

Bird & Bird



# Competition Law & Sector Regulation in the Telecom & Pharmaceutical Sectors

Brussels

*22 March 2023*



# Welcome



*Hein Hobbelen*

Partner

Bird & Bird



*Marco Botta*

Scientific Coordinator

European University  
Institute

## Brussels seminar

# *Competition Law and Sector Regulation in the Telecom and Pharmaceutical Sectors*

**Prof. Marco Botta**

**22.3.2023**



[www.eui.eu](http://www.eui.eu)



# Centre for a Digital Society (CDS)

## Areas

Competition

Regulation

Innovation

Democracy  
(new)

## Activities

Research

Executive  
Training

Policy Events



## Origins

Florence School of Regulation,  
Comms & Media (FSR C&M)

Established in 2009

Florence Competition Programme  
(FCP)

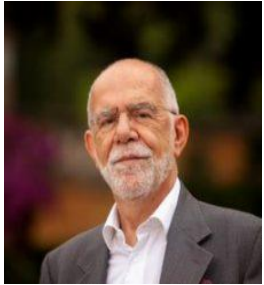
Established in 2016

[www.eui.eu](http://www.eui.eu)





# CDS – core team



Pier Luigi Parcu  
Programme Director



Marco Botta  
Scientific Coordinator



Chiara Carrozza  
Program Coordinator



Giorgio Monti  
Advisor



Lapo Filistrucchi  
Advisor



Maria Alessandra Rossi  
Advisor



Anna Pisarkiewitz  
Research Fellow



Igor Nikolic  
Research Fellow



Niccolò Galli  
Research Associate



Danielle Borges  
Research Associate



Roberta Carlini  
Research Associate



Elisabetta Spagnoli  
Head of Secretariat



Marsida Nence  
Administrative Assistant



Giulia Giannasi  
Communications officer



Elisabetta Airaghi  
Project manager

# CDS – Scientific Committee



Svend Albæk  
DG Comp



Paolo Boldi  
University of Milan



Erik Bohlin  
Chalmers University



Irina Brass  
UCL



Marc Bourreau  
Telecom ParisTech



Carlo Cambini  
Turin Polytechnic



Giacomo Calzolari  
EUI



Sandra Marco Colino  
Chinese University  
of Hong Kong



Alexandre De Streel  
University of Namur



Zoraida Frias  
Madrid Polytechnic



Michal Gal  
University of Haifa



Natalie Helberger  
Amsterdam University



Steffen Hoernig  
Nova School of  
Business & Economics



Orla Lynskey  
LSE



Nicolas Petit  
EUI



Giovanni Sartor  
University of  
Bologna & EUI



Damian Tambini  
LSE



Peggy Valcke  
K.U. Leuven



Esther van Zimmeren  
Antwerp University



Scott Marcus  
Bruegel

# Institutional and Media Partners





# Market Donors 2023



K&L GATES



CLEARY GOTTLIB



Copenhagen Economics





# CDS – next executive training courses

- 5 June – 7 June 2023, online: *Regulating Digital Platforms: Competition Policy v. Ex-Ante Regulation* ➤ REGISTRATIONS OPEN!
- 21-22 September 2023 (tbc), Brussels, DG CNECT: 6th Seminar for national judges on Electronic Communications.
- 4-6 October 2023, EU Court of Justice (Luxembourg): final workshop ENTraNCE for Judges 2023.
- Hybrid courses (EUI campus + Zoom) ➤ 16 – 20 October 2023:
  - 1) Florence Patent Licensing Academy.
  - 2) Florence Competition Autumn School.



# CDS – Policy Events in Planning

- **19 April 2023, webinar: ‘Re-shuffling the Connectivity Ecosystem’.**
- 24-26 May 2023, Gdańsk: 31st Postal Delivery and Economics Conference.
- **22-23 June 2023, EUI campus: Summer Digitalization Conference (co-organized with OECD), ‘Global Data Governance’ ➤ REGISTRATIONS OPEN!**
- 20 October 2023, EUI campus: Autumn Competition Conference.
- 6 December 2023 (tbc), EUI campus: scientific seminar, ‘Regulation and Regulators in the Digital Age’.

# Today's event

- **Fourth seminar jointly organized by EUI and Bird & Bird.**
- **Book launch:** PARCU, MONTI, BOTTA (eds.) *The Interaction of Competition Law & Sector Regulation*, (Edward Elgar Publishing, 2022).
- **Objective of the seminar: interaction of competition law and regulation in specific sectors:**
  - 1) Net neutrality and fair sharing in telecom.
  - 2) Excessive prices in pharma.
- **Key-note speech:** Paul Csiszár, Director, DG Competition – European Commission

# Today's event – practical information

- **Broadcasting:**
  - 1) Conference broadcasted via LinkedIn + Zoom.
  - 2) Zoom participants can ask questions to the panelists via the chat box ➤ NO microphone and camera.
- **Hastag**   : #BrusselsSeminar2023
- **Video recordings:** available on the event webpage after the conference.



