be tolerated. Reinforced rules on personal data protection have to be adopted to ensure internet security and the protection of users' rights to privacy.
The third challenge is the need for fast and ultra-fast internet access. This is essential for the attainment of a knowledge economy. The 2020 Agenda sets a series of targets, such as internet speeds of 30 Mbps or above, for all European citizens by that date. Investment is a key issue here, as some areas will not be

as attractive as others to private investors. The Commission will explore how to attract investment in broadband. In addition, the Commission has adopted a Broadband package consisting of a Broadband Communication, the NGA Recommendation and a proposal for a Decision on the Radio Spectrum Policy Programme. The Broadband Communication, in particular, envisages some form of cooperation with the European Investment Bank, and advises Member States to take measures to reduce costs for network roll-out.
The fourth challenge is interoperability and standards. As to allow people to create, combine and innovate there is a need that ICT products and services are open and interoperable.
The fifth challenge is research and innovation. On that point, Mrs Boix Alonso pointed out that Europe still underinvests in Public-Private Partnerships.
The sixth challenge aims at improving media literacy as 30% of Europeans have never used the internet.
The seventh challenge is to unleash the potential of ICT to benefit society.
Mrs Boix Alonso, concluding her presentation, indicated that 2010-2015 is the time schedule envisaged for implementing the Digital Agenda.

During the discussion, the issues raised concerned people's rights to access to the internet and how to empower users to fully benefit of the digital agenda. It is in this context that net neutrality comes into play, but the real problem is the meaning of net neutrality. For that reason a Communication on net neutrality will be released soon.
Effective competition would also seem to be a key factor, where transparency, the possibility to switch operators and the quality of service are fundamental.
The adoption of Code of EU online rights is also to be considered, not intended to create new rights but to make clear existing ones.

PANEL 1: COMPLEMENTARY HARMONISATION MEASURES

RECOMMENDATION ON NEXT GENERATION ACCESS (NGA) NETWORKS

Mr. Reinald Krueger, *Head of Unit, Information Society and Media DG, European Commission, Brussels*

Mr Krueger first highlighted the reasons for a Digital Agenda for Europe. In particular, it is one of the seven lead initiatives of the Europe 2020 strategy, whose aim is to overcome the crisis and prepare for the challenges of the century. One of the priorities of the Digital Agenda is the establishment of faster internet connections, also known as next generation access networks. Faster internet access, as part of the EU 2020 strategy, is conceived as a basis for growth, productivity and social integration. The targets set are: broadband for all Europeans by 2013, minimum 30 Mbit/s for all Europeans by 2020 and 50% of all European households to have subscriptions above 100 Mbit/s. The steps to be taken to achieve the targets are: a European Broadband Strategy and a fostering of investment in fibre rollout, together with measures in the area of spectrum policy.
Mr Krueger outlined the Broadband Strategy and the regulatory approach followed by the Commission, starting with an overview of the recent Broadband Communication. The Communication focuses on how to promote investment

and decrease the related costs, through transparency with regards to existing ducts, coordination of deployment work and better access to rights of way. Support of wireless broadband solutions is also touched upon, as well as how public authorities can make better and efficient use of structural funds and rural development funds. The development of broadband financing instruments can also be promoted by the plans of the European Commission and the European Investment Bank. Mr Krueger then focused on the market-based approach as a key principle followed in the EU regulatory framework, where technological neutrality is promoted. To this end, the analysis on substitutability and the competitive situation in the market are of key importance. Sector-specific regulation will come into play in those markets which meet specific criteria (the so-called three criteria test) and for the time necessary to switch to a "competition-law-only scenario". The three steps before ex ante regulation comes in are the following: 1) the identification of markets susceptible to ex ante regulation, through the three criteria test (high and non-transitory entry barriers; no tendency towards effective competition; and insufficiency of competition law); 2) the identification of a dominant operator, by adopting the dominance concept used under competition law and establishing single or joint dominance; 3) the imposition of regulatory remedies on dominant operators through the regulatory toolbox provided in the Directives.
Mr Krueger then outlined the principles contained in the NGA Recommendation, namely the support of investment in fibre rollout while safeguarding competition; the provision of guidance for national regulatory authorities, through general principles for NGA regulation in each Member State and the possibility to make variations according to national/regional characteristics; and continued primacy of the market-based approach, through the assessment of the state of competition and a forward-looking approach.

