The Technology, Media and Telecommunications Review

Fifth Edition

Editor
John P Janka

Law Business Research

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EDITOR'S PREFACE

This fully updated fifth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern the issues facing lawmakers and regulators, as well as service providers and new start-ups, in 29 jurisdictions around the world.

As noted in the previous edition, the pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models continue to fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today's world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a 'light touch' in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address 'network neutrality' concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

I would like to take the opportunity to thank all the contributors for their analytical input into this publication. In the space allotted, the authors simply cannot address all of the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2014

LIST OF ABBREVIATIONS

3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb

FTTH	Fibre to the home
FTTN	Fibre to the node
FTT*x*	Fibre to the *x*
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD–PCOs	Subscriber trunk dialling–public call offices
UAS	Unified access services
UASL	Unified access services licence

UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access

Chapter 1

COMPETITION LAW OVERVIEW

Abbott B Lipsky, Jr with John D Colahan[1]

I COMPETITION LAW OVERVIEW

This chapter provides an overview of antitrust and competition laws (competition law). While competition law was primarily (although not exclusively) an American phenomenon for most of the 20th century, competition law is now actively enforced in more than 120 jurisdictions, encompassing all the major economies of the world. Competition law has thus become relevant to the vast majority of global business activity and significant business enterprises. While the numerous competition laws and their enforcement modalities vary widely, this chapter attempts to provide a broad overview of their most basic and recognisable features and thereby to suggest how competition law is likely to interact with the telecommunications, internet and media sectors in any particular jurisdiction. This chapter also identifies significant competition law developments involving the telecoms, internet and media sectors in the past year.

II FUNDAMENTAL CHARACTERISTICS OF COMPETITION LAW

Competition law is usually understood as a system of legal limitations applicable to the marketplace conduct of firms. The principal common objective of such laws is to maintain a freely competitive marketplace, allowing efficiently run businesses the opportunity to enter and expand, ultimately stimulating innovation and providing a constantly evolving array of quality products responsive to changing demand, offered at reasonable prices and other terms. Some jurisdictions imbue their competition laws with one or more other considerations and objectives, such as single-market integration (European Union), national economic development (China) and promoting wider ownership by historically disadvantaged persons (South Africa).

1 Abbott B Lipsky, Jr and John D Colahan are partners at Latham & Watkins LLP.

While competition law evolved primarily as a form of economic legislation applicable to the general run of private-sector firms, other types of entities (such as trade associations and state-owned enterprises) are also subject to competition law in many jurisdictions. Specialised institutions such as labour unions, agricultural cooperatives and consumer organisations are often exempted from competition law in whole or in part or regulated by other rules and institutions. As described in Section IV, *infra*, where industries subject to sector-specific regulation are involved – as the telecoms, internet and media industries frequently are – significant and complex questions often arise involving the allocation of jurisdiction between competition law and the particular regulatory schemes.

III THE MAIN PROHIBITIONS OF COMPETITION LAW

Competition law is potentially applicable to an enormous range of marketplace conduct. Although the following generalisation is not universally true (indeed few assertions about competition law are), the range of conduct typically subject to antitrust law is often conveniently characterised into one of the following three categories: concerted conduct, structural business transactions and abuse of dominance (or 'monopolisation' in US parlance).

i Concerted conduct

Sometimes also referred to as 'restraints of trade' or 'restrictive agreements', competition law typically prohibits or otherwise limits certain agreements between or among distinct entities. There are generally two main elements to the definition of improper concerted conduct: an agreement between or among distinct parties or entities that affects or is intended to affect the parties' marketplace conduct; and a harmful or potentially harmful effect on marketplace competition. The competition law view of 'agreement' is extremely broad; it usually includes both formal and informal understandings, written or unwritten, or in general any 'meeting of minds' in a common course of conduct or other scheme, however manifested. In some jurisdictions, such as the EU, there is an additional concept of a 'concerted practice' that adds to the breadth of the concerted conduct prohibition.

Horizontal agreements

The classic example of an illegal restraint of trade is an agreement among competitors to observe a common minimum price. Absent other forms of cooperation that might contribute to improvements in economic performance (e.g., joint investment in new research or production facilities, introduction of a new product, cost-sharing, risk-sharing or the like) such an agreement would typically be regarded as a serious violation of competition law. Agreements between or among competitors are generally referred to as 'horizontal' agreements, to denote that the parties are participants at the same level of trade – such as manufacturing, distribution or retailing. Horizontal agreements that limit competition without any other cooperative feature capable of lowering prices, enhancing innovation, improving productivity, or providing some other identifiable economic benefit (as distinct from merely advancing the parties' own economic self-interest) are usually regarded as serious law violations, generally referred to as 'naked horizontal restraints' or 'cartel conduct'. In the same category one would typically find agreements to allocate markets (by customer, product, territory or channel of distribution) or to pool revenues or capacity.

By contrast, where competitors collaborate to invest in new capacity, introduce new products or methods of distribution, or engage in other similar initiatives, competition law generally allows agreed competitive constraints to be placed on the parties if they are no broader than appropriate to support the economically beneficial objectives of the collaboration. A classic example would involve parties that jointly invest in new production capacity in order to provide a new product or to offer existing products in a new geographic area, while requiring that each party refrain from engaging in independent competition with the new venture. In this example the justification for the competitive restriction is that the investment might not otherwise be sustainable and therefore might not occur without the restriction. There are many variations on this basic theme among the competition laws of the world. For example, some jurisdictions require such restraints to be no broader than what is strictly necessary to achieve the beneficial purpose, and even then such restraints are allowed only when the benefits of the collaboration are likely to be shared with ultimate consumers.

Numerous other types of horizontal agreement are considered under competition law, with their legality depending on a wide variety of factors including the nature of the industry and its products, the number and size distribution of competitors, and the likely effects (both beneficial and restrictive) of the collaboration and any accompanying restrictions. Technical standard-setting, joint procurement, benchmarking and other forms of information exchange are some common examples of horizontal collaboration assessed under competition law, with their legality depending on the details of the arrangement, the parties and the affected markets.

Vertical agreements

Competition law also governs agreements between parties that are not competitors, but have a relationship of buyer–seller, manufacturer–distributor, distributor–retailer, licensor–licensee, franchisor–franchisee and the like. Such agreements are commonly known as 'vertical' relationships to reflect that the parties are engaged in economic activities at sequential levels of commerce (in the continuous progression from raw materials to the provision of the product to the ultimate consumer), as distinct from competitive or 'horizontal' activities at the same level. In general, competitive restrictions arising between parties in vertical relationships are judged with less scepticism than horizontal agreements, for the competitive risks of such agreements are generally less significant, such agreements are encountered universally throughout the economy and experience has shown that vertical agreements and associated restrictions on the parties' freedom of action are manifestly necessary to permit commerce to function. Typical vertical agreements that include restraints on competition include distribution agreements in which the supplier limits the distributor to a specific geographic territory or class of trade, franchising relationships (involving the limitation of the franchisee to certain brands and methods of business), and field-of-use, territorial, customer or other restrictions on licensees by the owner-licensor of a patent, copyright, trademark or other item of intellectual property.

Notwithstanding the general acceptance of many competitive limitations in vertical agreements, some jurisdictions still regard some categories of vertical restraints with the hostility that is more typically reserved for cartel conduct. Most notably this includes minimum vertical price agreements. Such restraints have had a controversial and turbulent history under US competition law. They were once categorically banned (for a brief time along with all other vertical restraints), but are now subject to a 'rule of reason' or balancing test under federal law. Minimum vertical price restraints are still banned, however, under the laws of China, the European Union and its Member States and in many if not most other jurisdictions around the world – including (despite the liberalised standard of federal law) a number of individual US states. The EU also observes a strict prohibition on vertical agreements that limit active sales across the national boundaries of the EU Member States.

ii Structural transactions

Substantive standards

Some agreements involve more than short-term, partial economic relationships among fundamentally independent firms. When one firm acquires a substantial or majority ownership interest in another (through purchase of shares, for example) or when one firm sells assets representing an entire operating business unit to another independent firm, competition law recognises the different character of the transaction and applies a different set of rules and presumptions as well as a different set of procedures. Such transactions are known by many names – mergers, acquisitions, concentrations, control transactions, etc. This chapter uses the term 'structural transaction' to attempt to capture the essential nature of the arrangements that are generally accorded this distinct treatment. The essential feature is that such transactions create material and relatively long-lived changes in the structure or control of business organisations (i.e., ownership, management, the range of product lines, etc.).