Edited by  
Pier Luigi Parcu,  
Giorgio Monti and  
Marco Botta



# THE INTERACTION OF COMPETITION LAW AND SECTOR REGULATION

Emerging Trends at the  
National and EU Level



# ENTraNCE books

- **ENTraNCE for Judges:** training programme for national judges in EU competition law, organized by EUI and co-funded by DG Competition since 2011.
  
- **ENTraNCE books:**
  - 1) Published at the end of every edition of ENTraNCE for Judges.
  - 2) Contributions from invited speakers and participant judges.
  - 3) Edited by Parcu, Monti and Botta.
  - 4) Objective: analysis of ‘emerging trends at the national and EU level’ in EU competition law.
  
- **ENTraNCE books published by Edward Elgar:**
  - 1) *Abuse of Dominance in EU Competition Law* (2016).
  - 2) *Private Enforcement of EU Competition Law. The Role of the Damages Directive* (2018).
  - 3) *EU State Aid Law* (2020).
  - 4) *Economic Analysis in EU Competition Law* (2021)
  - 5) ***Interaction of Competition Law and Sector Regulation*** (2022).

# Objectives of the volume

- **Objective:** analysis of emerging trends in the interaction between competition law and regulation in the telecom, energy and pharmaceutical sectors.
  
- **Interdisciplinary approach:** contributions from lawyers and economists.
  
- **Main topics discussed in the book:**
  - 1) Co-investment agreements in building Very High Capacity Networks (VHCNs): overlap between competition law and sector regulation.
  - 2) Failure to provide information by the energy operator as abusive conduct.
  - 3) Excessive prices of drugs: overlap of competition law with IP/pharma regulation.

# Chapters in the volume

- 1) **PARCU**, MONTI, **BOTTA**, Introduction to the volume.
- 2) CAVE, *Liberalizing network utilities: economic principles and European regulatory experience.*
- 3) CROCIONI, SILOS RIBAS, *Could ex-ante regulation create incentives for anti-competitive behaviour?*
- 4) **VAN DUIJVENVOORDE**, *Regulating connectivity: linking the EU telecommunications framework to the digital future.*
- 5) **PARCU**, ROSSI, *Technology and the shifting boundaries of regulation and competition in the EU telecom sector.*
- 6) COELHO, *Competition law as an instrument for re-assigning radio spectrum and energi resources.*
- 7) SIRAGUSA, SETARI, *Recent EU and Italian trends in the energi sector: failure to provide information as abusive conduct.*
- 8) PITRUZZELLA, *Recent CJEU case law on excessive pricing cases.*
- 9) **SCOTT**, *The saga of a century old pharmaceutical remedy, phenytoin sodium sold in capsules.*
- 10) **COLANGELO**, *Excessive pricing in pharmaceutical markets: recent cases in Italy and in the EU.*
- 11) **AKKER**, SAUTER, *Excessive pricing of pharmaceuticals in EU law: balancing competition, innovation and regulation.*



*Thank you for your attention!*

[www.digitalsociety.eui.eu](http://www.digitalsociety.eui.eu)



# *Net neutrality and fair sharing in the telecom sector*

Dr. Anna Renata Pisarkiewicz

Bird & Bird

Brussels, 22 March



[www.eui.eu](http://www.eui.eu)