The NGA Recommendation focuses on remedies. As a matter of principle, fibre should be included in markets potentially regulated, namely those on wholesale physical network infrastructure access, and those on wholesale broadband access. The broadband situation in the retail market is still considerably varying across Member States. As for remedies, the imposition of access obligations is recommended for ducts, terminating segments in the case of "fibre to the home" (FTTH) networks, and unbundled fibre loops. In principle, access has to be cost-oriented although investment risk has also to be taken into account, possibly through risk premiums, price flexibility and co-investment. In the market for wholesale broadband access, where potentially available functional separation and the use of margin squeeze tests have to be considered, a more flexible regulatory approach could be applied.
The NGA Recommendation does not only deal with the usually used asymmetric remedies. In fact point 7 of the Recommendation also refers to the possibility, under specific circumstances, of applying symmetric measures, pursuant to Article 12 of the Framework Directive, which would not rely on a finding of SMP. Migration from copper to fibre networks is dealt with in points 39 to 41, providing for a negotiated appropriate migration path. If an agreement between the SMP operator and operators currently enjoying access to the SMP operator's network is not reached, NRAs should ensure that alternative operators are informed a minimum of five years before the de-commissioning of points of interconnection.
There would be a de facto fibre regulation in the EU, through the provision of access obligation, price regulation and migration obligations. As for access

obligation, it would be necessary to impose access to the civil engineering infrastructure of the SMP operator and to the fibre loop. Transitionally, virtual unbundling local access (VULA) could be imposed, however with prices based on cost-orientation. As far as access price is concerned, it should be cost-oriented. As for migration obligations, NRAs should put in place a transparent framework for the migration from copper to fibre-based networks, setting out rules for the "phasing out" of services at main distribution frames. Notification of new technical information prior to offering new products also has to be provided.
Mr Krueger finished his presentation by giving an outlook: 1) implementation of the NGA Recommendation by national regulatory authorities, 2) enlarged supervision by the Commission of remedies under the new Article 7a of Framework Directive, 3) more guidance on access prices based on cost methodology with static and dynamic consistency is needed and will come, 4) non discrimination obligations.

During the discussion, it was again emphasised that the Recommendation starts usually applying when there is a dominant operator. The issue of whether joint ventures may encourage investment was also raised. What seems to be needed is demand-side stimulation with the important contribution of public funding, regulatory certainty of investment to rollout fibre, in areas with less commercial interest the European Investment Bank should step in to ensure open access, while State aid comes in to play, in particular in so called white areas.

THE ROLE OF THE BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATIONS (BEREC) IN THE SYSTEM OF ELECTRONIC COMMUNICATIONS HARMONISATION MEASURES

Ms Paraskevi Michou, *Head of Unit, Information Society and Media DG, European Commission, Brussels*

Ms Michou started her presentation by pointing out that BEREC was created as a result of the recently approved reform of the EU Telecoms rules. It replaces the European Regulators Group for electronic communications networks and services which, since 2002, has acted as an advisory group to the Commission.
The aim of BEREC is to improve the consistency of the implementation of the EU regulatory framework and to encourage and promote cooperation and coordination between NRAs and the Commission. She particularly pointed out that NRAs and the Commission need to take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC.
The role of BEREC is strictly confined to the Internal Market. It will enable cooperation and share best practices between NRAs and with the Commission, in order to further contribute to a consistent application of the EU regulatory framework in all Member States. BEREC will provide assistance to NRAs on regulatory issues, while also delivering opinions on draft decisions, recommendations and guidelines from the Commission. It will issue reports and provide advice to the Parliament, Commission and Council on matters regarding electronic communications. It will also assist the EU institutions and the NRAs in their discussions with third parties.