The substantive legal standards applied to structural transactions continue to evolve, and even today, nearly a century after the United States first adopted a law addressed specifically to such transactions, these rules remain subject to change and controversy. The first period of active competition law challenges to structural transactions in the US, commencing with an important statutory amendment in 1950, led to the 'structuralist' approach. This featured a narrow focus on how transactions affected the number and size distribution of firms (market concentration), and by the 1960s the Supreme Court had consistently condemned mergers based on the attainment of even a very modest market share (less than 5 per cent in the most extreme cases) by the combining firms. Soon thereafter, however, both the Court and the enforcement agencies began to introduce a variety of analytical considerations that would allow a richer and more nuanced assessment of structural transactions.

In 1982 the US DoJ adopted Merger Guidelines that set a basic framework for analysis that has since been followed globally, although with important extensions and amendments over the intervening 30-plus years of enforcement experience. The principal creative contribution of the 1982 Guidelines was to centre the agency's legal judgment of structural transactions on economic analysis of key market and product characteristics and the identification of indicia of probable future competitive effects, rather than on changes in market concentration as such. The main elements of the analysis include definition of relevant markets in economic terms and assessment of supply expansion possibilities (including the potential for new entry). Changes in the number and size-distribution of firms continue to be considered as part of the analysis (with decreasing importance over time in the case of subsequent versions of the Guidelines in the US: in 1984, 1992 and 2010), but it is difficult to characterise their precise significance to the ultimate judgment made by agencies and courts. The relevance and proper weight to be accorded to efficiencies that arise from structural transactions (cost reductions, synergies from the combination of firms with complementary assets, personnel, or product lines) also continue to be controversial and difficult to assess.

More broadly, modern economically based merger analysis tends to examine the likelihood of two distinct forms of potential competitive harm: unilateral effects – namely, the risk that a business combination may allow the combined firm to raise prices (or reduce output, limit product quality or innovation, or impose other cognate adverse effects) unilaterally; and coordinated effects – the risk that a business combination will enhance the likelihood that remaining competitors would act collusively or would tend to raise prices or take equivalent competitively adverse actions without collusion but through the natural impact of their recognised interdependence. Most modern competition laws permit structural transactions to be assessed under either theory.

Unique procedures applied to structural transactions

Structural transactions are typically judged using a unique set of procedures, reflecting the reality that once consummated, it is potentially very costly and extremely disruptive to undo such a transaction. In 1976 the United States became the first nation to require 'pre-merger notification' to allow competition law assessment of structural transactions prior to consummation. If a transaction meets certain thresholds (involving the size of the transaction and, in many cases, the size of the parties by revenue or assets), the parties must file forms (containing a variety of financial and competitive information) with the federal antitrust agencies and wait for a prescribed period (30 calendar days) before consummating the deal. The agencies may extend the waiting period by requesting additional information, thereby allowing closer investigation of the competitive effects of the transaction.

This pattern of requiring pre-merger notification and waiting is now incorporated in the competition laws applicable to structural transactions in scores of jurisdictions around the world – perhaps as many as 100. Although still technically voluntary in a few key jurisdictions (Australia, New Zealand, Singapore, United Kingdom), mandatory pre-merger notification is now the global norm for review of structural transactions.

The distinction between concerted conduct and structural transactions

Some transactions can be difficult to classify as concerted conduct or as a structural transaction. By definition all structural transactions involve concerted conduct, but the question is whether a specific transaction merits treatment under the specialised procedures and assessment standards reserved for structural transactions. Ideally the structural transaction review standards and pre-merger review procedures are reserved for transactions with relatively permanent effects on firm structure, ownership or scope of operation, but there are questions of degree and so some line-drawing can be required. There is scope for differences of treatment as among different jurisdictions.

For example, when the European Union first adopted its Merger Control Regulation (MCR), it defined the set of transactions to be governed by this scheme as 'concentrations', involving a change in the control of an undertaking, including situations in which a business entity formerly under the control of a single owner might enter into arrangements with another party, giving rise to joint control of the entity. This raised the question of whether the shift in control would be considered a 'concentration' and subject to prior notification and approval, or whether the agreement giving rise to the shift in control would be judged like other forms of concerted conduct. The EU accordingly defined the notion of a 'concentrative joint venture', meaning a form of collaboration that involved creation of an entity endowed with its own competitive resources (e.g., production facilities) that make it capable of operating as an autonomous market participant (distinct from the venture's owners). Such ventures were required to submit to review under the same standards and procedures applicable to outright acquisitions (assuming the applicable turnover thresholds were met). Such concentrative ventures were distinguished from mere 'cooperative' joint ventures, which do not involve creation of an entity with the degree of independent economic substance and competitive autonomy thought necessary to merit review under the MCR. The latter type of venture continued to be regarded as nothing more than a form of agreement between otherwise independent parties, which therefore remains to be considered under the typical 'concerted conduct' standards of EU law. (At the time of writing, however, the EU is considering the adoption of a mandatory prior notification regime for the acquisition of non-controlling minority interests.) Most other jurisdictions must confront this same type of classification issue, and a variety of solutions have been adopted.

iii Unilateral dominant-firm conduct

The third and final basic category of business conduct typically subject to competition law is unilateral dominant-firm conduct. Such conduct is referred to as 'monopolisation' in the US and as 'abuse of dominance' in the EU and many other competition law systems. The EU also has a concept of 'joint dominance' that can capture more than one undertaking. Unlike concerted conduct and structural transactions, this category is generally reserved for unilateral (single-firm) conduct. This category, founded on antipathy to the perceived tendencies of monopolies or dominant firms toward improper aggrandisement at the expense of competitors, customers and consumers, poses its own difficult legal, economic and other policy questions. Although the US statutory prohibition on unlawful monopolisation has been in place since 1890, drawing the line between proper and improper behaviour for a market-dominating firm continues to present important complexities and has been characterised by sharp and continuing controversy. The more recent cognate – abuse of dominance – adopted in the EU and many other jurisdictions, presents equal issues and challenges.

Most competition laws apply single-firm conduct standards only to firms that have a substantial degree of market power or monopoly power as those terms are understood by economists. Some important jurisdictions, however (e.g., Germany, Japan), also apply special standards of conduct to firms in a 'superior bargaining position', even without proof that they possess monopoly power in any orthodox economic sense.

Assuming a firm meets the standard for application of unilateral-conduct rules, competition law attempts to supply rules to identify which types of conduct are impermissible. The US Supreme Court has provided a general definition of monopolisation by contrasting the 'willful acquisition or maintenance' of monopoly power with 'growth or development as a consequence of a superior product, business acumen, or historic accident'. A metaphor often used to suggest the same distinction involves a race between competing runners: contestants are permitted and encouraged to use all the speed and strength at their command, but they may not do anything that impedes the efforts of others. Unfortunately the utility of these standards as methods to assess specific types of marketplace conduct is often very limited.

The offence of predatory pricing – the concept of which is recognised by all the major competition law systems of the world – provides a classic example. Low prices are considered one of the principal objectives of free-market competition, but do the fundamental objectives of competition law require that there be a lower limit on a monopolist's price? Does a low price threaten to drive out or discipline other competitors so that customers and consumers may be exploited by higher prices charged by the monopolist in the long run? Again, all major competition law systems recognise this possibility, but they differ substantially in defining the elements of predatory pricing as a competition law offence. The US requires proof of 'below-cost' pricing (the specific standard of cost is yet to be defined authoritatively), plus a reasonable expectation that the monopolist can recoup profits sacrificed during the period of below-cost pricing with higher profits made possible by the exclusionary or disciplinary effects later on. The EU, like a number of other jurisdictions, does not require proof of a possibility of recoupment under its 'abuse of dominance' principles.

Of particular relevance to the telecoms, media and internet fields – industries often subject to sectoral regulation – is a distinction between exclusionary and exploitative conduct. In the US only exclusionary conduct is considered potentially subject to unilateral-conduct rules; a monopolist in the US may charge as high a price as it determines in its own discretion. It has even been suggested that supra-competitive profits serve the beneficial functions of providing rewards for superior business performance and luring additional entrants into the affected market. But in the EU and other like-minded jurisdictions, an 'exploitative' or excessively high price (although rare) may in theory be condemned under the law. In the US, attempting to limit monopoly pricing is regarded as a regulatory function, generally unsuited for the judicial system and appropriate (if at all) for sectoral regulators. From early days in the US, remedies proposed for acts of monopolisation have often been rejected on the grounds that they would unduly interfere with the jurisdiction of sectoral regulators assigned to ensure 'just and reasonable' prices and other terms of trade. The US choice to disregard monopoly exploitation as such (that is, so long as it is not exclusionary) has not carried the day in the EU and other 'abuse of dominance' jurisdictions, which remain open to challenges of 'exploitative' forms of abuse.