Seminar

## Reshuffling the connectivity ecosystem



### When

19 April 2023

15:00 - 18:30 CET



### Where

Online

Zoom



Add to Calendar



Register

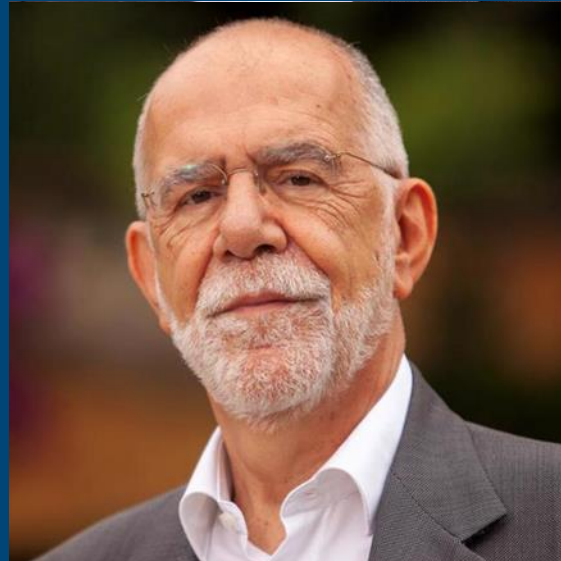


# Panelists

**Martin Cave**  
Imperial College  
Business School



**Pier Luigi Parcu**  
European University  
Institute



**Gera van  
Duijvenvoorde**  
Leiden University & KPN



**Peter Alexiadis**  
King's College London





# Exploratory Consultation:

## The future of the electronic communications sector and its infrastructure

Period: 23 February - 19 May 2023

- |   |   |           |
|---|---|-----------|
| 1 | TECHNOLOGICAL AND MARKET DEVELOPMENTS: IMPACTS ON FUTURE NETWORKS AND BUSINESS MODELS FOR ELECTRONIC COMMUNICATIONS | Q1 – Q20  |
| 2 | FAIRNESS FOR CONSUMERS  | Q21 – Q31 |
| 3 | BARRIERS TO THE SINGLE MARKET   | Q32 – Q39 |
| 4 | FAIR CONTRIBUTION BY ALL DIGITAL PLAYERS  | Q40 – Q62 |

# Political Commitment:

## European Declaration on Digital Rights and Principles for the Digital Decade

Joint Declaration of the European Parliament, the Council and the Commission

26 January 2022

### Commitment to:

- developing adequate frameworks so that all market actors benefiting from the digital transformation assume their social responsibilities and make **a fair and proportionate contribution** to the costs of public goods, services and infrastructures, for the benefit of all Europeans.
- **ensuring access to excellent connectivity for everyone**, wherever they live and whatever their income
- **protecting a neutral and open Internet** where content, services, and applications are not unjustifiably blocked or degraded.

# Political Commitment: EU's Digital Targets

## Decision (EU) 2022/2481 establishing the Digital Decade Policy Programme 2030



### Skills:

**ICT Specialists: 20 million**  
+ gender convergence

**Basic Digital Skills:** min 80% of population



### Secure and sustainable digital infrastructures

**Connectivity:** Gigabit for everyone

**Cutting edge Semiconductors:**  
double EU share in global production

**Data - Edge & Cloud:**  
10,000 climate-neutral highly secure edge nodes

**Computing:** first computer with quantum acceleration



### Digital Transformation of Businesses

**Tech up-take:** 75% of EU companies using Cloud/AI/Big Data

**Innovators:** grow scale-ups & finance to double EU Unicorns

**Late adopters:** more than 90% of SMEs reach at least a basic level of digital intensity



### Digitalisation of public services

**Key Public Services:** 100% online

**e-Health:** 100% of citizens have access to medical records online

**Digital Identity:** 80% of citizens have access to digital ID

## Political Commitment:

### Decision (EU) 2022/2481 of the European Parliament and of the Council establishing the Digital Decade Policy Programme 2030 14 December 2022

By 2030, networks with gigabit speeds should become available to those who need or wish to have such capacity. All Union end-users should be able to use gigabit services provided by networks at a fixed location deployed up to the network termination point. Moreover, all populated areas should be covered by a next-generation wireless high-speed network with performance at least equivalent to that of 5G. **All market actors benefiting from the digital transformation should assume their social responsibilities and make a fair and proportionate contribution to the public goods, services and infrastructures,** for the benefit of all citizens in the Union (Recital 13).



# The future of the connectivity infrastructure: the problem and its roots

**The issue:** How do we get from where we are today to the 2030 digital targets?

**The problem:**

- **an investment gap** of €65 billion per year, amounting overall to €250 billion to meet the European Gigabit Society interim targets by 2025.
- Hence, the investments needed to reach the 2030 Digital Decade targets will need to be significantly higher.