The structure of BEREC will consist of a Board of Regulators. It is composed of the 27 Heads of the NRAs, voting by two-thirds majority. The Commission, European Economic Area and accessing countries have a non voting observer status. For working purposes, it will be organised in the form of approximately 15 Expert Working Groups. The BEREC Office itself, is a EU body with legal personality and it is consists of a Management Committee and an Administrative Manager. The Administrative Manager is responsible for heading the Office under the guidance of the Management Committee. He assists the Board of Regulators, Management Committee and Expert Working Groups. The Management Committee is composed of the 27 Heads of the NRAs and the Commission, they take decisions on management and day-to-day operations, voting by two-thirds majority.
The Board of Regulators delivers opinions and is consulted on: drafting NRA measures under Article 7 and 7a of the Framework Directive; drafting recommendations and/or guidelines under Article 7b of the Framework Directive; drafting decisions on transnational markets; drafting harmonisation decisions and recommendations under Article 19 of the Framework Directive; cross-border disputes and other cross-border issues; drafting recommendations on relevant markets; drafting measures on the effective implementation of 112 and 116.
The BEREC Office is still in the process of being set up, although a manager has already been in place since 10 October. The Office will provide professional and administrative support services to BEREC, it will collect and exchange information from NRAs, it will disseminate regulatory best practices to NRAs, it will assist the Chair in the work of the Board of Regulators, it will assist the work of the Expert Working Groups. Its staff will be up to 28 people and its location is in Riga, in Latvia.
In June 2010 BEREC delivered its first formal opinion, requested by the Commission, on the draft Recommendation on NGA networks. It has also participated in the Commission public consultation on Net Neutrality, it delivered a report on Universal Service, guidance on functional separation and reports on regulatory accounting and a mobile termination rates benchmark.
The challenges ahead for BEREC and the Commission are: to have a fully operational and autonomous Office in 2011 as to accommodate all necessary tasks that come from the transposition of the reviewed framework for electronic communications into national laws (by 25 May 2011), The new tasks are the involvement in market analysis under Article 7 and 7a of the Framework Directive, giving opinions on harmonisation measures under Article 19 of the Framework Directive, and the resolution of cross-borders disputes under Article 21 of the Framework Directive.

During the discussion, the problem of the magnitude of the radio spectrum needed if we want to take on all the challenges ahead was emphasised, most importantly if we move from a dedicated use of radio spectrum to a market use of it. In this respect, net neutrality comes into play, a report on this is expected at the beginning of 2011. It has to be acknowledged, however, that radio spectrum plays an even more important role in the United States than in the EU.

II. NATIONAL JUDICIARIES' ROLE IN ACHIEVING A TRULY SINGLE MARKET AND RECENT DEVELOPMENTS AT EU AND NATIONAL LEVEL

The session was chaired by Mr Messina, who, prior to introducing the first speaker of the session, briefly highlighted the great importance of the national judge in the achievement of a truly single market, while also not forgetting the key role of the EU judiciary in providing the correct interpretation of the relevant EU rules. Mr Messina then introduced Mr Milan Kristof as the first speaker of the session.

OVERVIEW OF RECENT EUROPEAN COURT OF JUSTICE CASE LAW IN THE FIELD OF ELECTRONIC COMMUNICATIONS

Mr Milan Kristof, *Legal Secretary, Chambers of Advocate General Mazák, Court of Justice of the European Union, Luxembourg.*

Mr Kristof, as a preliminary point, pointed out that the real EU law judges are the national ones, as they have to apply EU rules in the first place. He then moved to the content of his presentation by stressing that the Court of Justice (hereinafter ECJ) has been quite active in the last year.
The first case he dealt with was *Telia Sonera Finland* (Case C-192/08), delivered on 12 November 2009. The case at issue concerned interconnection agreements between telecoms undertakings, the obligation to negotiate in good faith, the definition of "operator of public communications networks", and the powers of the NRAs. According to the ECJ, the Access Directive precludes national legislation in so far as it does not restrict the possibility of relying on the obligation to negotiate on the interconnection of networks solely to operators of public communications networks, leaving it to the national court to determine whether the operators concerned can be classified as operators of public communications networks. The ECJ followed by affirming that an NRA may take the view that the obligation to negotiate an interconnection has been breached where an undertaking which does not have SMP proposes interconnection to another undertaking under unilateral conditions likely to hinder the emergence of a competitive market at the retail level where those conditions prevent the clients of the second undertaking from benefiting from its services. The ECJ finally affirmed that an NRA may require an undertaking which does not have SMP but which controls access to end users to negotiate in good faith with another undertaking for either interconnection of the two networks concerned if the undertaking which requests such access must be classified as an operator of public communications networks, or interoperability of SMS and MMS message services if that undertaking is not covered by that classification.
The second case presented was Case C-424/07, *Commission v Germany* of 3 December 2009. It concerned the failure of a Member State to fulfil obligations provided in Directives 2002/19/EC, 2002/21/EC and 2002/22/EC, in particular the definition, analysis and regulation of new markets, the national provisions defining those "new markets" in general and laying down restrictive conditions concerning regulation of those markets by the NRA. The ECJ made it clear that the NRAs must have all the necessary powers to undertake their duties. The ECJ thus confirmed the position of the Commission that national legislation may not exempt next generation electronic communications markets from regulation