Of particular relevance to the telecommunications sector is whether a 'price squeeze' or 'margin squeeze' may be a form of unlawful abuse or monopolising conduct. This is the practice whereby an operator with substantial market power that competes at both the wholesale level (providing elements of a landline telecommunications network, for example) and the retail level (using its network to provide specific telecommunications services to ultimate customers) collects wholesale charges so high – and simultaneously charges retail prices so low – that retail competitors have no opportunity (or only severely limited opportunities) to compete with the network operator at retail. Whether such conduct is subject to competition law liability and, if so, what elements of proof are required to establish such liability are both controversial questions. Consideration of these issues may be influenced by whether the wholesale or retail charges are subject to regulation, such that regulatory remedies for such conduct are possible even where competition law remedies may not be.

IV ENFORCEMENT

The impact of competition law is shaped not only by the substantive standards applied to specific forms of business conduct, but also by a broad range of other provisions and arrangements that comprise the overall enforcement environment. Some of these are part of the overarching legal regime in the particular jurisdiction, while others are specialised or unique to competition law. Among considerations that determine the make-up of the enforcement environment, the following are among the more obvious:

a the basic institutions empowered to take up and resolve competition matters (administrative agencies, prosecutors, courts, appellate tribunals, etc.);

b methods of investigation used to obtain evidence (demands for documents, testimony or tangible items, entry and inspection of premises, etc.);

c proceedings to weigh evidence, assess liability and to prescribe and enforce remedies (trials, administrative hearings), including private-party standing to seek relief for competition law violations; and

d remedies applicable to individuals and businesses that violate competition law (such as criminal penalties, civil or administrative fines, civil damages, injunctions including divestiture or limits on the conduct of business, etc.).

This section gives some sense of the power and diversity of antitrust enforcement mechanisms encountered in the global competition law enforcement system.

i The US system – an antitrust superpower and microcosm of enforcement

The US remains the jurisdiction with the longest and strongest record of competition-law enforcement (although recent enforcement enthusiasm in other jurisdictions may challenge the US system in some respects). The US system is formidable and intricate and must be reckoned with by any firm whose affairs touch US commerce. For present purposes the US also constitutes a microcosm of enforcement institutions, procedures and remedies for competition matters found in other jurisdictions. Although many new forms of enforcement have emerged outside the US, a description of the US system can at least suggest the power and variety of competition law mechanisms encountered around the world.

Two federal agencies are charged with enforcement responsibility: the antitrust division of the Department of Justice (DoJ) (the cabinet department in the executive branch holding the portfolio for legal affairs) and the Federal Trade Commission (FTC). The FTC is a five-member, supposedly independent regulatory agency controlled by a complex array of connections to Congress (which oversees the FTC's legislative authority and its budget and acts as gatekeeper for presidential nominations of the Commissioners), the President (who nominates the Commissioners for Senate approval and designates the Chair) and the federal courts (which review FTC decisions).

The DoJ has exclusive federal authority to employ criminal-law procedures such as convening grand juries and procuring indictments in competition matters. Antitrust violations, when prosecuted criminally, are serious felonies under federal law. Convicted individuals may be incarcerated for up to 10 years and subjected to substantial fines. With increasing frequency in recent years, corporate fines in criminal antitrust matters have extended into the hundreds of millions of dollars. Lengthy periods of actual incarceration have become the norm for convicted individuals – a pattern that is gaining increasing acceptance in other jurisdictions.

The DoJ may also bring civil actions to enjoin violations. While cartel cases are always pursued as criminal matters, civil proceedings are the norm for all other types of cases (involving conduct whose legality must be established by careful examination of industry and product characteristics as well as the specific risks and benefits of the challenged practices). The main arena for resolving contested merger cases is injunctive proceedings that the DoJ is authorised to bring before federal district courts. Similarly, monopolisation cases brought by the Department are generally pursued as civil matters through the district courts.

The DoJ has no authority to determine guilt or innocence or to assess remedies in any case, civil or criminal. To affect private-sector behaviour the Department must obtain and file indictments or file complaints in court and obtain convictions or determinations of liability and then must convince the court to impose an appropriate remedy. In reality, however, the majority of merger matters are settled by consent-decree rather than by judgment following trial, and other types of cases are often disposed of by consent as well. Courts play a limited role in approving such settlements, and resort to the court is sometimes required for decree enforcement, but the practice of working out settlements is almost entirely within the control of the Department and the parties accused of unlawful conduct. Criminal matters are also frequently settled by plea agreements, where the court has a more substantial role in assessing remedies.

The FTC lacks criminal-enforcement authority, which generally leads it to defer to the DoJ in cartel matters. However it has a broad administrative mandate and a variety of unique enforcement tools not available to the DoJ. On merger matters the two agencies divide responsibility case-by-case through informal agreement, and to an extent the FTC generally proceeds in a way similar to the DoJ, seeking injunctive relief in federal district court when a merger case is contested. However the FTC employs administrative law judges who are authorised to conduct adjudicative hearings to rule on Commission complaints. The Commission may adopt decisions made by the administrative law judge following the hearing, or undertake *de novo* review of the matter.

The Commission is required to file an administrative complaint on its own docket before it may seek injunctive relief in court, but it may proceed to adjudicate its complaint regardless of the outcome in court. Orders issued by the Commission in its own adjudications are subject to review by a federal Court of Appeals. The Commission may proceed similarly on other competition law matters, including monopolisation and other single-firm conduct cases. (The FTC also has additional cards to play: its organic statute authorises proceedings to prevent 'unfair methods of competition' as well as deceptive acts and practices. Deception is primarily a consumer-protection matter not further addressed herein.) Moreover, apart from its pursuit of orders through administrative proceedings in specific matters, the Commission also has authority to investigate and report on firms and industries whose activities affect commerce.

While the authority of these two federal agencies is broad, this is only the beginning of the description of the US competition law enforcement arsenal. Any private party injured in its 'business or property' by an antitrust violation may bring suit in a federal district court to recover from the violator three times the amount of actual damages sustained. This places in the hands of every US firm and citizen the potential to become an enforcer of US antitrust law. A wide variety of other US legal practices encourages the pursuit of private federal antitrust litigation. Some are characteristics of the broader US legal system: extensive pretrial discovery and 'opt-out' class-actions that allow aggregation of thousands or even millions of claims for simultaneous determination. Others are unique to US competition law: mandatory trebling of private damages, one-way fee shifting in favour of plaintiffs (i.e., losing defendants pay successful plaintiffs' attorney's fees, but losing plaintiffs need pay nothing to defendants), joint and several liability (permitting the plaintiff complete discretion in allocating liability for damages among co-conspirators), estimation of the amount of damages through any means short of 'pure speculation', and the like. These features have helped to make antitrust cases one of the most prolific categories of litigation in the US legal system.

Finally, the states also have a significant role in US competition law enforcement. Every state has laws similar to the federal antitrust laws (although not identical to the federal law in every respect), and can enforce those laws through its own courts. There is also considerable federal–state cooperation and other forms of interaction that can be significant in many types of cases. States (through their legal officers) often cooperate in federal investigations and join federal agencies in filing complaints (or file parallel but distinct complaints regarding the same subject matter). States have authority to enforce federal competition law through a variety of mechanisms, including *parens patriae* actions in which the state may sue on behalf of its citizens who may be injured by violations.