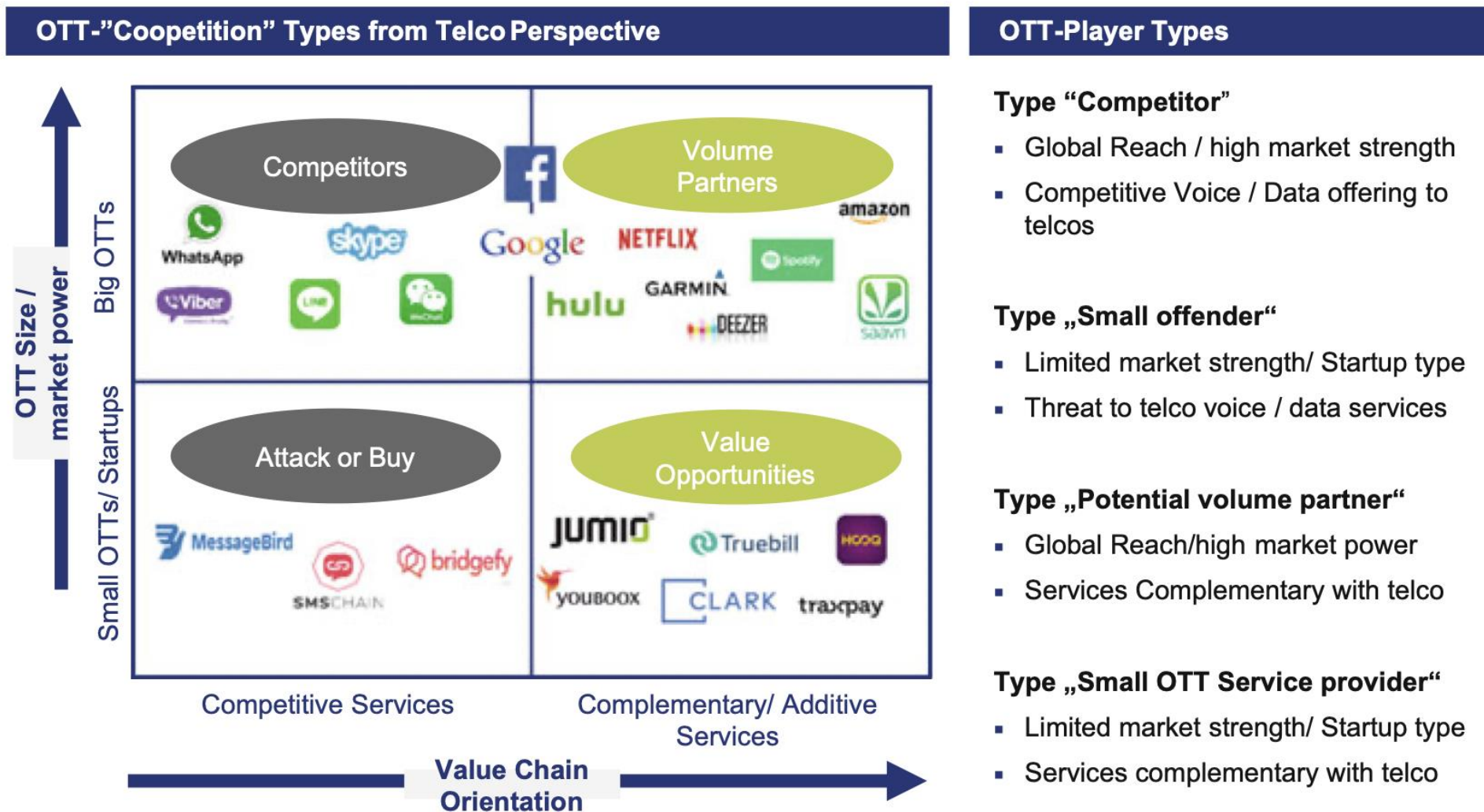
Potential causes behind the sub-optimal investment:

- Fragmented EU markets: barriers to in-country and lack of incentives for cross-border consolidation
- Intense competition and low ARPU (decreasing in mobile), despite increasing quality of broadband (higher speeds)
- Overly restrictive, too interventionist regulation, focused on static rather than dynamic welfare effects
- Strong net neutrality rules
- High but also very heterogeneous spectrum fees across the EU MS
- Uncertain business case, low willingness to pay
- Overall performance of the telecom sector and difficulty to attract investment (investment cycles and returns)

Context: telecommunications market in which previous telco business models are under attack both on the retail and wholesale level.



