

The European Electronic Communications Code – implementation in Polish law, Faculty of Management of the University of Warsaw, 24 June 2019

On 24 June 2019, a conference on ‘The European Electronic Communications Code – implementation in Polish law’ was held at the Faculty of Management of the University of Warsaw. The conference was organized by the Centre for Antimonopoly and Regulatory Studies (CARS) and the Center for Research of Legal and Economic Issues of Electronic Communications (CBKE). The conference consisted of two sessions and a panel discussion.

Professor Tadeusz Skoczny, the Director of CARS, and Professor Stanisław Piątek, the Deputy Director of CARS, opened the conference. Professor Skoczny welcomed the participants on behalf of the Dean of the Faculty of Management. Professor Piątek elaborated on the goal of the conference, which was to establish whether the implementation of the European Electronic Communications Code (hereinafter: EECC) requires an update of the existing Polish Telecommunications Law or rather the preparation of a completely new law.

The first session was moderated by Adam Jasser, Deputy Director of CARS.

Assistant Professor Ewa Galewska spoke about co-investment from a regulatory perspective. New infrastructure is needed in the EU to create a digital single market. The experience thus far in Europe has indicated that infrastructure develops best in Member States such as Spain, Portugal and France, which promote moving up the investment ladder, rather than in countries relying on highly regulated access obligations, such as Germany. There exist two models of co-investment. In the regulated model, the National Regulatory Authority (hereinafter: NRA) may influence the agreements entered into by undertakings to a considerable extent, while the commercial model allows for much more flexibility, even though it does not rule out an intervention by the NRA to remedy concerns relating to a market subject to co-investment. Both models work quite well in practice. The 2002/2009 regulatory framework did not rule out co-investment, however it was directly addressed only in the EECC. There is no definition of co-investment in the EECC, which allows the concept to be interpreted rather freely. The existence of co-investment agreements must, as a rule, be taken into account by NRAs, which must constantly monitor such agreements in order to determine whether a given market requires regulatory remedies. Co-investment may justify the withdrawal of regulatory remedies; however, such remedies may be put in place when co-investment proves problematic. The speaker considers co-investment to

be a de-regulatory feature, which comes with the risk of market consolidation, creating oligopolies and weakening regulation based on the existence of an undertaking with significant market power.

Professor Sławomir Dudzik spoke next talking about the management of radio spectrum under the EECC. The EECC consolidates the directives constituting the 2002/2009 regulatory framework, introducing some new concepts. The proper management of radio spectrum is necessary to create a digital single market in the EU. Radio spectrum policy aims at harmonization, the promoting of efficient use of spectrum, creating a stable investment environment, and a quick deployment of 5G networks. Harmonization should be achieved with the participation of the Radio Spectrum Policy Group (hereinafter: RSPG), which has no authority to issue binding decisions, but the reports and opinions of which may influence how individual Member States manage spectrum. Under the EECC, spectrum remains a national good and the profits from granting access to spectrum remain the profits of the national budgets. The EU authorities provide coordination only, with the exception of the binding Commission decision on resolving a dispute between Member States over the use of spectrum. The new concept of shared use of spectrum, necessary for the development of innovative solutions such as autonomic cars, will serve the effective and efficient management of spectrum. Periods for which rights to spectrum will be granted have been extended, which will improve investment stability. In Poland, 5G networks will not be implemented quickly because of issues relating to coordination between Poland and Russia, which were communicated to the Commission. Since the regulation of spectrum in the EECC is evolutionary rather than revolutionary, a new Telecommunications Law need not be created in Poland.

The third speaker was legal advisor Jakub Woźny, who considered the categories of electronic communications services (hereinafter: ECS). The general characteristics of ECSs did not change under the EECC, and involve their standalone character, provision for remuneration, and the responsibility of the provider for the effectiveness of the transmission of signals. The EECC recognizes three types of ECSs: Internet access services, as defined in Regulation 2015/2120; interpersonal communications services (which include traditional voice communication, VoIP services, internet communicators, and e-mail, but exclude social networking services, communication functions in games, and websites); and finally, other services, for example for the purpose of broadcasting, and machine-machine communications. While the changes to the categories of ECSs are not revolutionary, the new concepts, such as over-the-top interpersonal communications services, and machine-machine services will have to be regulated in Polish law.