Indeed, many states have nullified certain federal doctrines that might otherwise reduce liability. The most significant of these are the state statutes that abrogate the federal-law principle that only direct purchasers may recover damages from an antitrust violator in a private treble-damages action. This has created an entire category of antitrust claims, including major class actions, known as 'indirect purchaser' suits. A number of states also continue to regard vertical minimum price agreements as *per se* violations, unlike federal law, which assesses such agreements according to the usual 'rule of reason' standard applied to all other vertical restraints and to horizontal restraints other than cartel offences.

ii The European system – a unique and leading example of the administrative enforcement model

The procedures, institutions, exemptions, remedies and other key features found among the competition laws of the world are far too diverse to allow even the briefest summary in a single chapter. With significant exceptions, most competition law enforcement outside the US employs administrative methods, presenting a sharp contrast with the US, where the judiciary has a pervasive influence on the law and, aside from FTC administrative adjudication, individual contested cases are typically resolved in the courts. Because the EU is in many respects as active as the US, and given the size of the EU economy and the vigour with which its competition rules are now enforced, a description of its procedural methods will illustrate some of the main characteristics of an administrative model of competition law enforcement. The reader is cautioned, however, that EU competition-law enforcement has a number of special characteristics that cannot easily be analogised to other jurisdictions.

EU competition rules are based on broad principles contained in the articles of one of the EU's basic constitutional documents, the Treaty on the Functioning of the European Union (TFEU). The various EU institutions have their own roles in elaborating and enforcing these articles. Through the various judgments of the European courts and adoption of regulations, directives, guidelines and other instruments, EU competition law comes to be applied to the three basic forms of business conduct (restrictive agreements, abuse of dominance and structural transactions, known in the EU as 'concentrations'). Moreover, there is an organic relationship between the EU Member States and the EU institutions in the field of competition law. Each EU Member State has its own competition law based broadly on the TFEU articles, and each (save Luxembourg) has its own enforcement agency. The main engine of EU competition law enforcement is the European Commission, the top-level executive body of the EU and 'guardian of the Treaties'. There is a coherence and relatively high degree of coordination evident in the manner in which competition law is applied throughout the EU, including at Member State level, arising from decades of interaction between Member States and the EU Commission and the primacy of EU law over national law. The competition agencies of the EU and its Member States are woven together in a 'European Competition Network' and a variety of mechanisms exist for referral of specific competition cases (in whole or in part) between the Member States and the EU, both at the agency enforcement level and between Member State courts and the EU court of final appeal, the Court of Justice.

In specific cases the European Commission proceeds through an administrative process. The EU has no criminal enforcement authority in the field of competition law, nor does it have jurisdiction over individuals. (These limitations do not bind the competition agencies of the Member States, where national law largely determines methods of proceeding, remedy, etc.) It operates solely by applying its competition law to 'undertakings', and it does so under the direct authority of the Commission itself. The EU has established a Directorate General for Competition that carries out the day-to-day functions of applying the competition rules, but all official actions are ultimately the responsibility of the full college of Commissioners (one of whom holds the competition portfolio). DG Comp, as it is called, exercises authority to begin an investigation suo moto, or upon a complaint. It may seek information from any party through written requests, and it frequently conducts unannounced inspections (colloquially but more-or-less accurately called 'dawn raids') at business premises (as well as on domestic premises and vehicles used for business purposes) to obtain documents and conduct on-the-spot interviews relevant to investigations of potential infringements. Obstruction of these powers can lead to serious fines.

Following investigation the Commission digests the information available to it, including further information obtained through questionnaires and meetings and determines whether to issue a statement of objections to any party believed to have committed an infringement. This document sets forth the allegations and describes evidence in support of the Commission's statement. Those to whom the statement of objections is addressed are granted access to review the Commission's investigative file (subject to some exceptions) so that they can understand and respond to the Commission's allegations. Parties are also entitled to request an oral hearing presided over by a hearing officer, where the Commission's staff details the allegations and the parties may present a response. Complaining parties often are also present and may make their own presentations. Members of the Advisory Committee (whose input is required prior to decision by the Commission), consisting of representatives of each Member State, are also present and may question the staff, the parties or the complainants. Other Commission services may also be represented at the hearing. No Commissioner or other decision maker is present for such hearings, which are not regarded as an essential procedural step. At the hearing there is an informal approach to the use of documents and testimony, as contrasted with judicial procedures where rules of evidence, rights of cross-examination and various other procedural protections must be observed. Parties can and do forgo the opportunity to have an oral hearing. Decisions of the Commission are subject to review by the EU General Court and then finally by the Court of Justice.

The administrative elements of EU procedure are widely emulated in various degrees of detail by many competition agencies throughout the world. As previously described, even the US has its FTC, which resembles the European Commission in some key respects (although there are sharp and significant contrasts to be observed as well). On the other hand, many jurisdictions prosecute certain varieties of competition law matters through the courts, or incorporate more elements of judicial procedure than are characteristic of the typical EC proceeding. Then too, many other jurisdictions follow procedures that have no clear analogue in US or European practice.

In China, for example, competition law enforcement occurs under the broad authority of the State Council, the senior executive body of the government, and the Antimonopoly Commission, which includes a number of Chinese government agencies. Day-to-day enforcement responsibility is divided among the Antimonopoly Bureau of the Ministry of Commerce (for merger review only), the National Development and Reform Commission, the key general economic policy body of the central government (for price-related non-merger matters only) and the State Administration for Industry and Commerce, another large central-government agency charged with a variety of economic regulatory missions (for non-price-related non-merger matters only). Each Chinese agency has the authority to delegate its enforcement prerogatives to subordinate jurisdictions including provinces and municipalities, and a significant amount of enforcement in China seems to takes place at these subordinate levels (although apparently in close coordination with the central government agencies). China also provides for private rights of action through the courts. Thus the Chinese system emulates by degrees the US and EU systems, but it also has critical features that find no ready analogy in other systems of competition law.

As previously mentioned, it is not possible to summarise in this chapter the enormous diversity of enforcement modalities for competition law that may be found worldwide. The foregoing descriptions have been intended merely to suggest their potential range. Further information can be found in general publications such as the American Bar Association Section of Antitrust Law's Competition Laws Outside the United States (2011), or by reviewing material on the websites of the various competition agencies around the world, which are, for example, listed on the website of the International Competition Network (www.internationalcompetitionnetwork.org).

V COMPETITION LAW AND SECTORAL REGULATION

Another critical area that influences the application of competition law to the telecoms, internet and media sectors is the relationship between competition law and sectoral regulation. Competition law is usually thought of as a form of general economic legislation that governs business conduct among the broad run of firms throughout the economy of the jurisdiction in question. Of course, firms are always subject to other forms of regulation, but the focus here is on a particular model of regulation typically applied to firms in key sectors – generally including telecommunications, transportation and energy. Such regulation is primarily of an economic nature, involving the licensing of entry or exit by qualified operators, controlling the prices, terms and conditions on which products and services are offered, in order to prevent operators from obtaining excessive profits where such profits are made possible by regulations that grant exclusive or limited operating rights and thus limit competition. Economic regulations often include limits on structural transactions involving regulated operators.

In the broadest sense sectoral regulation is an alternative to competition as a policy mechanism for assuring the provision of products or services at best prices and other terms for customers and consumers. There is broad scope for debate as to the wisdom of subjecting any particular sector to economic regulation, or relying upon a regime of competition subject primarily or exclusively to competition law enforcement. Indeed, hybrid regimes tend to be the norm in many sectors: certain telecommunications operators, for example, are allowed to conduct their activities free of regulatory intervention – but subject to competition law enforcement – if the operators in that particular sector have been determined by the specific sectoral regulator to be subject to effective competition. Moreover, telecommunications firms are frequently if not always subject to both competition law enforcement and sectoral regulation. There are circumstances, however, in which sectoral regulation may completely displace competition law.

Looking at the broader sweep of recent history, a distinct trend toward reliance on competition and less use of sectoral regulation has become evident in many developed jurisdictions. In the US, for example, virtually all telecommunications service was provided by a regulated monopolist (the Bell System) as recently as the 1970s. Impelled by changes in technology and shifting public assessment of the relative merits of regulation and competition, new operators were allowed in the long-distance telephony sector, and aggressive competition law enforcement began to pressure the Bell System to allow competing telecommunications equipment providers to offer their products, and to permit the competing long-distance operators to interconnect locally through Bell System affiliates. Despite Bell System efforts to defend its traditional monopoly by reference to longstanding practice and the rights granted by legislation and by the regulations of the Federal Communications Commission, ultimately the Bell System was compelled to pay significant antitrust damages to competing equipment suppliers and to a competing long-distance carrier. Eventually the Bell System agreed to a massive spin-off of its local affiliates and certain other activities in order to settle the Justice Department's civil suit alleging monopolisation. Key to the allegations in both the government and private antitrust proceedings were the complainants' refutation of the Bell System's position that its conduct was properly based on legal rights provided in legislation and sectoral regulation.

