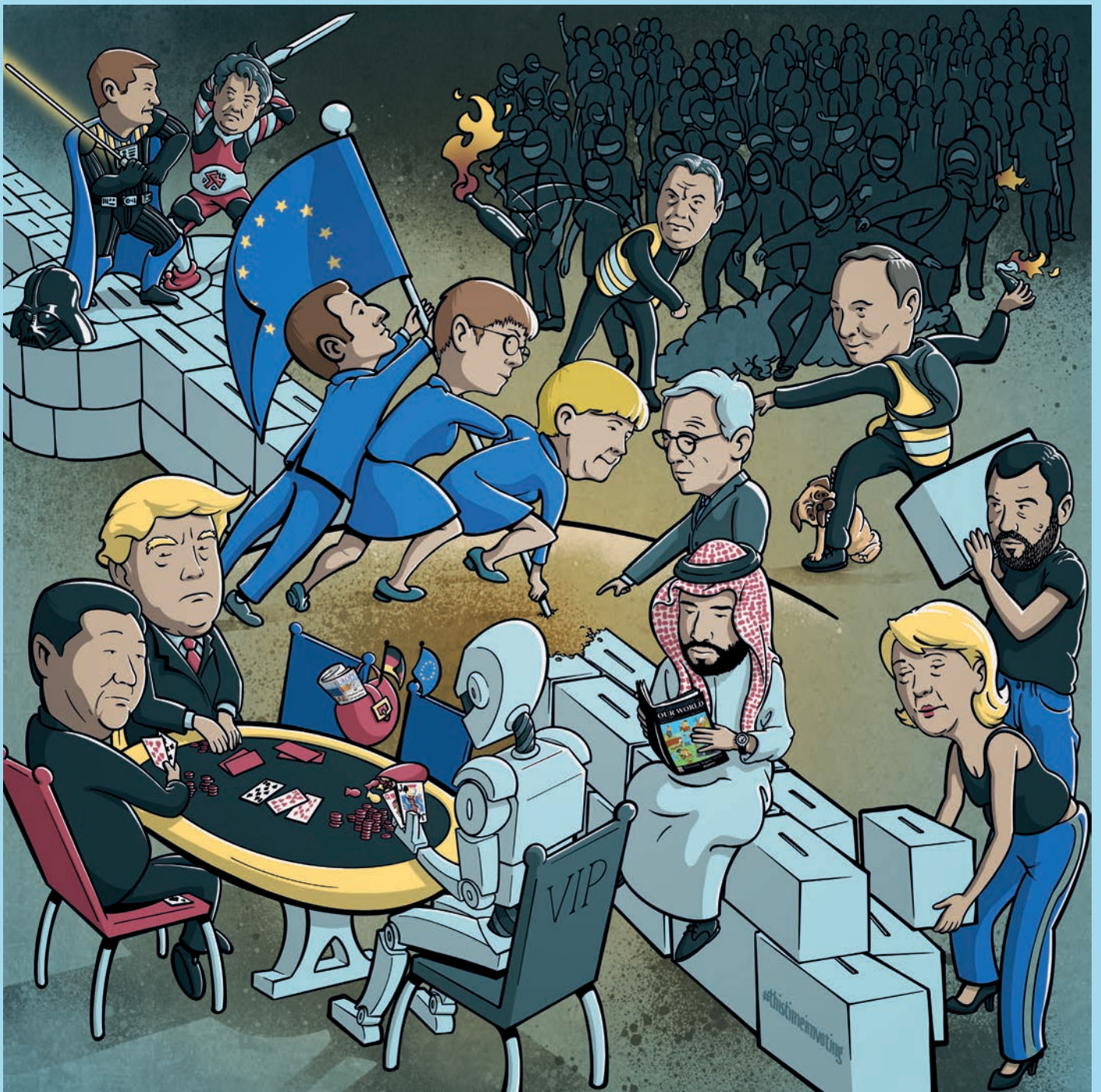


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A New Direction for EU Telecoms Policy?

By Peter Alexiadis and Tony Shortall

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On 4 December 2018, the Council approved a new legislative framework for the telecommunications sector in the EU, referred to as the European Electronic Communications Code (“the Code”). It is due to come into full effect across the EU Member States by late December 2020, codifying in one single document all the disparate elements of law which make up the EU Regulatory Framework for electronic communications.