or limit the discretionary powers of the NRA in its exclusive right to assess whether markets should be regulated or not.
The next case dealt with by Mr Kristof was Case C-522/08, *Telekomunikacja Polska v the Polish NRA*, delivered on 11 March 2010. In this case the ECJ held that a Member State may prohibit the making of the conclusion of a contract for the provision of telecommunications services contingent on the conclusion, by the end-user, of a separate contract for the supply of other services. National legislation which, subject to certain exceptions, and without taking account of the specific circumstances of the case in question, prohibits any combined offer is, however, incompatible with EU law on consumer protection (Unfair Commercial Practices Directive).
The next case was *Vodafone* Case C-58/08 of 8 June 2010, concerning the validity of Regulation 717/2007 on roaming on public mobile telephone networks within the EU. The ECJ considered the principles of proportionality and subsidiarity. On the legal basis, the ECJ concluded that the Regulation at stake, having as its object to improve the conditions for the functioning of the internal market, could be adopted on the basis of the then Article 95 EC (now Article 114 TFEU). As for proportionality, the ECJ found that maximum retail charges could be considered to be appropriate and necessary for the purpose of protecting consumers against high levels of charges. As regards subsidiarity, the ECJ affirmed that the EU legislature could legitimately take the view that a common approach at EU level was necessary to ensure the smooth functioning of the internal market, thus allowing operators to act within a single coherent regulatory framework. Mr Kristof concluded that the ECJ based its reasoning on the tobacco advertising case.
The next case was Case C-99/09 *Polska Telefonia Cyfrowa*, delivered on 1 July 2010. It concerned portability of telephone numbers and Article 30(2) or Directive 2002/22/EC. The ECJ concluded that, when assessing whether direct charge relating to transferring a telephone number is a disincentive, account must be taken of the costs incurred by the operator in providing that service. However, to avoid dissuading consumers from making use of the portability facility, NRAs may fix the maximum amount of that charge at a level below that operator's costs.
Mr Kristof then dealt with a judgment delivered on 6 October 2010 in the Case C-389/08 *Base NV at al*., concerning universal service. The ECJ affirmed that the Universal Service Directive, in principle, does not preclude the national legislature from acting as NRA within the meaning of the Framework Directive provided that, in the exercise of that function, it meets the requirements of competence, independence, impartiality and transparency, and that its decisions in the exercise of that function can be made the object of an effective appeal to a body independent of the parties involved. It is interesting to note that the Advocate General, in this case, affirmed that NRAs' role cannot be taken over by the legislature. The ECJ also affirmed that Directive 2002/22/EC does not preclude a NRA from determining generally and on the basis of the calculation of the net costs of the universal service provider, previously the sole provider of that service, that the provision of universal service may represent an "unfair burden" for those undertakings designated as universal service providers. Finally, the ECJ concluded that Directive 2002/22/EC precludes that authority from deciding in the same way and on the basis of the same calculation that those undertakings are effectively subject to an unfair burden because of that provision, without having undertaken a specific examination of the situation of each of them.