# Telcos v OTTs / CAPs



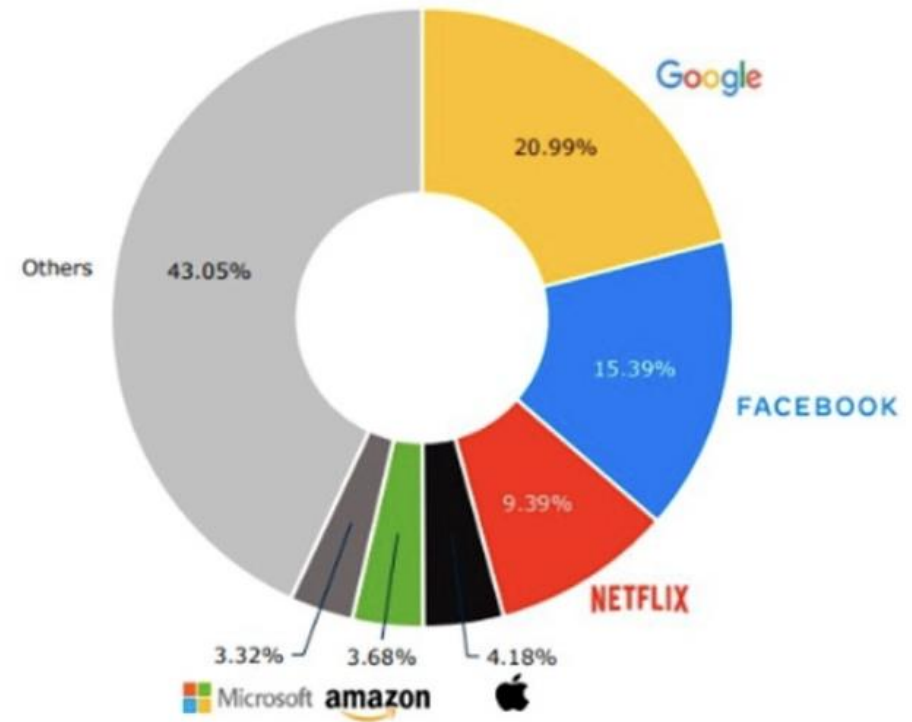
Source: Kramer and Jalajel (2018), OTT Partnering with Telcos: On the Rise

## Large Traffic Generators:

Does data growth imposes costs that are unfair and unsustainable?

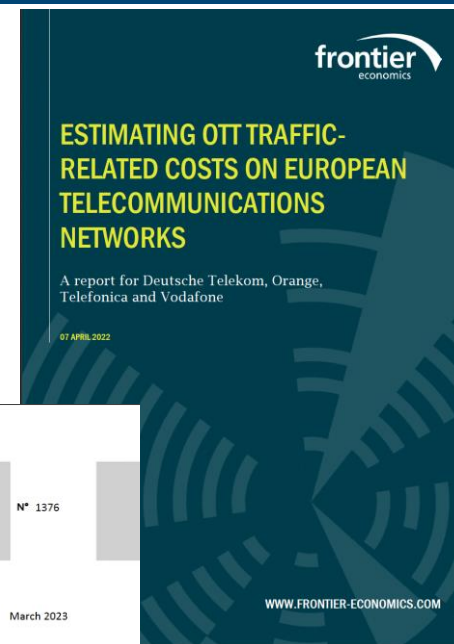
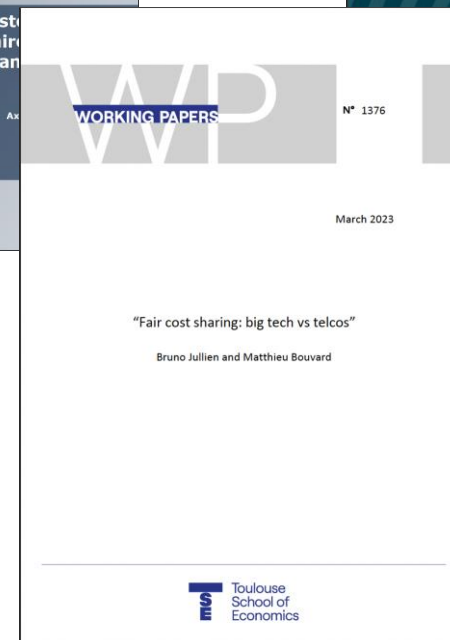
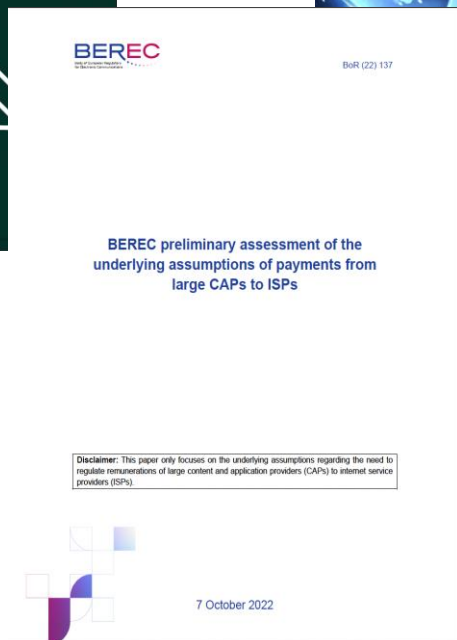
	Brand	2021	2022
1	Google	20.99%	13.85%
2	Netflix	9.39%	13.74%
3	Facebook	15.11%	6.45%
4	Microsoft	3.32%	5.11%
5	Apple	4.18%	4.59%
6	Amazon	3.36%	4.24%
TOTAL		56.35%	47.98%

Source: Sandvine (2023), [The Global Internet Phenomena Report](#).



