

PROCEEDINGS
SEMINAR FOR NATIONAL JUDGES
“ARTICLE 7 OF FRAMEWORK DIRECTIVE 2002/21/EC
ON ELECTRONIC COMMUNICATIONS”

Brussels, 30 November 2005

On 30 November 2005, the European Institute of Public Administration (EIPA) in association with the European Commission, Information Society and Media Directorate organised a seminar for national judges intended to inform about the goals at EU level of the so called “Article 7 consultation mechanism” as laid down in the Framework Directive 2002/21/EC (hereinafter the “regulatory framework”) and the legal and economic challenges this mechanism may entail in particular at national but also at European level.

The seminar attracted 28 judges from 17 different Member States, as well as representatives from multiple national regulatory authorities (hereinafter “NRAs”) and was attended by several Commission officials.

Keynotes as regards the objective of the regulatory framework were presented by Mr Bernd Langeheine, Director for Electronic Communications Policy, Information Society and Media Directorate General, and Mr Frank Benyon, Director, Principal Legal Advisor, Business Law Team, Legal Service of the European Commission.

THE PRINCIPLES & PROCEDURES

THE OBJECTIVE OF THE EU REGULATORY FRAMEWORK FOR
ELECTRONIC COMMUNICATIONS – REGULATORY AND COMPETITION
PERSPECTIVES

Mr Bernd Langeheine

Director for Electronic Communications Policy, Information Society and Media Directorate-General

Mr Langeheine started by thanking all participants for their presence and the organisers for having arranged this much called for and challenging seminar. He then gave a comprehensive overview of the Regulatory Framework for Electronic Communications.

He briefly outlined the main components of the EU regulatory package, being the Framework Directive, the Authorisation Directive, the Access and Interconnection Directive, the Universal Service Directive, the Data Protection Directive, the Liberalisation Directive, the Spectrum Decision, and the Guidelines on significant market power and the Recommendation on relevant markets.

He then described the objectives of the Regulatory Framework which are to promote competition, including the encouragement of efficient investment and innovation, to contribute to the development of the Internal Market and to promote the interests of citizens. The main features of the framework are the legal certainty it provides to market players as ex-ante regulation is applied only in markets that are not sufficiently competitive. Also, its technology neutral approach to regulation and its alignment of the significant market power concept with concept of dominance in competition law, the framework is both flexible and “future proof”.

Multiple actors have been and are still involved in getting the EU electronic communications sector off the ground through appropriate and focussed regulation. At the European level, the main actors are the European Parliament, the Council and the Commission. Furthermore, there is the advisory Communications Committee (COCOM) established by the Framework Directive and composed of Member States’ representatives which is chaired by the Commission and the European Regulators’ Group (ERG) of which it ensures the secretariat and which has been created with the goal of encouraging cooperation and coordination between national regulatory authorities (NRAs) and the Commission. Last but not least there is the European Court of Justice (ECJ). At national level, instead, the main actors are the legislators, Ministries, regulatory and competition authorities and the Courts.

Subsequently, Mr Langeheine outlined the legislative, administrative and judicial issues that play a crucial role in the development of an internal market for electronic communications. When EU directives and decisions are transposed into national law by the Member States, the Commission monitors the accuracy of transposition and application. At the time of this seminar, one Member State has not yet transposed the e-communication directives, four Member States have been brought before the ECJ for non-communication of transposition measures, 21 Member States have been subject to infringement proceedings for incorrect transposition and/or application. In total 100 proceedings have been launched so far. As to regulatory measures proposed by the NRAs, these are subject to oversight by both the other NRAs and the Commission, where the latter has the power to in some cases veto the proposed measures in line with the provisions set out in Article 7 of the Framework Directive. In order to facilitate a consistent regulatory practice throughout the EU, the Commission has, with the involvement of the COCOM and the ERG, issued recommendations, guidelines and communications, whereas the ERG has adopted opinions and common positions. Finally, also the national courts and the ECJ may be called upon to conduct judicial reviews. Judicial review at EU level is carried out by means of infringement proceedings (Art. 226-227 CE) where the Commission and Member States are the involved parties, direct actions (Art 230 EC) where Member States and market players are the involved parties, and preliminary rulings (Art 234 EC) where national courts are the involved parties. As to the latter, the question arises to what extent NRAs may be considered to be an involved party.