A similar trend toward greater reliance on competition relative to sectoral regulation is evident in many other jurisdictions. The impressive proliferation of alternative communications technologies has tended to reinforce this evolution. Mobile and wireless communication, packet switching and the internet, optical transmission and switching, as well as the spectacular rise in the capabilities of communications devices of every description due to epochal improvements in the basic underlying technology of data processing and transmission, underlie this development. As competition becomes technically feasible, it invites greater reliance on competition subject to competition law and less reliance on command-and-control economic regulation.

Yet the progression from sectoral regulation to competition is hardly uniform. The EU presents an example of the complexities involved: most individual EU Member States had a legacy of PTT dominance in basic telephony and other communications methods of earlier times. Both operators and the sectoral regulators were organised along national lines, and the jurisdiction of the EU was largely absent in this highly regulated sector. The interests of the Member State, its PTT and its sectoral regulator were to some extent indistinct and this confluence of interest did not necessarily favour rapid introduction of new operators and breakthrough technologies, which would have tended to undermine the position of incumbents. As the European Economic Community evolved into the European Union and the integration of the Single European Market progressed, and as the membership of the EEC and then the EU expanded significantly (from the six original Member States of the EEC in 1957 to the current 28 EU Member States as of this writing), European authorities exerted legal and policy efforts to separate the public function of regulation from the business activities of the PTTs, then encouraged the national sectoral regulators to permit broader scope to allow competing operators into various segments of the telecommunications sector, ultimately culminating in active (albeit still highly controversial) proposals for a single integrated EU telecommunications market.

Similar evolution has occurred in many jurisdictions, with the characteristics and speed of such changes being highly dependent on a wide variety of local political and economic conditions, the historical development of the communications industry and its users, as well as the particular characteristics of the local legal and regulatory system. The importance of these efforts, as well as their diversity, is well illustrated by some of the most important recent developments in the telecom, internet and media industries of various key global jurisdictions.

As just discussed, the EU – with a PTT legacy focused on monopoly regulated at national level, with concomitant freedom from competition law constraints – is currently grappling with questions of whether to promote an integrated EU-wide market. This would include, for example, requirements for 'net neutrality', authorisations that would allow operators to participate on an EU-wide basis (rather than on national basis as at present), and abolition of roaming rates for mobile telephony within the EU.

Approval of mergers in the telecoms, internet and media sectors always provide governments with a ready point of leverage to control competition conditions and to seek other concessions from operators across a wide variety of policy portfolios. Mobile operators, for example, reportedly have been asked recently to accede to certain government security protocols that involve accessing communications ordinarily enjoying a presumption of privacy. The same appears to be the case for recent structural transactions involving telecoms equipment manufacturers, as well as for transactions involving Tier 1 internet backbone providers. At the time of writing the EU appears to be about to adopt legislation establishing a single market in telecommunications, yet details seem uncertain.

Finally, numerous competition law issues continue to be raised with reference to firms active in the internet search business, with a number of jurisdictions scrutinising the practices of Google Inc. While the US Federal Trade Commission concluded a major investigation of Google with a consent resolution, the EU continues its own investigation of Google. At the time of writing, published comments of the EU Competition Commissioner indicate that a proposed consent resolution originally deemed acceptable by the European Commission and Google is being reconsidered. It therefore seems that the investigation may not be concluded until the investiture of the new Commission members scheduled for November 2014.

Chapter 7

FRANCE

Myria Saarinen and Jean-Luc Juhan[1]

I OVERVIEW

The French regulatory framework is still based on the historical distinction between telecoms and postal activities, on the one hand, and radio and television activities, on the other hand (sectors are still governed by separate legislation and by separate regulators). Amendments in the past 15 years were conceived as to reflect the progress and the convergence of electronic communications, media and technologies; and the liberalisation of the TMT sectors caused by the *de facto* competition between fixed telephony (a monopoly until 1998) and new technologies of terrestrial, satellite and internet networks. French law also mirrors the EU regulatory framework through the enactment of the three EU Telecoms Packages in 1996, 2002 and 2009 that have been fully transposed into French law.

The TMT sectors in France have been fully open to competition since 1 January 1998 and are characterised by the interactions of mandatory provisions originating from many sources and involving many actors (regulators, telecoms operators and local, regional and national authorities). The TMT sectors are key to the French economy and 2013 is once again an important year in many respects for these sectors' business.

The major trends in the telecommunications and internet sectors in 2013 were (1) the acceleration in the transition to superfast broadband on both fixed and mobile networks, as much in terms of coverage as subscription numbers; (2) the start of growing reconfiguration of the sector, brought in particular by Vivendi's decision to sell off SFR, France's second-largest mobile operator; and (3) the growing imbalance of economic power between the top internet companies and ISPs, which is one of the central issues of today's net neutrality debate. Wholesale and retail electronic communications markets

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in France generated €46.6 billion in revenue, marking the third consecutive annual decrease, which can be attributed to the drop in retail prices (-10.3 per cent according to the national statistics office, INSEE), which has only been partially offset by the rise in volume. However, the average EBITDA remained unchanged from 2012, which can be attributed in particular to a drop in costs enabled by sizeable productivity gains. Having acquired no licences in 2013, operators were able to maintain their essential physical investments at the record-high levels reached in 2011 and 2012, €7.1 billion, which allowed them to finance the deployment of next-generation fixed and mobile superfast networks, in addition to upgrading their existing systems.[2]

In 2013 media markets were marked by the 'continuity and renewal' of regulation, in particular with the adoption of new legal provisions aiming at increasing the independence of the French public broadcasting and improving spectrum management.[3]

II REGULATION

i The regulators

There are four specialist authorities involved in the regulation of technology, media and telecommunications in France:

a The Electronic Communications and Postal Regulatory Authority (ARCEP) is the independent government agency that oversees the electronic communications and postal services sector. It ensures the implementation of a universal service, imposes requirements upon operators that exert a significant influence in the context of market analyses, participates in defining the regulatory framework, allocates finite resources (radio frequencies and numbers), sanctions,[4] resolves disputes and delivers authorisations for postal activities.

b The Superior Audio-visual Council (CSA) is the regulatory authority responsible for the audio-visual sector. The CSA sets rules on broadcasting content and allocates frequencies by granting licences to radio and television operators. It also settles disputes that may arise between TV channels and their distributors, and is empowered to impose sanctions on operators in case of breach of specific regulations. Law No. 2013-1028 of 15 November 2013 relating to the independence of the French public service broadcasting has amended the legal

2 See the ARCEP annual report, 2013.

3 See the CSA annual report, 2013.

4 The ARCEP's sanctioning power has been restored by Order No. 2014-329 of 12 March 2014 on the Digital Economy after the French Constitutional Council ruled that the legal provisions contained in the CPCE governing ARCEP's power to sanction were unconstitutional as they did not comply with the principle of impartiality (see Constitutional Council, Decision No. 2013-331 QPC of 5 July 2013). The new provisions in the CPCE introduce a separation of the proceedings and the adjudication functions by assigning them to different members of the ARCEP Board (see new Articles L5-3, L36-11 and L130 of the CPCE). The terms of application for this new sanctions procedure have been specified by a Decree No. 2014-867 of 1 August 2014 (see new Articles D594 to D599 of the CPCE).

nature of the CSA, its composition, the status and appointment procedure of its members and their powers (see Section IV.i, *infra*).

c The Data Protection Authority (CNIL) ensures the protection of personal data. Automatic personal data processing systems must be declared to the CNIL. The CNIL also supervises compliance with the law, by inspecting IT systems and applications, and is empowered to issue sanctions that range from warnings to fines.

d The High Authority for the Distribution of Works and the Protection of copyright on the Internet (HADOPI), which was established in 2009, is in charge of protecting intellectual property rights over works of art and literature on the internet.

These four authorities may deliver opinions upon request by the government, parliament or other independent administrative authorities such as the French Competition Authority (FCA), which also renders decisions and opinions that may have a structural impact on these sectors (except for HADOPI). The National Frequencies Agency is also an important agency responsible for managing frequency spectrum and planning its use (see Section IV, *infra*).

The CSA and ARCEP are the two main regulators in the TMT sectors. Discussions about the opportunity to merge these two entities at the time of the convergence or to limit the powers of ARCEP have regularly occurred within the past years. Finally, the merger proposal was given up. Instead, it was argued that the two regulators should work in closer cooperation on certain common subjects.

