

Summary of Hybrid Seminar 'Competition Law and Sector Regulation in the Telecom and Pharmaceutical Sectors'

Organised by Bird & Bird and



On 22 March 2023, Bird & Bird and the Centre for a Digital Society of the European University Institute (EUI) jointly organised a hybrid seminar on 'Competition Law and Sector Regulation in the Telecom and Pharmaceutical Sectors'. The seminar brought together academics, practitioners, members of the judiciary, government officials, representatives from the EU institutions and industry representatives.

The key-note speech was delivered by **Paul Csiszár**, Director of DG Competition, European Commission.

Recordings of the sessions and slides are available on the [event webpage](#).

Opening

In his opening speech, Partner **Hein Hobbelen** welcomed the audience on behalf of the Brussels Competition, Trade and Regulatory & Public Affairs practice of Bird & Bird and the wider firm and gave a brief introduction on the interplay between competition law and regulation in EU law.

Marco Botta, Scientific Coordinator of the [Centre for a Digital Society](#) (CDS), also welcomed the seminar participants. The CDS is a recently established programme based at the [Robert Schuman Centre for Advanced Studies](#) (RSCAS) of the [European University Institute](#) (EUI). The CDS's mission is to engage in the on-going public debate on the effects of the digitalisation process on markets and democracy, adopting an interdisciplinary and non-doctrinal approach. The Centre focuses on the following four 'core areas': innovation, competition policy, regulation of digital markets as well as the impact of digitalisation on democracy. The CDS carries out three types of activities: policy-applied research, organization of policy dialogues as well as executive training education. The Centre has established strong partnerships with international organizations, such as OECD and UNCTAD, and academic research centers. The Centre is supported both by public funding and by several market donors.

Marco Botta also presented the recently published book on [The Interaction of Competition Law and Sector Regulation. Emerging Trends at the National and EU Level](#). The volume, edited by Pier Luigi Parcu, Giorgio Monti, and Marco Botta, was published in December 2022 by Edward Elgar Publishing. The book discusses the interaction of sector-specific regulation and competition policy; it identifies emerging trends and reflects on the nature of network regulation in the energy and telecom industries. Expert contributors examine the recent European Electronic Communications Code (EECC), as well the relevant regulatory framework in the electricity and pharmaceutical sectors. Chapters consider key topics, such as the recent antitrust investigations concerning the excessive price of off-patent drugs and the impact of digitalisation on the future of network industries.

Panel I: Net neutrality and fair sharing in the telecom sector

Anna Renata Pisarkiewicz (EUI Centre for a Digital Society, Research Fellow) introduced the topic of net neutrality and fair sharing in the telecom sector by explaining how the current debate fits into the EU's wider political commitment to ensure excellent connectivity for everyone, proportionate contribution to the costs of infrastructure while securing that Internet remains open. This political commitment together with the EU's digital targets that are set in the Digital Decade Policy Programme 2030 raise the question of whether there is a problem of sub-optimal investment in infrastructure that might prevent the EU from reaching its objectives. To date experts and academics have identified multiple potential causes, which include the fragmentation of the EU telecom market, intense competition and decreasing revenues, regulatory framework and competition assessment that might disproportionately focus on static welfare effects without paying due attention to dynamic effects, questionable value of net neutrality rules as well as uncertain business case for VHCN and 5G. Altogether these factors emphasize the urgency to understand the overall performance of the telecom sector, and whether its ability to attract private investment can be improved.

Martin Cave (Imperial College London, Professor) observed that both fixed fibre investment and fibre competition have grown in the EU in the last 10 years, and 5G is increasingly available. The EU has set challenging connectivity targets of universal gigabit availability and full coverage by 5G of populated areas by 2030. Connecting the last homes will require high levels of investment. Over the same period, traffic carried by Internet Service Providers (ISPs) has become dominated by large Content and Application Providers (CAPs), which have grown exponentially in penetration and profits. It is natural to ask if they should contribute to ISP investment costs in some fashion, but discussion of this question requires a more precise elucidation of the goals of the relevant public policy and more certain means of attaining them. While it is quite possible that a relaxation of EU Net Neutrality Regulation would enhance networks' investment capability, the wider social implications of such an action should be considered.

Gera van Duijvenvoorde (Leiden University, Professor; KPN, Competition Counsel) expressed scepticism that the connectivity goals are realistic. She also argued that few attempts are made to understand what 'fair' means in the context of the 'fair share' debate. The fair share could be dealt with within the European Electronic Communications Code (EECC), as National Regulatory Authorities (NRAs) are required to investigate access arrangements and investments in the whole sector. At the same time, the internet ecosystem is larger than telecommunication companies alone, which limits the EECC's effectiveness as it can arguably not create incentives for other parties on how to use and transmit data. Professor van Duijvenvoorde advocated for a holistic approach in which the need for adequate broadband access should be at the forefront. Specifically on the question of redistribution, Prof. van Duijvenvoorde argued that although the EECC could regulate certain parts of the negotiations between CAPs and ICPs, the European Commission would be better suited to do so via soft-law guidance or maybe even via the Digital Markets Act (DMA). Prof. van Duijvenvoorde posited that net neutrality is here to stay for now and is a principle with merit. One should, however, continue to evaluate whether an open Internet is needed and wanted by the public.