The Code re-aligns the electronic communications regulatory framework in a manner which strikes what appears to be a very different policy balance between the importance of maintaining competition through inter-platform competition, on the one hand, and the need for the massive investments that are deemed to be

necessary to drive the DSM strategy. This initiative seen in the broader context of the health of the European economy, whose dependence on the deployment of future upgraded networks by both fixed and mobile operators was set out in rather stark terms in the Commission’s Gigabit Society Communication.

To this end, a principal objective of the Code is to foster investments in these new Very High Capacity Networks (VHCNs). VHCN is essentially about investments in fibre and nothing else. In the case of fixed networks, it is defined as “Fibre to the Home” or “Fibre to the Building” (or its “equivalent” but, as defined, it is difficult to see how it can have a practical equivalent). In the case of mobile networks, it means “Fibre to the Base Station”.

The Code’s new policy balance is pursued in a number of ways. At one level, the Code seeks to lower entry barriers and enable competitive investments by lowering the costs of deployment for those networks through the enhanced sharing of civil infrastructures. The Code also seeks to create incentives to investment by ensuring lighter access conditions and higher returns, wherever possible. To some extent, the Code also seeks to create more transparency and legal certainty for investors by setting out the rules in greater detail, in advance of any statutory interpretation effected by National Regulatory Authorities (“NRAs”). This might arguably create unforeseen difficulties in certain instances, especially because it can be almost impossible to legislate

for every contingency. Irrespective of these measures, however, by making the promotion of investment in VHCN a primary objective for EU regulators, NRAs are bound to focus all of their decision-making through this prism to determine what the impact of any of their regulatory decisions will be on the deployment of VHCN.

In terms of specific regulatory obligations laid down in the Code to drive VHCN investments, the momentum to achieve the benefits of this infrastructure-based approach to competition is now laid squarely at the feet of separation remedies. These range from the very specific support given to “Wholesale-only” operators (which have no retail operations and hence, in theory, have no incentive to discriminate against retail competitors) to co-investments made in VHCN where a separate governance structure is likely to emerge. While the evidence to date suggests that Wholesale-only operators and their investments are accelerating rapidly, the evidence of integrated operators making a competitive response to such investments is more elusive. The competition implications of such an approach (and, indeed, the long term investment benefits) are also less than obvious. A Wholesale-only business model, in particular, while possibly removing the incentives for the operator to discriminate, also signals very strongly the limits to infrastructure competition, as do all separation remedies. In parallel, the impact of the separation of networks raises very legitimate concerns about investment co-ordination and so-called investment “hold-up” problems in the future.

The counterweight to the apparent dilution of regulatory intervention in the sector is arguably found in the wide-ranging role to be played by BEREC, the European Union’s consulting group for NRAs. A surprisingly large role is to be played by BEREC in the articulation of policy in the electronic communications sector as the Code is implemented into national laws. It is not unreasonable to assume that many existing regulatory principles may therefore continue to find their way into the post-2020 regulatory regime, especially given the possible consultation role that BEREC might play in the elaboration of rules regarding platform providers.

Thus, the policy drift of the Code suggests that the presumption that competition alone



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will deliver the investments necessary for Europe to achieve its broadband aspirations has been rebutted in practice. Regulatory policy in the future will henceforth confer primacy to achieving the longer term goal of achieving VHCN deployment above the short term goal of greater broadband retail price competition. Indeed, the recent grant of unconditional clearance to a 4-to-3 mobile merger in The Netherlands in parallel with the adoption of the EECC suggests – even if only indirectly - that even EU competition law might in parallel be re-calibrating its notion of consumer welfare to attribute greater weight to the importance of network upgrades above short-term retail price rises.

If all of this is correct, the EU will be witnessing a massive shift in regulatory policy emphasis. Whether or not, however, that official policy line at Commission level materialises in practice across all the Member States will depend in large measure on the attitude of NRAs, cooperating with BEREC, in the implementation of regulatory policy in concrete individual situations of enforcement. One should not be surprised if, at the ground level of policy enforcement, change in policy is not as far-reaching as many in the Brussels community of policy formulation might be anticipating.