Mr Langeheine concluded his keynote speech by underlining the need for a coherent approach to regulation, also with regard to judicial review, the need for close cooperation between the Commission and the NRAs, the importance to keep national judges informed, and the decisive role the European Court of Justice will play.

Mr Frank Benyon

Director, Principal Legal Advisor, Business Law Team, Legal Service of the European Commission

Mr Benyon started by giving a brief overview of how the Commission's Legal Service works. Its main function is to be the advocate of the Commission, mainly in Luxembourg but also in Geneva. The Commission is party to all litigation in Luxembourg: as an applicant against Member States or as a defender against companies, or systematically intervening in preliminary rulings. It gives legal advice on everything which the Commission decides, including legislative proposals, treaties with third countries or international organisations. The Legal Service's involvement with DG INFSO includes drafting legislation and assisting its passage in Council and European Parliament.

Mr Benyon's keynote then continues by placing the objective of the Regulatory Framework for electronic communications in context. The main developments in the telecommunication sector during the last years were presented thereafter. In 1988 the Commission adopted what was to become a model form of directive: the Terminal Equipment Directive, which abolished "special and exclusive rights" and required Member States to remove the monopoly rights. It furthermore broke new ground as the first liberalisation directive to be adopted under Article 90(3) of the Treaty (now 86(3)).

Two years later the European Commission adopted a further liberalisation directive, the Service Directive, which required Member States to withdraw special and exclusive rights for the supply of telecommunications services other than voice telephony. Voice telephony was not included because the Commission believed that introducing full competition in this area could have jeopardized the national operator's ability to comply with universal service obligations. In 1998, all remaining special and exclusive rights for telecommunications markets were withdrawn. Consequently, economic operators were free (subject to limited restrictions) to engage in providing voice telephony.

This first harmonisation package was based on the internal market provision of the Treaty, now Article 95, and was designed to complement the withdrawal of special and exclusive rights by actively ensuring interconnection by Open Network Provision, while also harmonising the "services of general economic interest" justification with common rules on Universal Service.

The second package, subject of discussion today, aligned the sector specific measures which allowed NRAs to impose regulatory obligations on undertakings with only 25% market share and focused on market areas, onto general competition law principles concerning relevant market and single or joint dominance.

Mr Benyon continued by referring to three judgements of direct relevance to the judges and NRAs, namely

1. Albacom (C-292/01 and C-293/01) 18 September 2003,
2. Bundesrepublik Deutschland v. Isis (C-327/03 and 328/03) of 20 October 2005,
3. O2 and Mobistar (C-544/03 and 545/03) of 8 September 2005;

and concluded by saying that the telecommunications sector appears to have become, after more than 15 years subject to the normal application of all Treaty rules.

REGULATION VS COMPETITION LAW

Mr Angel Tradacete

Director for Information Communication and Media, Competition Directorate General

Mr Tradacete explained that the underlying aims of both liberalisation policy and competition law coincide. They both aim at keeping the markets open and competitive in order to increase the welfare of citizens and to ensure efficient allocation of resources. They also aim at integrating national insulated markets into a common single market. He, therefore, stressed that that competition law complements liberalisation policy.

Liberalisation, which lifts trade barriers creating obstacles to trade between member states, can be achieved by two means:

1. sector specific legislation, and
2. competition law

In the Telecom sector, the tensions created by parallel application of sector specific regulation and competition law is solved in a novel way; competition law principals and methodologies are embedded into the regulatory framework.

The regulatory framework contains clear provisions for the co-operation between the national regulators and the Commission and the national regulators themselves. It also contains a proposal for co-operation between them and the national competition authorities.