Wojciech Krupa (legal advisor) was the fourth speaker in the first session talking about the evolution of the regulation of the electronic communications market. Four distinct periods in the history of European Union telecoms regulation may be identified. The first period, of liberalization, began in the late 1980s and lasted through the 1990s. The goal then was to introduce competition to the market, by removing special and exclusive rights of national operators, and ensuring interoperability between the network of the incumbent and the networks of competitors. The second period

(of developing competition) began with the entry into force of the 2002 regulatory framework, which took into account changes in the market, including the convergence of services. Competition became the means of securing end-user benefits. Market analysis was introduced and the use of *ex ante* regulation. Remedies were generally aimed only at undertakings with significant market power. Licensing was simplified, and radio spectrum management was regulated. The third period (of the creation of a single market) began with the 2009 review of the regulatory framework. The EU recognized that while competition was developing in all Member States, approaches to regulation were very different in various countries. The Commission was given new powers, and the Body of European Regulators for Electronic Communications (hereinafter: BEREC) was created in order to facilitate the creation of a single market. Risk associated with investment in next generation networks was recognized as a factor to be taken into account when deciding on market remedies. Consumer protection was strengthened by improved transparency and disclosure obligations. The cost reduction directive of 2014 marked the beginning of the fourth period (one of investment). The Commission recognized that markets had become mature and competitive, and thus it is time to move onto investment in very high capacity networks. The current paradigm is to secure end-user benefits through the construction of such networks. Competition concerns are no longer paramount.

Associate Professor Maciej Bernatt, the Scientific Secretary of CARS, was the moderator of the second session.

The first to speak was Doctor Artur Salbert, who talked about the rights of end-users and the universal service. He remarked that the EECC protects consumers rather than all end-users, however it seems that individual Member States may regulate as they see fit the relations between the providers of electronic communications services and end-users who are not consumers. Disclosure obligations of ECS providers have been extended to include not only consumers but also enterprises, excluding large ones, which will require implementation in national law. A readable contract summary provided to consumers is a completely new feature, one which will be subject to specification by the Commission, which may greatly reduce the provider's ability to shape contracts. It has become obligatory to offer free access to a tool allowing the comparison and evaluation of Internet access services, including their quality and prices. The speaker also mentioned the automatic extension of contracts, the possibility to limit the maximum duration of consumer contracts, informing end-users about the best tariffs at least once per year, the lack of the right to terminate the contract in the case of a reduction in price, switching Internet access providers, and bundled offers. Speaking about the universal service, Doctor Salbert mentioned that it now encompasses adequate broadband Internet access, and voice communications. All providers may be obligated to provide these services at affordable prices although to consumers only, rather than to all end-users. Only designated undertakings may be required to provide those services where there is no access to them under normal commercial circumstances. The financial model of providing the universal service remains the same as it was before.

Doctor Andrzej Nałęcz spoke next about the construction of very high capacity networks. Such networks consist wholly of optical elements at least up to the

distribution point at the serving location. Technologies other than optical may also be used, however only if they offer the same quality parameters. The EECC sets the goal of making Internet access services in such networks available to all households and enterprises in the EU. This goal is a political one, and its objective grounds are questioned in economic literature, which indicates low demand for such services, justified by the lack of Internet content requiring very high transmission speeds in the foreseeable future. Investments in very high capacity networks come with high risk, therefore the EECC aims to lower that risk, mostly through promoting early stage co-investment. It should be more profitable to enter into a co-investment agreement than to demand access to a network that has already been built. Very high capacity network investors may benefit from reduced regulation, both symmetrical and asymmetrical, which should encourage investment. The implementation of the EECC in this respect does not require the preparation of a new law. The speaker proposed concrete changes to the existing Telecommunications Law. He also remarked that the bill on the partial implementation of the EECC in Polish law, recently proposed by the government, does not put adequate emphasis on transparency, nondiscrimination and the reduction of uncertainty relating to the NRA's approach to investment.

The third to speak was Doctor Mateusz Chołodecki, who talked about the NRA and its cooperation with EU authorities. He summarized the regulation of the NRA's position in the 2002/2009 regulatory framework, and then he proceeded to describe the same issues under the EECC. Significant changes have not been introduced. The NRA's independence has been strengthened by regulating the appointment and dismissal procedures of its chief, and by ensuring it has proper regulatory capacity, relating for example to its budget. BEREC may now issue an opinion on the resolution of cross-border disputes by NRAs. The procedure for consolidating the internet market remains largely the same, however, the Commission has been equipped with new powers to require a NRA to withdraw a draft measure concerning access to ducts or authorizing co-investment. The harmonization procedure is completely new. The speaker remarked that the Commission has become a super-regulator of sorts, and even though the NRAs are supposed to be independent, that is not true of their relations with the Commission. The speaker is of the opinion that the EU aims at creating supranational markets and a Pan-European regulatory authority.