The prevailing regulatory regime in France regarding electronic communications is contained primarily in the Post and Electronic Communications Code (CPCE) and regarding audio-visual communications in Law No. 86-1067 of 30 September 1986 on Freedom to Communicate, as subsequently amended. The main piece of legislation governing the law applicable to data protection is Law No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties, as subsequently amended. Intellectual property rights are governed by the Intellectual Property Code.

ii Regulated activities

Telecoms

Telecoms activities and related authorisations/licences are regulated under the CPCE.

To become a telecoms operator, no specific licences or authorisations are required; the implementation and the operation of public networks and the supply of electronic communication services to the public is free, subject to prior notification to ARCEP (Articles L32-1 and L33-1 of the CPCE).

Conversely, the use of radio frequencies requires a licence granted by ARCEP (Article L42-1 of the CPCE).

Media

Authorisations and licensing in the media sector are regulated under Law No. 86-1067 of 30 September 1986.

Authorisations for private television and radio broadcasting on the hertz-based terrestrial frequencies are granted by the CSA following bid tenders and subject to the conclusion of an agreement with the CSA. The term of authorisations cannot exceed 10 years.[5] Broadcasting services that are not subject to CSA's authorisation, namely, those broadcast or distributed through a network that does not use frequencies allocated by the CSA (cable, satellite, ADSL, internet, telephony, etc.) are nevertheless subject to a standard agreement or a declaration regime.[6]

iii Ownership and market access restrictions

General regulation of foreign investment

Since the entry into force of Law No. 2004-669 of 9 July 2004, the discrimination of non-EU operators is prohibited and they are subject to the same rights and obligations as EU and national operators.[7] According to Article L151-1 et seq. of the French Monetary and Financial Code, when a foreign (EU or non-EU) investment is made in a strategic sector (such as security, public defence, cryptographics or interception of correspondence)[8], the investor must submit a formal application dossier to the French Ministry of Economy for prior authorisation. Any transaction concluded without prior authorisation is null and void, and criminal sanctions (imprisonment of five years and a fine amounting to twice the amount of the transaction) are also applicable. A recent decree of 14 May 2014[9] has expanded the list of sectors in which foreign investors must seek prior authorisation by the French Ministry of Economy. In particular, the decree has added to the regulated activities referred to in Article R153-2 of the French Monetary and Financial Code, activities relating to the integrity, security and continuity of operation of networks and electronic communications services.

Specific ownership restrictions applicable to the media sector

French regulations provide for media ownership restrictions in order to preserve media pluralism and competition. In particular, any single individual or legal entity cannot hold, directly or indirectly, more than 49 per cent of the capital or the voting rights of a company that has an authorisation to provide a national terrestrial television service where the average audience for television services (either digital or analogue) exceeds 8 per cent. In addition, any single individual or legal entity that already holds a national terrestrial television service where the average audience for this service exceeds 8 per cent may not, directly or indirectly, hold more than 33 per cent of the capital or voting rights of a company that has an authorisation to provide a local terrestrial television service.[10]

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5 See Articles 28 to 32 of the Law of 30 September 1986 which determine the CSA's allocation procedures.

6 Articles 33 to 34-5 of the Law of 30 September 1986.

7 Article L33-1 III of the CPCE.

8 Article R153-2 of the French Monetary and Financial Code.

9 Decree No. 2014-479 of 14 May 2014.

10 Articles 39-I and 39-III of the Law of 30 September 1986.

Further, unless otherwise agreed in international agreements to which France is a party, a foreign national may not acquire shares in a company holding a licence for a radio or television service in France and that uses radio frequencies if this acquisition has the effect of raising (directly or indirectly) the share of capital or voting rights owned by foreign nationals to more than 20 per cent. This provision does not apply to service providers of which at least 80 per cent of the capital or voting rights are held by public radio broadcasters belonging to Council of Europe Member States, and of which at least 20 per cent is owned by one of the public companies mentioned in Article 44 of the Law of 30 September 1986.[11] Specific rules restricting cross-media ownership also apply.[12]

iv Transfers of control and assignments

The general French merger control framework applies to the TMT sectors, without prejudice to the aforementioned ownership restrictions and to specific provision for the media sector. The merger control rules are enforced by the FCA.[13]

Regarding the telecoms and post sectors, the FCA must provide ARCEP with any referrals regarding merger control and the ARCEP can issue a non-binding opinion.[14]

Regarding companies active in the radio or TV sector involved in a Phase II merger control procedure before the FCA, the FCA must obtain a non-binding opinion from the CSA.[15]

Any modification to the capital of companies authorised by the CSA to broadcast TV or radio services on a frequency is subject to the approval of the CSA.[16]

11 Article 40 of the Law of 30 September 1986.

12 Articles 41-1 to 41-2-1 of the Law of 30 September 1986.

13 For recent examples of mergers in the TMT sectors, see Decision of the FCA of 2 April 2014 No. 14-DCC-50 in which the FCA ruled again on the acquisition of D8 and D17 (formerly Direct 8 and Direct Star) by Canal Plus group, after the decision was quashed by the Council of State (the highest French administrative court), and cleared the transaction subject to several commitments (available at www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14DCC50); see also Decisions of 22 January 2014 No. 14-DCC-09 and of 24 December 2013 No. 13-DCC-199 regarding a series of acquisitions by the Altice group in the telecommunications sector (respectively of Numericable, a cable network electronic communications operator, and Mobius, telecoms operator in Réunion; available at www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14DCC09 and www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13DCC199). In June 2014, Altice/Numericable notified the proposed acquisition of mobile operator SFR to the FCA which opened in-depth probe in July 2014. The FCA is still reviewing the merger (see Section VI.ii, *infra*).

14 Article L36-10 of the CPCE.

15 Article 41-4 of the Law of 30 September 1986.

16 Article 42-3 of the Law of 30 September 1986.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Under the CPCE, electronic communications services other than voice telephony to the public may be provided freely.[17]

As regards the ADSL network, and following local loop unbundling, alternative operators must be provided with direct access to the copper pair infrastructure of France Télécom, the historical operator. Therefore, as with traditional fixed telephony, DSL networks are subject to asymmetrical regulation.

As regards services ISPs can operate freely and provide services but they must file a declaration with ARCEP before commencing operations.[18] A failure to comply with this obligation constitutes a criminal offence.[19]

More generally, ISPs must comply with the provisions of Law No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy governing e-commerce, encryption and liability of technical service providers, as subsequently amended. Law No. 2004-575 of 21 June 2004 also sets out a liability exemption regime for hosting service providers. They are not subject to a general obligation to monitor the information they transmit or store, nor are they obliged to look for facts or circumstances indicating illicit activity. Nevertheless, when the provider becomes aware that the data stored is obviously illicit, it has the obligation to remove the data or render its access impossible. In that respect, the question of the qualification as 'host provider' has been widely debated by French courts.[20]

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17 Article L32-1 of the CPCE.

18 Article L33-1 of the CPCE.

19 Article L39 of the CPCE. This risk is not theoretical: in March 2013, ARCEP informed the Paris Public Prosecutor of Skype's possible failure to comply with its obligation to declare itself as an electronic communications operator in France. According to ARCEP, most, if not all of the services that Skype provides relate to electronic communications; this does seem to be the case for the service that allows internet users located in France to call fixed and mobile numbers in France and around the world, using their computer or smartphone. As a result, ARCEP has requested several times that Skype declare itself as an electronic communications operator, which the company has so far failed to do.

20 This issue now seems resolved regarding video-sharing sites: see for instance the judgment by the French Supreme Court (Cass. civ. 1ère, 17 February 2011, No. 09-67896, *Joyeux Noël*) in which the Supreme Court recognised a simple hosting status for Dailymotion. This issue is still to be debated with respect to online marketplaces such as eBay from which it follows that French courts, which are favouring a very factual analysis of the role of the services provider, will give significant importance to judges' discretion. In that respect, See Cass. Com, 3 May 2012, No. 11-10.507, *Christian Dior Couture*; No. 11-10.505, *Louis Vuitton Malletier*; No. 11-10.508, *Parfums Christian Dior*, in which the Supreme Court confirmed an earlier decision of the Paris Court of Appeal that did not consider eBay as a 'host provider' and therefore refused to apply the liability-exemption regime. See in contrast, the *Brocanteurs v. eBay* case, CA Paris, Pôle 5, ch. 1, 4 April 2012, No. 10-00.878 in which second-hand and antique dealers accused

ii Universal service

The EU framework for universal services obligations, which defines universal services as the 'minimum set of services of specified quality to which all end users have access, at an affordable price in the light of specific national conditions, without distorting competition',[21] has been implemented by Law No. 96-659 of 26 July 1996 and further strengthened by Law No. 2008-3 of 3 January 2008. Universal service is one of the three components of public service in the telecoms sector in France (the two others being the supply of mandatory services for electronic communications and general interest missions).