Closely related to the previous case is the next case *Commission v Belgium* (Case C-222/08), also delivered on 6 October 2010, concerning the calculation of the costs of universal service, where the ECJ concluded that Belgium had failed to fulfil its obligations under the Universal Service Directive.
Another important case, although a competition law one, is *Deutsche Telekom v Commission* (Case C-280/08 P), where the major issue involved was the interaction between regulation and competition law and whether charges adopted by an NRA can prevent the Commission from taking other measures. The ECJ concluded that even though wholesale prices for local loop access services were set by the NRA, margin squeeze was attributable to Deutsche Telekom, since the latter had sufficient scope to adjust the retail prices charged to its end-users, notwithstanding the fact that those prices were subject to some regulation. Mr Kristof pointed out that, in principle, the US system works differently (when there is a regulatory mechanism to deter and remedy anticompetitive pricing the costs of antitrust enforcement are regarded to likely be greater than the benefits).
Another interesting case on margin squeeze is *TeliaSonera* (Case C-52/09), which was - at the time - still pending before the ECJ. The AG's Opinion was delivered on 2 September 2010.
Mr Kristof concluded his presentation with a list of upcoming cases: Case C-390/09 *Reti Televisive Italiane*, concerning the Television without Frontiers Directive, where primacy of EU law is involved; Case C-410/09 *Polska Telefonia Cyfrowa*, on guidelines on market analysis not published in the language of a new Member State; Case C-543/09 *Deutsche Telekom*, on subscribers data for directory enquiry services; Case C-16/10 *The Number and Conduit Enterprises*, on Article 8 of the Universal Service Directive; Case C-70/10 *Scarlet*, on IP address and data protection and Internet Service Provider traffic filtering; Case C-71/10 *Ofcom*, on access to the databases of mobile base stations; Case C-85/10 *Telefónica Móviles España*, on spectrum fees; Case C-143/10 *Commission v Belgium*, on the must-carry regime in Brussels; Case C-284/10 *Telefónica Móviles España*, on annual fee to holders of general authorisations; Case T-226/10 *UKE v Commission*, concerning an action for annulment of the Commission Veto Decision under Article 7 of the Framework Directive.

THE MAJOR ROLE OF THE NATIONAL JUDGE IN FURTHER IMPROVING CONSISTENCY IN THE REGULATION OF THE ELECTRONIC COMMUNICATIONS SECTOR

Ms Vivien Rose, *Chair, Competition Appeal Tribunal, London*

Ms Rose started her presentation by emphasising that the importance of consistent application of the electronic communications regulatory regime was recognised as a key driver in the reform package adopted at the end of 2009. For that purpose, she referred to the Commission Communication to the European Parliament and the Council of 13 November 2007.
Ms Rose explained how the national judge's role to improve consistency is generated by the appeal mechanism required by Article 4 of the Framework Directive, which places an obligation on Member States to assure an effective appeal mechanism for undertakings affected by a NRA decision. There are many different kinds of decision that can be the object of an appeal and the arrangements made for appeals differ between Member States. Appeals can

raise a range of legal, factual and economic issues. The legal issues can focus on the interpretation of the provisions of the Directives themselves or on the national legislation implementing the Directives. They can also cover issues of fairness of the procedure adopted by the NRA.

Ms Rose continued by examining the tools available to national courts seeking to ensure consistency in how they approach all these issues. As far as legal consistency is concerned, a possible tool for the national judge is submitting a preliminary reference to the Court of Justice under Article 267 TFEU. In this regard, Article 4 of the Framework Directive says that the appeal body may be a court but does not have to be. If it is not a court, Article 4(2) says that the appeal body must give written reasons for its decision and its decision must be subject to review by a court or tribunal within the meaning of Article 267 TFEU. In this connection, she referred to Case C-462/99 *Connect Austria v Telekom Control Kommission*. The reference to the Luxembourg court is a step which has rarely been taken in the English system. One recent example is *The Number (UK) Limited v OFCOM* case, concerning the interpretation of Article 8 of the Universal Service Directive combined with various provisions of the Framework and Authorisation Directives. The legal issue was the scope of the obligations placed on British Telecom to make its database of subscribers available to other companies who wanted to provide directory enquiry services to the public. According to the appellants, a reference was necessary because there was a difference in the wording of the different language versions of the Directive which the Court of Justice was in the best position to resolve. The Competition Appeal Tribunal declined to make a reference, holding that although the interpretation it had arrived at was not *"acte clair"*, a reference to Luxembourg might have delayed the case. On appeal, the Court of Appeal considered the correct interpretation at length, looking at the German and French versions of the relevant text, the *travaux préparatoires*, and the overall policy objectives. Although the Court of Appeal came to its own decision, it did not consider it as beyond doubt, thus referring questions to the ECJ.