Mr Tradacete finally argued that an informal co-operation with national judges needs to be developed in order to remove obstacles such as delaying tactics used by undertakings in appealing measures by regulators.

Ms Anna Emanuelson

Case Manager, Unit for Telecommunications and Post, Information Society Coordination, Competition Directorate-General

Ms Emanuelson started by saying that the electronic communications sector has moved from a mainly administrative approach to a regulatory perspective entirely based on and compatible with competition law analysis.

She then defined regulatory instruments as ex ante instruments and competition law as ex post and explained with some examples the differences that this entails as to the assessment of a particular case. However, she stressed the fact that competition law does

to some extent also have an ex ante component in the way that also competition law tries to deter from anticompetitive behaviour in the future by imposing, for example, heavy fines on undertakings or behavioural remedies.

The Commission's guidelines on assessing market power refer to the fact that a NRA will define national markets using the same methodologies as under competition law (demand and supply side substitutability), and although in most cases the markets defined for ex post and ex ante purposes will be the same, in certain cases they might differ, even if the assessment is based on the same principles. This is because under ex ante regulations the NRAs shall define the market on the basis of a so-called forward looking approach. They cannot, thus, only look at the past evidence but they have to make certain assumptions with regard to future developments.

The same conclusion can be drawn in relation to the answer to the question whether there is significant market power (hereinafter "SMP") or in other words dominance. Once again, the NRAs will have to make assumptions - which do not have to be made by competition authorities (except in merger cases) - that may lead to differences in outcome.

Furthermore, while it is enough for a NRA to find SMP in order to impose remedies, a National Competition Authority (hereinafter "NCA") must also find evidence of past abuse of dominant positions (e.g. as regards the possibility of imposing access to networks as an obligation to undertakings, the NCA would seek for proof of past abusive behaviour, such as refusal to supply, whereas the NRA would only need to find the SMP).

It is important to underline that regulation does not exclude the application of competition law. One would have to assess on a case-by-case basis whether the undertaking that is regulated still has a sufficient margin of discretion making it possible for that undertaking to cease the infringement of competition rules.

Ms Emanuelson also mentioned procedural differences. While national courts may now see applications of competition rules in a large number of different cases, they only act as appeals court when it comes to decisions from NRAs.

More importantly, while there is a clear framework for co-operation between the Commission and national courts in the area of competition policy, following the decentralisation of the competition rules and the adoption of the Regulation 1/2003, such a context does not exist when it comes to the regulatory framework. Ms Emanuelson raised the question whether the judges would find it advantageous to have a similar type of co-operation framework as regards the Article 7 cases (e.g. the issue of amicus curiae and a common website for national judgments). In addition, Commission's binding veto decisions would normally not come before national courts. These could be appealed to the European Court of Justice (hereinafter the "ECJ"). As to comments letters, the NRAs are obliged to take utmost account of them, while the national courts in view of Article 10 of the Treaty must try to take into account the European context in order to achieve a coherent approach in the application of the regulatory framework.

Ms Paraskevi Michou

Head of Unit for Procedures related to national regulatory measures, Information Society and Media Directorate-General

Ms Michou begun her presentation with an update on the notifications so far received from the National Regulatory Authorities (NRAs). She then proceeded by explaining some aspects of the Commission's task and policy with regard to the Article 7 procedure.

The Commission has to reply to all notifications of draft regulatory measures by the NRAs. If the Commission considers that the draft measures would create a barrier to the single market or if it has doubts as to its compatibility with Community law, the Commission must respond by a "serious doubts" letter which initiates a second-phase investigation. At the end of this second phase investigation,

- the Commission may issue a veto, if it is not convinced that there is enough evidence that the measure does not create a barrier to the single market or is not in line with Community law, in which case the NRA must withdraw the measure, or
- the Commission may withdraw its "serious doubts" if, in the meantime, it has come to the conclusion that the measure is not incompatible with Community law
- the NRA may withdraw its notification on its own initiative at all times during both the first and the second phase

Ms. Michou stressed that the Article 7 consultation mechanism gives the Commission a unique oversight on the state of play in the national electronic communications markets throughout the EU and on the regulatory measures proposed throughout the EU to tackle persistent market failures.