Source: Source: Axon Partners Group (May 2022). Europe's internet ecosystem: socio-economic benefits of a fairer balance between tech giants and telecom operators.

# Studies and reports on the topic



# The future of the connectivity infrastructure:

## Main issues

### Data traffic growth and its impact on costs and investment

- Does data growth imposes costs that are unfair and unsustainable?
- Is there any difference in the impact of data growth on costs in mobile and fixed networks?

### Asymmetric bargaining power between major OTTs/CAPs and telecom network operators

- in relation to IP traffic? According to BEREC (2022): not an issue
- in the capillary, access network?

### Telecommunications markets: in search for the right theory

- One-sided, two-sided markets or rather a connectivity ecosystem?
- Market vs ecosystem failures

### Fair share and net neutrality

- Can these two co-exist?
- Unlevel playing field: traffic versus content prioritization

If there is an investment gap, and fair share/cost recovery from CAPs will not solve the problem or would in parallel raise disproportionate regulatory and transaction costs, what could be an effective way to close the investment gap?





## Questions for debate: Round 1



- What has changed in comparison to the situation 10 years ago, when in response to telcos' complaints about the impact of the OTTs, Neelie Kroes unapologetically told the telecom operators to 'adapt or die'?
- What is the underlying problem/market failure that this consultation seeks to address? Is it sub-optimal investment? Can a contribution from traffic generators can be the right solution?
- Do you agree with framing the VHCN/broadband market as a two-sided market?
- How do connectivity goals, in your view, fit into the fair share debate?
- Could the EECC offer a legal basis for fair share? If additional investment were to be obtained from large traffic generators, who precisely should pay and to whom? Considering that the US FCC wants to address the connectivity problem by brining tech companies into universal service, could such an approach work in the EU instead of a very controversial direct compensation?
- One of the main concerns is that additional revenues obtained from CAPs might not necessarily be used for investment at all, or not for the right investment. Do you envision that it would be necessary to introduce a clear mechanism that would mandate how this money would have to be spent?



## Questions for debate: Round 2



- Would you agree that we would not have a problem of under-investment today if we did not have strict rules on net neutrality as introduced by the Open Internet Regulation? What do know today about the impact of net neutrality rules on investment and economic welfare effects in general?
- Would it make sense to differentiate between weak and strong net neutrality?
- Do you see the Open Internet Regulation as the source of the problem or maybe the solution?
- Recently Meta has stopped paying to DT fees for data traffic, and the case which has gone to court will apparently be transferred from a court in Bonn to a specialised court in Cologne with expertise in competition issues. While according to BEREC preliminary assessment concerning the remuneration paid by large CAPs to ISPs from 2022 there are no problems that would require regulatory intervention, this case, as well as a case brought by SK Broadband (Korea) against Netflix show that existing agreements may nonetheless be problematic. How do such agreements fit into the Open Internet Regulation, and considering the German case, do you think we can expect more litigation between the telecoms operators and CAPs?



*Thank you for your attention!*

[anna.pisarkiewicz@eui.eu](mailto:anna.pisarkiewicz@eui.eu)

**in** Centre for a Digital Society

**t** @EUI\_DigitalSociety

 Co-funded by the  
Erasmus+ Programme  
of the European Union

[www.eui.eu](http://www.eui.eu)





# Competition Law and Sector Regulation in the Telecom and Pharmaceutical Sectors

**Coffee break**  
**Back at 17.15**



[www.eui.eu](http://www.eui.eu)



# *Excessive pricing in the pharmaceutical sector*

Prof. Marco Botta

Brussels seminar, Bird & Bird  
22 March 2023



[www.eui.eu](http://www.eui.eu)





# Excessive pricing – legal test



- **Art. 102(a) TFEU:** dominant firm shall not ‘impose directly or indirectly unfair purchase or selling prices’ ➤ excessive pricing.
- **United Brands test :**
  - 1) **Excessive limb:** the difference between price and costs is ‘excessive’.
  - 2) **Unfair limb:** the price is ‘unfair in itself’ OR ‘unfair when compared to competing products’.
- **Alternative test ➤ benchmarking approach:**
  - 1) NCA compares excessive price with a ‘benchmark’ price (e.g. competitors; different geographic areas):
  - 2) *AKKA-LAA*: difference between excessive and benchmark price has to be ‘appreciably high’, ‘significant’ and ‘persistent’.
  - 3) *Pfizer-Flynn*: NCA should verify its findings under multiple tests.
  - 4) Dominant firm may put forward objective justifications.