Obligations of the operator in charge of universal service are listed in Article L35-1 of the CPCE and falls into three main categories of services:

a telephone service: connection to an affordable public telephone network enabling end-users to take charge of voice communications, facsimile communications and data communications at data rates that are sufficient to permit functional internet access and free emergency calls;

b enquiry and directory services (both in printed and electronic versions); and

c public payphones covering the national territory.

These services must be rendered at tariff and technical conditions that take into consideration the difficulties faced by some users, such as users with low incomes, and that do not discriminate between users on the ground of their geographical location.

The designation of the operator or operators in charge of universal service is made by the Minister in charge of electronic communications, following calls for applications (one per category). So far, only France Télécom-Orange has been selected as the operator guaranteeing the provision of universal services.

Universal service currently only covers telephone provision and not information technologies. However, in an Opinion No. 11-A-10 of 29 June 2011, the FCA considered that the reduced price policy (also called the 'social tariff') set up for telephone networks, pursuant to universal service rules, might be extended to internet services even though the EU Telecoms Package does not expressly allow for the inclusion of such in the universal service. In the absence of regulation, France Télécom-Orange launched a 'social tariff' for multi-service offers (telephone and internet) on 9 February 2012.

ARCEP determines the cost of universal service and, when it is necessary to finance it in case it represents an excessive burden for the operator in charge, ARCEP also determines the amount of the other operators' contributions to the financing of universal service obligations through a sectorial fund. In principle, every operator contributes to

eBay of encouraging illegal practices providing individuals with the means to compete unfairly against professionals, the Paris Court of Appeal considered eBay as a host provider able to benefit from the liability-exemption regime. The Court of Appeal based its decision on the fact that eBay had no knowledge or control of the ads stored on its site. If the seller was asked to provide certain information, it was for the purpose of ensuring a more secure relationship between its users.

21 Article 1(2) of Directive No. 2002/22/EC.

the financing, each contribution being calculated on the basis of the turnover realised by the operator in their electronic communications activities.[22]

iii Restrictions on the provision of service

Net neutrality is a growing policy concern in France.[23] From the electronic communications regulator's standpoint which focuses on the technical and economic conditions of traffic conveyance on the Internet, the key question in the debate over net neutrality is how much control internet stakeholders can rightfully exert over the traffic. This implies examining operators' practices on their networks, as well as their relationships with some content and application providers.

In that respect, ARCEP started discussions on net neutrality in 2010 that led to the issuance of 10 proposals to ensure the internet's smooth operation and balanced development, and to define the tools needed to maintain this balance.

ARCEP also issued an important decision on 29 March 2012 giving it the ability to gather information on the market for interconnection between ISPs and the main content and application providers.[24] The ARCEP decision had been disputed by American carriers AT&T and Verizon (MCI Communications Services) and by their French subsidiaries but the Council of State confirmed its legality in a decision dated 10 July 2013.[25] Feedback and lessons drawn from the first three rounds of information gathering in 2012 and 2013, along with the administrative inquiry that ARCEP conducted between November 2012 and July 2013 into interconnection between Iliad and Google,[26] have led the Authority to amend its 2012 decision. The new decision dated 18 March 2014[27] introduces two main changes to the system established in 2012: (1) it distinguishes the installed and configured capacity on each interconnection link covered by the decision; (2) it also allows ARCEP to request additional information periodically, to enable it to assess the scale of a presumed traffic overload on interconnection links. For the sake of simplicity, ARCEP has also reduced the amount of information that operators are required to provide, and the number of relationships covered by the decision.

Also in the context of net neutrality, the FCA issued a decision on 20 September 2012[28] regarding the dispute between the US operator Cogent and France Télécom in relation to a controversial issue: whether network operators are entitled to charge for

22 Article L35-3 of the CPCE.

23 See the opinion issued on 1 March 2013 by the French Digital Council (CNN) (available at www.cnnumerique.fr/wp-content/uploads/2013/03/130311-avis-net-neutralite-VFINALE.pdf).

24 Decision No. 2012-0366 of 29 March 2012.

25 Council of State, decision No. 360397 of 10 July 2013.

26 Decision No. 2013-0987 of 16 July 2013 by which ARCEP closed the administrative inquiry involving several companies, including Free and Google, on the technical and financial terms governing IP traffic routing.

27 Decision No. 2014-0353 of 18 March 2013.

28 Decision of the FCA of 20 September 2012 No. 12-D-18 on practices concerning reciprocal interconnection services in the area of internet connectivity.

opening additional capacity. The MegaUpload website – since then shut down by US authorities – was a Cogent customer that used to send, via Cogent, to subscribers of France Télécom's subsidiary Orange, very significant traffic volumes (up to 13 times greater than in the other direction), essentially video content downloaded by web users. In view of the severely asymmetric traffic to its detriment, exceeding the maximum ratio stated in its peering policy, France Télécom wished to charge for opening additional interconnection capacity. The FCA considered that such a practice was not liable to contravene competition law inasmuch as France Télécom did not refuse access to its subscribers by Cogent – and indeed opened additional capacity free of charge on several occasions between 2005 and 2011, in response to demand from Cogent – but simply requested payment for opening new capacity, in accordance with its peering policy, without seeking to charge for existing capacity hitherto provided free of charge. The FCA's decision has been confirmed by the Paris Court of Appeal in a decision of 19 December 2013.[29] An appeal against this decision is now pending before the French Supreme Court.

As to content, pursuant to the Law of 21 June 2004, ISPs have a purely technical role and they do not have the general obligation to review the content that they transmit or store. Nevertheless, when informed of unlawful information or activity, they must take prompt action to withdraw the relevant content, failing which their civil liability may be sought. Since 2009, HADOPI has been competent to address theft and piracy matters. It intervenes when requested by regularly constituted bodies for professional defence which are entitled to institute legal proceedings in order to defend the interests entrusted to them under their statutes (e.g., SACEM), or by the public prosecutor. After several formal notices to an offender, the procedure may result in a €1,500 fine.[30]

iv Security

Law No. 91-646 of 10 July 1991 concerning the secrecy of electronic communications, now codified in the Internal Security Code, provides that the Prime Minister may exceptionally authorise, for a maximum period of four months (renewable only upon a new decision), the interception of electronic communications in order to collect information relating to the defence of the nation or the safeguarding of elements that are key to France's scientific or economic capacity. The recent Law No. 2013-1168 on Military Programming (LPM) introduced a new chapter in the Internal Security Code relating to administrative access to data connection, including real-time geolocation.[31] The new regime, which will enter into force on 1 January 2015,[32] authorises the collection of 'information or documents' from operators as opposed to the collection of simply 'technical data', which is authorised under the current law. In addition, access to data organised by the new regime is exclusively administrative, namely, without judicial control. Requests for implementing such measures are submitted by designated

29 CA Paris, Pôle 5, ch. 5-7, 19 December 2013, No. 2012/19484.

30 See Articles L331-25, L336-3 and R335-5 of the of the Intellectual Property Code.

31 New Articles L246-1 et seq. of the Internal Security Code introduced by Article 20 of the LPM.

32 Article 20 IV of the LPM.

administrative agents to a 'chosen personality' appointed by the National Commission for the Control of Security Interceptions (CNCIS) upon proposal of the Prime Minister. CNCIS will be in charge of controlling (a posteriori) administrative agents' requests for using geolocation measures in the course of their investigation. The Minister for Internal Security, the Defence Minister and the Finance Minister can also issue direct requests for the implementation of real time geolocation measures to the Prime Minister, who, in this case will directly grant authorisations.

The collection and future processing of personal data is subject to several cumulative conditions, which include information, consent and legitimate purpose, and – as a matter of principle, subject to certain exceptions – no transfer outside the EU. Any operator that determines the purposes and the manner in which personal data are processed is considered a 'data controller' and therefore needs to file a prior declaration of such processing to the CNIL. According to the CNIL, IP addresses are considered as personal data.