Peter Alexiadis (King's College London, Professor) kicked off by stating that the current discussions, already a while after the first fair-share debate more than a decade ago, are timely: the market has gone its way and it needs to be patched up now. The question, however, is how much gaps can be filled and if that can be done now. The pursuit of very high-capacity networks as a goal of the EECC was just as important as creating competition. This led to the situation where, for example, telecom regulators had no issues with co-investment, whereas competition regulators could not stomach the idea that co-investment was allowed under the Code, while clear objections would raise against it under competition law. The EECC has helped to raise investments from institutional investors, who value the fact that the EECC offers a long-term and stable framework which allows them to manage their investments long-term. Frequent changes to regulation are likely to impact investments negatively and may chase institutional investors away from the sector forever. Redistribution between CAPs and ISPs in the current framework could become difficult and would most likely require significant legislative intervention, which is complex due to the EU's process of acquiring approval among all Member States. Net neutrality also complicates and bars off many options. Prof. Alexiadis advocated for the redistribution to take the form of a fund, managed centrally and transparently by the Commission.

Panel II: Excessive pricing in the pharmaceutical sector

Marco Botta (EUI Centre for a Digital Society, Professor) introduced the topic of the second panel by discussing the peculiarities of pharmaceutical markets, in terms of lack of demand elasticity, high entry barriers

caused by costly R&D investments and long-term patent rights, as well as widespread State intervention via retail prices caps and reimbursement by the national health care funds. In view of these peculiarities, excessive pricing cases are more common in the pharmaceutical sector than in other industries. During the recent years, a few competition authorities in Europe have investigated cases of excessive prices of certain drugs: *Pfizer-Flynn* in UK, *Aspen* in EU and in Italy, and *Leadiant* in the Netherlands are good examples of this enforcement trend. In his intervention, Prof. Botta compared the common features of these cases and prepared the floor for the debate by the panellists.

Margherita Colangelo (Roma Tre University, Professor) posited that antitrust enforcement may play a role where regulatory failures or loopholes exist and innovation is not at stake. Cooperation between competition authorities and medicines agencies could be enhanced to identify which interventions are best suited to address problematic behaviour which is not effectively caught by regulation. Prof. Colangelo discussed a number of cases in which companies exhibited regulatory gaming behaviour, where undertakings strategically exploit sectoral rules for anticompetitive purposes. In *Aspen*, several factors have been considered in the antitrust assessment, including the specific conduct, economic reasons for the behaviour and the undertaking's overall strategy, which may suggest that, to some extent, intent can be considered a relevant, although not essential, element to frame such conducts. Prof. Colangelo acknowledged that commitment decisions allow swifter implementation by undertakings, quicker effects on markets and possibility to have more tailored remedies. Nonetheless, such decisions do prevent extensive assessment of the case at hand, limiting potential scrutiny by courts, which, for novel and complex cases, may be crucial to give guidance to the industry and competition authorities.

Ilan Akker (Dutch Authority for Consumers and Markets, ACM, Economist) stated that the relation between prices and innovation is key. Some argue that high prices of pharmaceuticals are acceptable because they are based on extensive R&D and other costs of innovation. This, however, is not always true, such as in cases of evergreening of patents. The threshold to establish anticompetitive behaviour in the pharmaceutical sector, is high. Recent cases have however shown that regulation and competition law enforcement can be complementary, in particular because of the different timing of the interventions (*ex-ante* and *ex-post*). In addition, whereas regulation uses a global approach, competition law enforcement is more targeted. Antitrust cases do in many cases point at regulatory weaknesses that should be addressed, such as the unfocused incentives in the orphan regime. Economic models used to substantiate findings in abuse cases, are tailored to the situation, as it is difficult to see beforehand which model would suit best in which situation.

Baptist Vleeshouwers (Bird & Bird, Senior Associate EU, Competition, Trade and Regulatory & Public Affairs) commented on the "unfairness" limb of the *United Brands* test. Some have argued that excessiveness 'in itself' could cause prices to be unfair. However, that would collapse the first and second limbs of the *United Brands* test and would essentially allow authorities to prosecute any prices it considers "just too damn high". A better interpretation is to look at the relation of the price to the "economic value" of the products, which is a legal rather than an economic test. The recent decisional practice in the pharmaceutical sector shows that the context and way in which prices were increased plays an important role, e.g., the fact that increases cannot be explained by any underlying improvement to the therapeutic value, the significant adverse impact on patients and the healthcare system, an improper use of regulatory procedures or the abuse of loopholes in the system. Mr Vleeshouwers argued that excessive pricing cases should be limited to such cases, as anything else would make competition authorities *ex post* price regulators, which is not their role.

Adam Scott (UK Competition Appeal Tribunal, Director of Studies), speaking in a personal capacity, stated that the *United Brands* test is old and was developed in a different context (i.e., market of bananas). A better application can be found in the first UK case on excessive pricing (i.e. *Napp* case), which was confirmed by AG Wahl in *Latvian Copyright*. It, nonetheless, remains very difficult to define qualitative terms such as "excessive", "fair" and "unfair", and in how these definitions should be used. When defining these terms, competition authorities and courts should take due regard to the dependence of patients on their medication, the complexity in every vein of the operations of pharmaceutical undertakings and the recoupment not only for the successfully marketed medicine, but also for many other unsuccessful attempts to cure disease innovatively. In case pharmaceutical undertakings do cross the line and act in breach of competition laws, commitments (such as those given by *Aspen* to DG Comp) can ensure continued supply and contain lasting solutions, though including risks for undertakings if they do not comply with these commitments. It will also be very interesting to see the exact dynamics between commitments and damage claims, especially in cases of non-compliance with the commitments.



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