# Enforcement dilemma

- **Authors AGAINST enforcement:**

- 1) What is 'excessive'? What is 'unfair'? ➤ if some customers are ready to pay, the price is NOT excessive.
- 2) High prices attract new entrants ➤ markets self-adjust in the long term.
- 3) Sanctioning excessive pricing harms dominant firm's incentives to invest in its infrastructure and to innovate.
- 4) High burden of proof for the NCA; legal test is unclear.

- **Authors PRO enforcement:**

- 1) Some products are 'indispensable': consumers have high 'willingness to pay' even in the presence of excessive pricing ➤ demand is NOT elastic.
- 2) Legal and *de facto* monopoly ➤ new entry is NOT possible.
- 3) Dominant firm may engage in rent-seeking behaviors, rather than innovating.
- 4) Burden of proof is high, BUT legal test has been clarified by CJEU case law.



# Peculiarities of the pharmaceutical sector

- **Demand of drugs is NOT elastic:**
  - 1) Some drugs are 'indispensable' for our health ➤ consumers have high willingness to pay.
  - 2) Information asymmetry ➤ consumers buy a drug because of a therapy/prescription.
- **R&D investments and patents:**
  - 1) Drugs are released on the market after years of testing and receiving State authorization.
  - 2) Patents: temporary monopoly right to compensate past R&D investment by pharmaceutical firm ➤ 20 years + supplementary protection certificate (SPC) + orphan drugs.
  - 3) High R&D investments + patent rights ➤ entry barriers.
- **State intervention:** retail price cap + reimbursement by health care fund ➤ consequences:
  - 1) Consumers demand is NOT elastic.
  - 2) Price and availability of drugs changes in every EU Member State.



# Main decisions sanctioning excessive pricing cases in pharma

- **Pfizer-Flynn (UK):**

- 1) In 2016, CMA sanctioned excessive price of phenytoin sodium capsules ➤ off patent drug against epilepsy.
- 2) Decision quashed by CAT in 2018, and by the Court of Appeal in 2020.
- 3) July 2022: new CMA decision ➤ CAT second ruling is pending.



- **Aspen (IT):**

- 1) In 2016, AGCM sanctioned excessive price of Cosmos (i.e. anti-cancer drug) ➤ similar to *Pfizer-Flynn*.
- 2) Decision fully upheld by *TAR Lazio* and *Consiglio di Stato*.



- **Aspen (EU):**

- 1) 2021 EU Commission commitment decision ➤ price cap.
- 2) Same infringement of AGCM decision, BUT Italy NOT assessed by EU Commission.



- **Leadiant (NL):**

- 1) In 2021, ACM sanctioned excessive price of Leadiant ➤ orphan drug against rare metabolic disease.
- 2) Same case investigated by NCAs in IT, BE, ES.

Autoriteit  
Consument & Markt



# Common features among the 4 NCAs decisions



- **Drugs peculiarities:**

- 1) Drugs target 'rare' diseases ➤ consumers' demand NOT elastic.
- 2) Limited demand ➤ NO new market entry after patent expiration.

- **Off-patent drugs**

- 1) Off-patent drugs: when patent expires, the price should decrease ➤ price increase unfair.
- 2) NO patent rights ➤ NO innovation justification.
- 3) Exception: *Leadiant* case ➤ orphan drug.

- **Evidence of abuse:**

- 1) Re-branding + sudden price increase without changing the product features ➤ price increase unfair.
- 2) Excessive price: price increase over 1000%.
- 3) *Aspen*: aggressive negotiation strategy with health care authority ➤ threat to withdraw the products from the market.

- **Legal test:**

- 1) *United Brands* test ➤ price increase is 'unfair in itself'; difficult to identify 'competing products'.
- 2) Limited reliance on benchmarking approach ➤ difference in price regulation among EU MS.



# Questions for the debate



- 1) Should NCAs investigate excessive pricing cases in pharma? Would it be better for the State to intervene directly via price regulation?
- 2) What is the role of an 'exploitative strategy' by the dominant firm in the assessment of an excessive pricing case (e.g. Aspen aggressive negotiation strategy with health care authority) ?
- 3) Should NCAs enforcement against excessive pricing be limited to off-patent drugs, or include drugs covered by patent rights (e.g. orphan drugs)?
- 4) Can a price be considered as 'unfair in itself' under *United Brands* test? What type of evidence should the NCA put forward in the case?
- 5) What is the role of the 'benchmarking approach' in the assessment of excessive pricing of drugs?
- 6) Incentive effect of commitment v. infringement decisions in an excessive pricing case?