The fourth to speak in the second session was counsellor Xawery Konarski, who talked about the relationship between the EECC, the regulations on e-privacy, and the General Data Protection Regulation (hereinafter: GDPR). He commented on how complicated the legal system has become, with all the directives and regulations referencing one another. The EECC will influence the protection of privacy by regulating interpersonal communications services. Ultimately, the e-privacy regulation will replace the current e-privacy directive and it will serve as *lex specialis* to GDPR. There are significant discrepancies between the components of interpersonal communications services under the EECC and under the provisions on e-privacy, particularly with respect to minor ancillary features, such as the communications modules of dating applications. After the e-privacy regulation comes into force, the ability to process movement and location data of end-users will be considerably

limited. It is also of importance that the EECC has its own definition of the security of networks and services.

The two sessions were followed by a panel discussion with the participation of: Wanda Buk (Undersecretary of State in the Ministry of Digitization); Iwona Różyk-Rozbicka (Director of the Legal Department of the Electronic Communications Office); Jolanta Tropaczyńska (Director of the Legal Bureau of Orange Polska S.A.); Dariusz Trzeciak (representative of the National Economic Chamber of Electronics and Telecommunications (KIGEiT)); Professor Maciej Rogalski (Rector of Łazarski University); and Tadeusz Piątek (legal advisor, the DZP law firm). The panel discussion was moderated by Professor Piątek, who encouraged the participants to comment on the necessity of either updating or replacing the Polish Telecommunications Law. One of the options would be to consolidate into one new Code the many matters thus far regulated in separate laws, including the Telecommunications Law and the law on supporting the development of telecommunications services and networks. Relevant issues include how to work on a new bill and how to consult with stakeholders. Controversial issues must be identified. The need to take into account the many recommendations and other documents to be issued by the Commission may prove to be a challenge.

Wanda Buk remarked that creating a whole new law would be more challenging from a legislative point of view, and it might prove risky, since in the legislative process unexpected changes might be introduced to well established features of the telecommunications regulations. The Telecommunications Law and the law on supporting services and networks should not be combined. An update of the Telecommunications Law will serve as the main means of implementing the EECC in Poland.

Iwona Różyk-Rozbicka said she is not sure the decision on either updating or replacing the Telecommunications Law has to be made right away. However, the remaining time for implementation seems too short to prepare a completely new law, which would also need a proper period of *vacatio legis*. If we agree that implementation may be postponed then a new law becomes a possibility. There is indeed the risk noted by Wanda Buk. A simplistic implementation by copy-pasting the EECC should be avoided, even though it may be tempting, considering the difficulty of introducing the convoluted language of the EECC into a national legal system, as has become apparent by now in other Member States that are already working on the implementation.

Jolanta Tropaczyńska remarked that electronic communications providers in Poland would prefer an update of the existing Telecommunications Law rather than its replacement. It is important to include undertakings in the legislative process by properly hearing them out. The larger the undertaking, the harder it is for it to adjust its operations to a new law. Undertakings will probably require as much time to implement the law as the state authorities require to prepare it.

According to Dariusz Trzeciak, an update of the existing law is the best option. The form of a new Code should be avoided for reasons relating to legislative complexity.

Marcin Rogalski began by indicating that he intended to be controversial. He proposed the creation of a new, revolutionary law, recognizing the full convergence

of electronic media, putting an end to disjointed regulations, and taking into account current developments, such as artificial intelligence. It is important to prepare a proper concept for the new law, aiming at establishing whether we want to update the existing market or create a whole new market.

Tadeusz Piątek proposed the creation of a new law, the Law on Electronic Communications. It may seem a daunting task, but it is not – after all, the Law of 2004 was no mean feat either, and yet it was successfully prepared, even if with some delay. The new law will not be perfect, but if the people leading the work on it are determined and sure of its aims, they will succeed. The preparation of the concept of the law should be outsourced to a party not itself a stakeholder in the matters to be regulated.

The panel discussion was followed by a short open discussion. Wojciech Hałka positively commented on the idea of outsourcing the preparation of the concept of the new law. Doctor Mateusz Chołodecki remarked that even though the EECC is a directive, it closely resembles a regulation, many of its provisions requiring copy-paste implementation. However, it may be possible to include in the new law some national priorities. Assistant Professor Ewa Galewska commented that the EECC does not provide enough room for such prospects. Professor Skoczny advocated the creation of a new law, especially in the form of a comprehensive Law on Electronic Communications, proposed by Tadeusz Piątek. He also endorsed the idea of outsourcing the preparation of the law's concept.

Professor Piątek closed the conference thanking the participants, speakers, and members of the panel discussion.

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