The aim of the Article 7 procedure being the consolidation of the internal market for electronic communications, the means to achieve this are:

- being consistent when taking decisions,
- applying regulations in a focused way, and
- improving transparency.

Finally, she made some remarks with respect to important aspects of the Article 7 procedure:

- Market definition: the starting point for the NRAs to define their national markets is the Recommendation of relevant markets. Although 18 markets susceptible to ex ante regulation are identified in this Recommendation, the actual number of markets notified by NRAs may be higher, because national geographic or competition circumstances require the definition of different markets.
- Assessing significant market power (SMP): The Commission will verify whether the NRAs assessment is in line with EC Community law principles in general and with the SMP guidelines in particular. In this context, not only market shares are

a very important indicator for SMP, but also factors like market dynamics and barriers to entry.

- Remedies: the Commission does not have veto-power regarding remedies, but it has issued several comments which contain guidelines on the appropriateness of remedies and the type of remedies which have to be applied to the market at hand.

Ms Michou concluded by informing the parties that the experience of Article 7 will give an input to the upcoming review of the Recommendation of relevant markets.

NATIONAL REGULATORY EXPERIENCES AND JUDICIAL PRACTICES

PRESENTATION BY NRAs NATIONAL MEASURES CHALLENGED BEFORE NATIONAL COURT

Ms Sara Anderson

Expert, Office of the Director-General, National Post and Telecom Agency, PTS, Stockholm (SW)

The telecommunication market in Sweden is liberalised since 1993. According to Ms Anderson, this liberalisation had an impact on the intensity of regulation. Sweden witnessed an initial rise in regulations caused by the need to protect the consumer from abuses.

With respect to the experiences from the new decision-making model in Sweden, Ms Anderson reported that Sweden finalised the list of the markets except for two (plus remedies in the broadcasting market) and that regarding the focus on bottlenecks and competition problems related to dominance, three trends can be seen:

- The old regulatory regime on remedies for interconnection and other primary network functions such as local loop unbundling (LLUB), existed before the start of analyses, has been converted to the new regime, given that there is still need for regulation in this field.;
- The new toolbox given to the regulatory authority allows Sweden to undertake reforms to increase consumer benefits and services higher up in the value chain, which was not possible under the old framework;
- Abolishment of previously existing regulations on retail level. Shift from focus in the regulation on consumer protection tariffs on the retail level to more focus on whole sale level.

The need for speedy implementation has been catered. Sweden is among the 5 most rapid member states in Europe to carry out market reviews. However, as to the effects of these market reviews, these have not been that successful. Operators challenge decisions in a very extensive way. In this context, Ms Anderson referred to the fact that Sweden has the

highest degree of appeals in Europe. 95 % of all cases were appealed in terms of dispute resolution. Reasons for this are:

1. Sweden had 12 years of experience under the regulatory framework and the operators are therefore very familiar with the regulatory system and the appeal mechanisms available;
2. There is a long-standing tradition in Sweden to get a second opinion at courts;
3. Sweden has a very open judicial system. Courts are able to revise and validate decisions both on the formal matter and on the subject matter;
4. Some operators use the appeal as a strategy to postpone the entry into force of their obligations. This happens even in cases where they do not have a very high chance to win;
5. There are no costs for proceedings other than the lawyers' costs.

Finally, the decision-making model seems to be very worrisome in relation to the revision of the market needs. Such a revision has to take place every 2 or 3 years. Meanwhile there are court proceedings at the same time as the second generation of regulations is adopted. Accordingly, there is the risk the Swedish authorities will start issuing new remedies before the final court instance has had its final saying. This creates legal uncertainty and in some cases a legal vacuum for operators.

Finally, the Swedish government has appointed an investigatory committee to examine whether the regulatory framework is efficient and able to deliver in accordance with market needs.