Ms Rose emphasised the fact that the question of delay is a crucial one, particularly in a sector where there is always one party who is financially affected by delays and one party which makes a substantial amount of money for each day that the case continues. This was exactly what happened in *The Number* case in the UK. Ms Rose called on judges of the other Member States to give details of their experience in a similar situation.

Ms Rose then moved on to talk about other important ways in which national judges can try to ensure the consistent interpretation of the regulatory framework. The first is to adopt a purposive approach to construing the wording of the relevant legislation, citing what the Court of Appeal said in paragraph 63 of the appeal from the *The Number (UK)*: *"Our task is, I think, to give the language of the [Universal Service Directive] a meaning which is consistent with and respects its position within the general framework of the CRF."* In another recent case before the CAT, *Telefónica O2 UK Limited v OFCOM* [2010] CAT 25, the Tribunal adopted a holistic approach, looking at the whole structure of the background directives and the distinction they made between technological harmonisation and the authorisation process.

According to Ms Rose, the second aspect of how the proper approach to interpretation of EU instruments assists national judges in arriving at consistent application of the Common Regulatory Framework (CRF) is in the scope of materials relied on. For example, in *Telefónica O2* the Tribunal said that it was important to look at the Recitals to the Directives, although the same Tribunal

affirmed that they have to be viewed *"broadly and purposively"*. The Court of Appeal, in *The Number* appeal, also referred to the *travaux préparatoires* in its judgment.

Another aspect of interpretation for national judges identified by Ms Rose was that they should avoid importing national concepts into EU instruments or assume that the instrument was drafted with a particular national procedural situation in mind as acknowledged in the CAT's judgment in *T-Mobile UK v OFCOM* [2008] CAT 15.

The last aspect of interpretation which helps achieve consistency, identified by Ms Rose, is whether the appeal body looks at how the EU instrument has been implemented in other Member States, and whether the Commission has objected to what has been done there, to find out what is the prevailing view on what the words mean. She then mentioned two UK examples.

The first example is the Tribunal's judgment in *Telefónica O2 Uk Limited v OFCOM* [2010] CAT 25, concerning the meaning of the obligation imposed on Member States to *"make available"* certain bands of spectrum for UMTS technology. It was by looking at the fact that some Member States had enacted a general bar on their NRA conferring licences for the use of the spectrum band for UMTS, that the Tribunal was assisted in coming to the conclusion that it was that kind of enactment that the Directive intended Member States to lift. The fact that the UK did not impose such a legislative bar on OFCOM might mean that actually there was nothing for the obligation to bite on in the UK, thus adopting a permissible interpretation of the EU instrument. However, the case is now before the Court of Appeal.

Another example dates back to a previous case, *Hutchinson 3G v OFCOM [2008] CAT 11*, concerning the NRA finding that a "new entrant" was dominant in the market for terminating calls on its network.

Similarly, in *T-Mobile and others v OFCOM* [2008] CAT 12, concerning the resolution of a dispute on what mobile call termination rates were reasonable, the Tribunal held that OFCOM had erred in not considering evidence on the rates in other countries.

The final point of Ms Rose's presentation dealt with the future role of national judges under the amended Article 4 of the Framework Directive. She focussed on Article 4(3) and the corresponding Recitals 14 and 15 of the Directive. In commenting, Ms Rose considered that provision to be a rather defensive and partial measure, focussing on the procedural aspects of the appeal process rather than on the ways in which different Member States have interpreted the Directives. She wondered whether it would not be more helpful to have some central place where the judgments of the courts of the Member States on the interpretation of the relevant EU provisions can be made available. She added that the amendments to the Framework Directive are intended to formalise and strengthen the role of BEREC as the body where NRAs can share their experience and seems to stress how important the appellate body process is. However, it does not seem to do anything to help appeal judges in their task. Drawing a parallel to the competition law sphere, she underlined the fact that the Commission has express powers to intervene in national proceedings and to provide help on request to national judges. These powers have not been widely used, so the question is how helpful it would be to introduce them here in the area of electronic communications.

She then concluded by giving some more useful examples, apart from this annual training seminar of European judges, taken from the competition law sphere, such as the role of the Association of European Competition Law

Judges and an increasing number of publications, both from the EU Commission and from private sources, disseminating decisions from national jurisdictions applying competition rules. In her opinion, telecoms judges could follow suit.