# Panelists

**Baptist Vleeshouwers**

Bird & Bird



**Ilan Akker**

Dutch Authority for  
Consumers and Markets



**Margherita Colangelo**

University Roma Tre



**Adam Scott**

UK Competition  
Appeal Tribunal





## COMPETITION APPEAL TRIBUNAL

### *Introduction*

- Pfizer and Flynn have both appealed the CMA's retaken Decision on *Phenytoin sodium*
- I can summarise the grounds but, as it is *sub judice*, I can't discuss the merits
- And what I say today should not be taken as a policy or prediction of a position after due evidence and argument

Adam Scott

# Costs, comparables and fairness

- *United Brands* led to a search for *unfair in itself* or by comparison
- *Napp* [2002] CAT 1 [90] variety of methods based on costs and comparables
- *Napp* approved by the AG in *Latvian Copyright*
- How are competition authorities let alone courts to handle the volume of evidence that economists can generate ?
- *Fair* and *unfair* are qualitative terms and hard to define
- Judges have to assess *procedural fairness* and *substantive unfairness*

# Pfizer – summary of grounds

1. Real world indicators of value ignored
2. Narrow focus on cost-plus analysis contrasted with QALY analysis like NICE and value for money
3. Excluding alternative methods and especially demand-side factors
4. Procedural unfairness
5. Penalty appeal



# Flynn – summarised grounds

1. Findings tainted
2. Returns consistent with comparators
3. Pricing in line with comparators or not out of all proportion
4. Pricing not high enough to be abusive
5. Flynn's risks not captured
6. Not recognising economic value beyond cost-plus nor Flynn's role in assuring security of supply

# What is the context for fairness ?

- Pfizer mention QALY and NICE
  - NICE is the UK's National Institute for Clinical Excellence and
  - QALY is
- Generically national health services or systems of social security with reimbursement have to work out what treatments are worth supporting financially
- They are in a weak position when a treatment seems essential to continue or to endorse for introduction
- **BUT treating one patient may mean denying treatment to others**

# What is the overall context in Pharma?

We want

- A healthy pharmaceutical industry
- Risks managed through regulated distribution
- Innovation to continue
- Security of supply

We have

- Complexity in partial regulation, market authorisation, prescribing practices and patients accustomed to particular formulations

# What is the context of an old but seemingly essential drug?

- Patients and medical practitioners are relying on such drugs
- Manufacturers and distributors – if alone or otherwise dominant – therefore have leverage
- Manufacturers and distributors – may have their power reinforced by structural factors and behavioural patterns
- Those responsible for procurement or for reimbursement are therefore generally weak in market terms

# Questions for the debate



- 1) Should NCAs investigate excessive pricing cases in pharma? Would it be better for the State to intervene directly via price regulation?
- 2) What is the role of an 'exploitative strategy' by the dominant firm in the assessment of an excessive pricing case (e.g. Aspen aggressive negotiation strategy with health care authority) ?
- 3) Should NCAs enforcement against excessive pricing be limited to off-patent drugs, or include drugs covered by patent rights (e.g. orphan drugs)?
- 4) Can a price be considered as 'unfair in itself' under *United Brands* test? What type of evidence should the NCA put forward in the case?
- 5) What is the role of the 'benchmarking approach' in the assessment of excessive pricing of drugs?
- 6) Incentive effect of commitment v. infringement decisions in an excessive pricing case?



# The task for me

Adam concludes the first round of interventions as the only one to discuss the last question concerning infringement v. commitment decisions in excessive pricing cases.

# The task for authorities and for courts

- Investigations are heavy on effort and cost
- Excessive pricing has not proved easy to prove
- There is great capacity for appeals
- There is considerable risk if a finding is upheld
  - Of substantial fines and
  - Even more substantial claims for damages

# So what of commitments

- EVP Vestager on Aspen: a strong signal not to engage in abusive pricing
- Aspen's commitments offered a fast, comprehensive and lasting solution
  - Price reductions
  - Continued supply
- Breach of commitments could lead to significant fines
  - Without any finding of infringement
- Commitments don't exclude national private actions for damages
  - EUCJ Case C-547/16 *Gasorba v Repsol*

*Thank you for your attention!*

[marco.botta@eui.eu](mailto:marco.botta@eui.eu)



# Bird & Bird



# Thank you

twobirds.com

Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dublin • Dusseldorf  
• Frankfurt • The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris  
• Prague • Rome • San Francisco • Shanghai • Singapore • Stockholm • Sydney • Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority (SRA) with SRA ID497264. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.