The committee has a mandate to propose possible suggestions for changes of the procedural legislation. It has to look at the system and strike a balance between the right of parties to have a court trial and the need for a predictable and transparent regulatory environment for market players.

Mr Paul Edgar Micallef

Chief Legal Adviser, Malta Communications Authority, MCA (MT)

After a short report on the state of the market review in Malta, Mr Micallef gave an overview of the Maltese protagonists dealing with dispute issues that may arise:

- MCA = is the sectoral regulator
- Office of Fair Competition
- Courts
- Communications Appeals Board
- Commission for Fair Trading = quasi-judicial forum which decides issues under general competition law.

He then presented in a detailed fashion the composition of some of these authorities and their procedures.

Problems which may arise in practice:

- Contestation of competition related decisions: There is an overlap between roles of the Maltese national competition office on the one side and the MCA on the other. In

order to counter this difficulty, a memorandum of understanding has been drafted between these organisations. The memorandum is a useful tool in establishing how these two authorities deal with competition issues involving telecommunications; however this memorandum does not entirely solve all jurisdictional issues that may arise.

- As a general rule, the MCA is responsible for ex ante regulation and the Maltese national competition office for ex post regulation arising under the competition law. In practice, however, it is not entirely clear to the operators to which authority they should refer their dispute. The Government should, therefore, revise the relevant legislation establishing clearly the remit of each authority in relation to competition related disputes concerning telecommunications.
- Different aspects of competition issues relating to the same case may be decided by two different judicial or quasi-judicial forae. This may lead to some difficulties. To date there has been a decision taken by the Commission for Fair Trading - which is the Maltese competition tribunal - which held that the Maltese Office of Fair Competition and the MCA have concurrent jurisdiction in such cases. In absence of hard and fast rules under the applicable competition legislation each case must be considered in relation to the issues involved in order to determine which authority should be investigating a particular dispute.

Furthermore, Malta has to deal with a problem of manpower. Most persons having expertise in the subject matter either work for the operators or for the MCA. Appellate bodies therefore do not have ready access to experts.

Finally, Mr Micallef suggested, that the overlap of roles between the judicial and quasi-judicial bodies should be solved by the creation of a judicial forum which can decide on all competition issues, having exclusive jurisdiction to deal with competition cases in the sector of electronic communications.

Discussion followed and interventions were made by the audience mainly as regards the expertise of the judges in different member states to deal with cases in the electronic communications sector and the structure of the appeal bodies. In Ireland for example, the appeals panel is not a permanent body but is appointed as each appeal comes to the Minister. Therefore, operators concerned cannot apply for interim relief. In addition, because of this structure, the time between the lodging of an appeal and its first hearing before the panel is in most cases very long (e.g. 174 days in one case mentioned). That said, in fast moving markets decisions of the regulators are not being enforced and are not being challenged in a sufficiently swift period of time.

<i>NATIONAL COURT(S) DEALING WITH APPEALS</i>
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Mr. Hans Peter Lehofer
Member of the Administrative Court, Vienna (AU)

Mr. Lehofer commenced by saying that judges have to judge whether Community law is correctly applied to the factual situation. In special circumstances of the telecommunications and electronic communications market one has to take a close look, not only at the Community competition case-law and legislation but also check whether

the obligations of the NRAs under the regulatory framework are correctly followed, including the guidelines.

He then mentioned the Connect Austria case under the old regulatory framework in which the ECJ held that Member States have the responsibility to ensure that rights of the undertakings concerned are effectively protected. In Austria the right of appeal that was limited to certain infringements, such as an infringement of a constitutionally guaranteed right, was not held as a suitable mechanism to ensure that rights are effectively protected, due to its limited nature.

Through a detailed description of three cases, Mr. Lehofer explained the way the Austrian administrative court applies the regulatory framework.

The cases concerned:

- call termination in individual fixed networks,
- voice call termination in individual mobile networks, and
- publicly available telephone services at a fixed location.