During the discussion, a point was raised on the effective role of the *travaux préparatoires*, which is not always very clear. On the call for more information, it was pointed out that the ECJ already has a database, although that may only contain those national cases which have been referred to it *ex* Article 267 TFEU, thus limiting itself to keep following those cases, once back in the national courts for the judgment in the main proceedings.
On legal certainty and the question of delays in delivering judgments, it was pointed out that in some Member States a time limit may apply.

PANEL 2: RECENT DEVELOPMENTS AT NATIONAL LEVEL

FRANCE

Ms Alice Pézard, *Judge, Cour de Cassation, Paris*

Ms Pézard indicated that recent developments in this sector are focussed on two rulings adopted in the last two years.
The first one concerns SFR and France Télécom. SFR, an alternative electronic communications operator, has authorisation to install and to manage electronic communications networks for the public, and to supply electronic communications services in competition with France Télécom, the incumbent operator. For that purpose, SFR wanted to high-speed access to internet. In order to do this without depending on France Télécom wholesale services, SFR has decided to invest in the unbundled local loop, i.e. in the access to that part of the network which is owned by France Télécom and which is located between the telephone socket of the subscriber and the distributor. SFR and France Télécom have concluded several agreements to access the local loop, providing for installing and co-location conditions for interconnections of SFR equipment to France Télécom buildings. The first agreement was signed in 2005 and the last one in July 2007. SFR considered itself to have been overcharged by France Télécom, and in 2008 therefore decided to ask the French electronic communications regulator (ARCEP) to adjudicate on the dispute. SFR asked, *inter alia*, for the reimbursement of the overcharges as of the notification of the regulator's decision of 19 May 2005 asking France Télécom to orientate its tariffs towards cost prices. Both ARCEP in 2008 and the Court of Appeal of Paris in May 2009 rejected the claims from SFR, ruling that France Télécom had to reimburse SFR from February 2008 and not retrospective from 2005. As a result, the reference time for the reimbursement should start from the date the litigation started. The case is now pending before the Cour de Cassation, judgment expected to be delivered by the end of December 2010.
The second case, concerning optic fibre networks, is a Court of Appeal case delivered in June 2009, where it upheld the ARCEP November 2008 decision. The facts were the following: Numericable had proposed wholesale access to optic fibre networks. France Télécom, having not been given access, has

presented a claim to ARCEP. Numericable had developed optic fibre through its own co-axial cable and through other infrastructures. France Télécom is complaining of not having been given access by Numericable and of not knowing the technical and financial conditions. ARCEP concluded that France Télécom had to give evidence of the necessity of the information but it was unable to do so because it is able to offer the same service. The Court of Appeal agreed.

UNITED KINGDOM

RECENT DEVELOPMENTS IN THE UK AND DECISIONS IN COMMUNICATIONS CASES BEFORE THE CAT AND BEFORE THE COURT OF APPEAL OF ENGLAND AND WALES

Dr Adam Scott OBE TD, *Member and Chairman of the Training Committee, Competition Appeal Tribunal, London*

Dr Scott, referring to *Hutchinson 3G UK v Ofcom* and *British Telecommunications v Ofcom*, known on appeal as *Vodafone and Others v Ofcom and BT* [2010] Civ 391, recalled that the Article 4 procedure in the UK relating to SMP decisions and remedies currently involves not only a full on-the-merits appeal but a sub-procedure in which "price control matters" are referred to the Competition Commission for a report. The latter is of course subject to judicial review by the Tribunal, as provided for in Article 4(2). In the appeal case, the Court of Appeal has been asked whether the CAT is empowered to direct Ofcom to reset the price control for the whole period of its original decision or simply for the remaining period. The CAT believed that it was so empowered. The Court of Appeal emphasised the *ex ante* nature of remedies in the Common Regulatory Framework (CRF) and therefore in UK legislation. They found no option for a retrospectively active resetting of the price control, as distinct from what can happen after a dispute resolution.

The next case was *The Number (UK) Limited v Ofcom* [2009] EWCA Civ 1360, concerning Universal Service and Directory Enquires, now referred to the ECJ in Case C-16/2010.