From this description the following points emerged:

- An NRA may take decisions of other NRAs into account if it provides a reason for this, as well as comments of other NRAs in Article 7 procedures.
- The ERG's remedies paper, dealing with the question of which remedies should be applied in different circumstances is very helpful but is not a substitute for legal reasoning by a court.
- National courts need to take the utmost account of Commission decisions.
- An NRA shall take into account the regulatory environment, i.e. - in call termination in fixed networks of alternative operators - whether or not the incumbent operator will still have SMP and interconnection obligations in the next 2-3 years. Such obligations would limit its buying power as he could not be in a position to charge excessive prices for interconnection ("modified greenfield approach").
- A no-comment letter of the Commission is not a decision, and the national court, therefore, has to weigh the arguments and come to a conclusion by itself.

Mr. Lehofer also mentioned that the national court has recently forwarded a preliminary question to the ECJ. The case concerned a competitor of a SMP operator who applied to participate in a market analysis procedure. The NRA denied the operator legal standing. In Austrian administrative procedures there can be no right of appeal without being a party to the procedure in question.

Since the decision of the administrative court depends on the interpretation of Articles 4 and 16 of the Framework Directive, the following questions were put forward to the ECJ which is still to rule (Case C-426/05) :

- Are Articles 4 and 16 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) ('Directive 2002/21/EC') to be interpreted as meaning that the term 'parties

affected' includes undertakings operating as competitors on the relevant market in respect of which specific obligations are not imposed, maintained or amended?

- In the event that the first question is answered in the affirmative, does Article 4 of Directive 2002/21/EC preclude a national provision which provides that only the undertaking in respect of which specific obligations are imposed, amended or withdrawn has the status of a party to market analysis proceedings?

Finally, Mr Lehofer argued that Article 7 of the Framework Directive is not intended to make the Commission to be an international regulatory authority. The task of the Commission is to provide legal comments but not to decide the case. This is a task given to the NRAs, subject to appeal as foreseen in Article 4 of the framework directive. The Commission's comments indicate the relevant questions of community law and need to be taken into account by the national courts when cases come before them.

He concluded by saying that the harmonised application is the guiding principle of the regulatory framework and the national courts must contribute to that aim.

Mr. Adam Scott

Member of the Competition Appeal Tribunal, London (UK)

Mr Scott first dealt with some particularities of the British judiciary system, and gave a list of relevant authorities and bodies (Ofcom, OFT, CC and CAT).

With regard to the Competition Appeal Tribunal (CAT) he mentioned that the CAT deals both with public law and private law.

The relevant legislation on communications in the UK is the Competition Act, the Enterprise Act and the Communications Act which implements the regulatory framework.

He then explained the proceedings and mentioned, among other things, that appeals can be brought under competition law. If someone feels that the NCA should have taken action and it hasn't then he does not need to appeal under regulatory law but he can appeal under competition law.

Mr. Scott went on to mention some of the cases which were brought to the Tribunal under the new regulatory framework. In this context he also stressed that most decisions in UK taken by the Ofcom, are not appealed.

He also stated that a national appeal court is not bound by what the Commission has said on a particular case. The national appeal court will read the comments but it is not bound by them. In this context he referred to a debate on the question of the relationship of national appeal courts to other decisions taken by the Commission and the recommendations and guidelines of the Commission. He referred to a leading judge who made it clear that it is not going to be very good for European legal certainty if national courts regard themselves as able to contradict things that the Commission says. That will lead to a great deal of confusion.

Mr. Scott, however, wondered how a national court can pay attention to decisions of which they may not be aware, whether taken by the Commission or NRAs or courts in other countries.

Finally, Mr Scott discussed the Hutchison case. The CAT was not convinced by Hutchison's arguments for there being a particularly high burden of proof on the NRA in the wake of Tetra Laval. The CAT did not find make a substantive decision on SMP but did require the NRA to re-examine the actual factual situation regarding countervailing buyer power and to do so in the light of evidence that had become available since their original decision.

VIEWS FROM THE EUROPEAN COURT OF JUSTICE¹

Ms Bettina Kotschy

Referendaire, Chambers of Judge Peter Jann, ECJ

In her introduction, Ms Kotschy stressed that the role of the ECJ is that of any supreme court, namely to ensure the correct application of the law.

In the specific context of the electronic communication services sector, this essentially means to examine whether (i) national regulatory or (ii) specific Commission decisions are in conformity with the Regulatory Framework for electronic communications (RF) or higher provisions of Community law, such as, for instance, article 49 EC or the general principles.

Ms Kotschy first addressed the ***procedural aspects of ECJ scrutiny***. She recalled that the ECJ has a monopoly for the binding interpretation of EC law and she mentioned the different forms of actions which may lead to ECJ scrutiny (i.e. essentially preliminary rulings and direct actions).

With regard to the RF, Ms Kotschy pointed out that Article 7(4) Framework Directive provides for a special notification procedure with a (positive or negative) Commission decision and that this could lead to a variety of interesting constellations of ECJ scrutiny concerning the legality of this Commission decision. For example, in the *Telekom Austria case*, the Commission had issued a veto decision in which it argued that the conclusion of the Austrian NRA (TKK) declaring the Austrian market for 'transit services in the fixed public telephone network' to be effectively competitive (i.e. deciding implicitly that Telekom Austria did not have significant market power) was not based on convincing evidence. The TKK asked the ECJ for a preliminary ruling on the validity of this Commission decision, but the ECJ decided that the TKK was not a court or tribunal because it was not dealing with litigations pending before it, and could not, therefore, file preliminary rulings.

With regard to the implications of this case for the future and the question in which other ways this case could be brought before the ECJ, Ms Kotschy came to the following conclusions:

¹ *The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Court of Justice.*

1. The national appeal body could ask a new preliminary question in the context of proceedings brought by Telekom Austria against the implementation of the Commission veto decision, namely the withdrawal by the TKK of its draft decision.

However, there might be one problem to this if national procedural law should only allow for action against acts producing legal effects: Can the withdrawal of a draft decision be seen as producing legal effects? This question being left to national procedural autonomy, Ms Kotschy pointed however out that eventually the TKK would in any case have to take a legally binding decision because market review is obligatory. Thus, the TKK would either declare the market to be effectively competitive (this time with better evidence), or designate Telekom Austria as a SMP operator (and impose remedies). In this second case Telekom Austria could appeal to the appeal body, which could then ask a preliminary question.

2. Somebody could bring a direct action for annulment against the Commission veto decision before the European courts. Such an action would, however, face the following two main problems:

- Is the Commission veto decision a challengeable act producing legal effects within the meaning of Article 230 EC? Or is it only a provisional act, considering that any TKK decision designating Telekom Austria as a SMP operator and imposing remedies would again have to be notified to the Commission?
- Who has *locus standi*? Could the TKK as the addressee of the veto decision bring an action for annulment? Could Telekom Austria do so? In the latter case, the main problem would probably be to assess the direct concern. Does the Commission veto decision affect the legal situation of Telekom Austria and leave no discretion to the TKK who is entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules?

In this context, Ms Kotschy also mentioned the case-law on estoppel which could theoretically prevent Telekom Austria to invoke the invalidity of the Commission decision before the national appeal body if it could clearly have filed an action for annulment before the European courts. Thus, according to her, the safest solution for an operator like Telekom Austria would be to go both ways – file a direct action and lobby for a preliminary question by the national appeal body.

With regard to the *substantive aspects of ECJ scrutiny*, Ms Kotschy explained that, so far, there is not yet any interesting case-law on the New Regulatory Framework. However, although several issues may impact the precedent value of judgments concerning the old regulatory framework, she held that such judgments might nevertheless be helpful for the interpretation of the present Regulatory Framework. Moreover, Ms Kotschy stressed the importance of case-law from other areas of Community law (inter alia for the interpretation of the Regulatory Framework). Thus, she mentioned namely the case-law on the Community legal order, the case-law on fundamental rights and the case-law on competition law.