Another case was *Carphone Warehouse v Ofcom (Local Loop Unbundling)* [2010] CAT 26, where Carphone Warehouse asked the CAT to set aside the Local Loop Unbundling Decision in its entirety and remit the matter to Ofcom to conduct a proper consultation and to take a decision that covers prices for both LLU services and Wholesale Line Rental (WLR) services. The day before the hearing, the parties settled all the non-price control matters. The Competition Commission rule that Ofcom had made certain errors in the LLU decision. The Competition Commission therefore determined remedies and consequent changes to the price control. The Competition Commission determination was not challenged, so the CAT upheld those grounds of the appeal to the extent set out in the Competition Commission determination and dismissed the other grounds of appeal. The CAT remitted the decision to Ofcom.

The *Cable & Wireless UK v Ofcom* [2010] CAT 23, concerning leased line charge control, featured C&W appeal against the price increases that Ofcom allowed on particular services and, the issues being price control matters, they were referred to the Competition Commission for determination. No one challenged the Competition Commission's determination, so the CAT upheld

those grounds of the appeal to the extent set out in the CC's determination. The CAT remitted the decision to Ofcom.
A very interesting case is *British Telecommunications v Ofcom (termination charges: 080 calls)* [2010] CAT 17, because of the perception, in the UK's Impact Assessment on the revised Common Regulatory Framework, that the current appeals process provides that appeals are decided on the merits, which can often result in a full rehearing of Ofcom's decision rather than a review to determine whether they made a material error. This judgment is now under appeal at the Court of Appeal of England and Wales. According to the CAT, an appeal on the merits is not a *de novo* re-run of the whole case, but Ofcom's decision is reviewed through the prism of the specific errors that are alleged by the appellant. What is intended is an appeal on specific points.
Another interesting case to follow, because now under appeal before the Court of Appeal of England and Wales, is *Telefónica O2 UK v Ofcom (900 MHz Band)* [2010] CAT 25. It concerns whether a mobile network operator has a directly effective EU law right under the GSM Directive, as amended to require Member States to make the 900 and 1800 MHz bands available for UMTS, or 3G, systems as well as for the GSM, or 2G, systems.

SWEDEN

Ms Annika Sandström, *Senior Judge, Administrative Court, Stockholm*

Ms Sandström opened her speech by referring back to the 2005 edition of the present seminar, when a Commission representative raised some questions on the Swedish system and the many cases pending before its courts. Following that meeting, Sweden proceeded to a revision of its system, which then came into force in 2008, where the possibility to have an action before the Supreme Court was excluded. Also limitation periods have been set for the execution of judgments. She also gave some statistics, showing that in 2005 there were 55 pending cases at first instance, whereas now there are 16. However, further appeals are expected soon, in particular on termination rates, remedies on SMP, on the identification of SMP, and testing equipment. New cases on SMP will feature criticism on the LRIC system of calculation.
Ms Sandström also highlighted the fact that Article 4 of the Framework Directive (right to make an appeal) has been interpreted by the ECJ in a rather generous way, thus opening the gates to numerous potential applicants.

During the discussion, some issues were raised on how to assure the speeding up of proceedings without denying justice, as in the Swedish example. On the more technical issues, it would of course be advisable to have the support of economists within a Court, however, it was pointed out that if economic analysis is duly carried out at the stage of the NRA or the NCA's decision, it is much easier for the Court to deal with economic issues, so a suggestion would be to improve economic analysis at NRA level.

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On behalf of the organisers, Mr. Messina delivered the concluding remarks of the seminar, highlighting the most important issues raised during the day. In particular, he illustrated the challenges ahead for the European Commission in

the implementation of a Digital Agenda for Europe, where more measures are expected, alongside those already adopted in 2010. He also expressed the wish that BEREC would soon be fully operational and ready for the tasks it has been assigned. On the role of national judiciaries, he fully agreed with the point made at the end of Ms Rose’s presentation, in particular the idea to promote other mechanisms of cooperation between national judges, apart from those already existing such as the already successful annual seminar. These cooperation mechanisms, however, need to be more successful than the ones promoted in other similar fields, such as European competition law.

Mr Grussmann, on behalf of the Commission, thanked the speakers, the organisers and all participants for their contributions to this year's seminar for national judges, which left substantive scope for follow-up by another such event in 2011.