Concerning the case-law on the Community legal order, she mentioned the principle that general rules of EC law are applicable as long as there are no special rules which apply. Thus, if a question is not harmonised by the Regulatory Framework, the general rules will, in principle, apply. She also noted the obligations of the Member States which determine the correct transposition of directives into their national law.

Concerning the case-law on fundamental rights, Ms Kotschy referred to the fundamental rights which have to be respected in the context of penalties, data retention and rights of way.

Concerning the case-law on competition, Ms Kotschy mentioned, for instance, the concepts of effective competition, collective dominance and interdependent markets and the essential facilities doctrine which apply to remedies, open network provision and interconnection.

Finally, Ms Kotschy gave an *outlook on new cases* to come:

- *Mobistar*: concerning the costs for interconnection related to the provision of number portability.
- *Centro 7*: Centro 7 got authority for broadcasting services but it did not get a frequency. It now claims that also has a right to get a frequency.
- *T-mobile* and *Hutchinson*: Concerns the VAT-directive. The parties argue that they have a right to deduce VAT from the price they paid for the frequencies regarding UMTS, GSM and 3G.

PLENARY SESSION – PARTICIPANTS VIEWS

Chairman

Prof. Nico Van Eijk, Professor by special appointment of Media and Telecommunications Law, Institute for Information Law, University of Amsterdam (NL)

Panel

Mr Robert Kolthek, Senior Legal Officer, Onafhankelijke Post en Telecommunicatie Autoriteit, OPTA, Den Haag (NL)

Mr Michael Scotter, Member of the Legal Service of the European Commission, Brussels (B)

Mr Hans Peter Lehofer, Mr Adam Scott

During the plenary the issues of expertise, exchange of information, confidentiality, and the time-frame for handling cases were discussed.

Expertise

The participants recognised that there is not always sufficient expertise within the courts. According to Mr. Lehofer, however, a judge must have experience to handle cases. A judge does not need to be an expert on all issues. Mr Lehofer argued that there are two aspects in this context. On the one hand, it is the task of NRAs or lower administrative appeal bodies to present the case in such a way that it can be understood by a judge. The NRA must put forward a decision that can stand on its own and that can be taken into review. On the other hand, judges are used to deal with very special matters.

Ms Bettina Kotschy stressed that the lack of expertise was not only a problem of national courts but also of the ECJ. She, therefore, urged the participants to keep preliminary questions simple. Especially, since questions had to be translated into French and during this process little nuances would get lost.

Finally, the Irish participant mentioned that the question of expertise very often leads judges not to go to the heart of the matter. In his view, the Irish solution of having an appeal panel where experts can have a look at the case would also allow for a review of the merits of the case.

In the view of some participants, however, this solution would not be in conformity with the European Convention on Human Rights.

Time-frame

In some member states, the problem of time has been solved by unwritten commitments which the members of the courts undertake at the beginning of their term. In France, for example, the Court of Appeal and the Supreme Court have committed itself, although only by an informal commitment, to give a decision within six months. In Luxembourg the same amount of time is necessary to deal with administrative matters.

Exchange of information and Consistency

It was recognised that the exchange of information would be very helpful in achieving the aim of consistency in the application of the regulatory framework.

Mr Michael Shotter stressed that the heads of the NRAs have been suggested to inform the Commission of all relevant judgments in the national context because the Commission simply does not have the resources to monitor what is the situation in all the different courts of the member states.

It was also suggested that there should be more co-operation between judges, academics, the legal profession and the Commission and that lawyers should be prepared to write articles about the state of the art elsewhere.

Many references were made to the co-operation efforts within competition law matters. Here the Association of European Competition law judges exists which has regular meetings.

Confidentiality

Most participants felt that the confidentiality should not be over-valued. It was argued that there seems to be a tendency on the part of the market players to claim that almost anything is confidential, although most data for which confidentiality is claimed are not really confidential.

In this context the Mobistar-case was mentioned. One of the issues raised by the Belgian Courts was the question as to the degree of information which needs to be disclosed to the court. Accordingly, some guidance on this point may soon be given by the ECJ.