In addition to these general rules applicable to the protection of personal data, the CPCE provides specific rules pursuant to which operators must delete or preserve the anonymity of any traffic data relating to a communication as soon as it is complete.[33] Exceptions are provided, however, in particular for the prevention of terrorism and in the pursuit of criminal offences.

French e-consumers benefit from consumer law provisions and from specific regulations. In particular, they are protected against unsolicited communications (such as spam) insofar as their consent is required prior to the use of their personal data for commercial exploitation. Moreover, consumers must be provided with valid means by which they may effectively request that such unsolicited communications cease.

Data used for the purpose of location identification are also to be considered as personal data in the meaning of the Law No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties. In the past few years, the CNIL has taken decisions on statistical measures of advertising effects based on locational identification of smartphones, pay-as-you-drive systems, anti-theft devices, Google Latitude and Google Street View. Two conditions are usually required: the individual's knowledge and consent.

Any person under 18 is considered a child under French law. Unlike in the US, there is no specific statute governing the protection of children online. In general terms, the Law of 21 June 2004 provides that an ISP should inform subscribers where there is a technical means of restricting access to selected services.

As for privacy, children's online rights are protected in the same way as those of adults. According to CNIL practice, collecting children's personal data is allowed only with prior authorisation from their parents and if clear information is provided to the child.

In addition, provisions aimed at protecting children against activities or products such as pornography, gaming or alcohol are enshrined in criminal law and in a range of sectorial legislation. In order to increase the efficiency of the existing provisions meant to

33 See Articles L34-1 and D98-5 of the CPCE.

prevent child pornography, Law No. 2011-267 on Performance Guidance for the Police and Security Services (LOPPSI 2) allows the administrative authorities to order an ISP to cut access to websites displaying images of child abuse.[34] Law No. 2010-788, dated 12 July 2010 (Grenelle II), also forbids any type of communication with the purpose of promoting the sale, the provision or the use of a mobile for children under 14 years old.[35]

Unauthorised access to automated data-processing systems is prohibited by Articles 323-1 to 323-7 of the French Penal Code. In addition, with regard to cyberattacks, LOPPSI 2 introduced a new offence of online identity theft at Article 226-4-1 of the French Penal Code and empowers police officers, upon judicial authorisation and only for a limited period, to install software in order to observe, collect, record, save and transmit all the content displayed on a computer's screen. It helps the detection of infringements, the collection of evidence and search for criminals by facilitating the creation of police files and by organising their coordination.

In terms of personal data protection, LOPPSI 2 increases the instances where authorities may set up, transfer and record images on public roads, premises or facilities open to the public in order to protect the rights and freedom of the individuals, and recognises that the CNIL has jurisdiction over the control of video protection systems.

v Cloud computing services

Cloud computing services, which comprise Iaas, Paas or Saas provision, have considerably developed in recent years. However, their use by companies raises new questions in terms of legal and risk management.

After the launch of a public consultation at the end of 2011, in order to clarify the applicable legal framework, the CNIL issued in 2012 practical recommendations for French companies, in particular small and medium-sized ones, contemplating using cloud computing services.[36] The guidance sets out a checklist applicable to both private and public clouds and with seven key steps to be followed by cloud customers, which can be summarised as follows:

a Identify the types of data and the data processing that could go to a cloud provider, particularly focusing on data such as personal data, sensitive personal data (within the meaning of the 95/46 EC Directive) as well as data that is strategic for the customer.

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34 See Article 6 of the Law of 21 June 2004.

35 Article L5231-3 of the Public Health Code.

36 CNIL, 'Recommandations pour les entreprises qui envisagent de souscrire à des services de Cloud computing,' available at www.cnil.fr/fileadmin/images/la_cnil/actualite/Recommandations_pour_les_entreprises_qui_envisagent_de_souscrire_a_des_services_de_Cloud.pdf; and 'Synthèse des réponses à la consultation publique sur le Cloud computing lancée par la CNIL d'octobre à décembre 2011 et analyse de la CNIL,' 25 June 2012, available at www.cnil.fr/fileadmin/images/la_cnil/actualite/Synthese_des_reponses_a_la_consultation_publique_sur_le_Cloud_et_analyse_de_la_CNIL.pdf.

b Determine the customer's requirements in terms of security from a legal (e.g., localisation of the data), technical (e.g., interoperability with the existing system) and practical (e.g., reversibility and data portability) standpoint.

c Undertake a risk analysis so as to ensure an adequate level of security.

d Identify the right cloud offering (Saas, PaaS, or IaaS; private, public or hybrid cloud solutions) based on the findings and conclusions of steps (a) and (b) (e.g., a public IaaS cloud for the website of the company and a private SaaS cloud for company e-mails).

e Choose the right cloud provider with sufficient service and privacy-level guarantees. First, this involves determining whether the cloud provider will act as a data processor (with the result that the cloud customer will bear full responsibility for the compliance of the data processing with French law) or as joint data controller. While the CNIL admits that cloud providers should generally be regarded as processors, it states that the provider will be a joint controller if it exclusively determines the technical means, with no real leverage for the customer to negotiate them (these considerations are not new – the CNIL had already outlined them in a former recommendation relating to cross-border transfer of data). In cases where the provider acts as joint controller, the CNIL recommends that the customer be responsible for the necessary filing with the CNIL and for providing the data subjects with information notices, while the customer and provider should both be responsible for implementing the confidentiality and security measures. In any event, the CNIL remains at liberty to redefine the relationship regardless of what is stated in the contractual provisions. Second, the CNIL imposes an obligation to include certain essential elements in the cloud computing contract. For the CNIL, this includes contractual provisions addressing, among other things, how complaints will be dealt with, notification of unauthorised access, a duty of cooperation with the data protection authorities, audit rights, requirements as to the location of the data and service-level agreements with penalties. The working document contains a list of recommended contractual clauses setting out these essential elements.

f Revisit customer's IT security policy in light of the conclusions of the risk analysis conducted in step (c).

g Update the risk analysis regularly.

In the document, the CNIL also suggests some model contractual clauses that can be included in cloud computing agreements.

IV SPECTRUM POLICY

i Development

The management of the entire French radio frequency spectrum is entrusted to a state agency, the National Frequencies Agency. It apportions the available radio spectrum, whose allocation is administered by governmental administrations (e.g., those of civil aviation, defence, space, the interior) and independent authorities (ARCEP and the CSA) (see Section II.ii, *supra*).

In recent years, French spectrum policy has primarily concerned the development of DTTV and the digital dividend. The total transition to DTTV was completed on 30 November 2011.

ii Flexible spectrum use

The trend towards greater flexibility in spectrum use is facilitated in France by the ability of operators to trade frequency licences, as introduced by the Law of 9 June 2004.[37]

The general terms of spectrum licence trading were defined by Decree No. 2006-1016 of 11 August 2006, and the list of frequency bands whose licences could be traded was laid down by a Ministerial Order of 11 August 2006. A frequency database that provides information regarding the terms for spectrum trading in the different frequency brands open in the secondary market is publicly accessible.[38] The spectrum licence holder may transfer all of its rights and obligations to a third party for the entire remainder of the licence (full transfer) or only a portion of its rights and obligations contained in the licence (e.g., geographical region or frequencies). Transfer of frequency licences is subject either to prior approval of ARCEP[39] or to notification to ARCEP, which may refuse the assignment under certain circumstances.[40] Another option available for operators is spectrum leasing, whereby the licence holder makes frequencies fully or partially available for a third party to operate. Unlike in a sale, the original licence holder remains entirely responsible for complying with the obligations attached to the frequency licence. All frequency-leasing operations require the prior approval of ARCEP.

iii Broadband and next-generation mobile spectrum use

Until 2009, there were three 3G licence holders in France: Orange France, SFR and Bouygues Telecom. The fourth 3G mobile licence was awarded to Free Mobile on 17 December 2009.

The next stage was the allocation of spectrum in the 800MHz and 2.6GHz bands for the deployments of ultra-high-speed 4G mobile network: in that respect, licence for the 2.6GHz frequency was awarded to Bouygues Telecom, Free Mobile, Orange France and SFR in September 2011[41] and in December 2011, licence for the 800MHz was awarded to the same operators except Free Mobile,[42] which has instead been granted roaming rights in priority roll-out areas.

In respect to mobile network, SFR and Bouygues Telecom announced in January 2014 that they have finalised and signed an agreement whereby the two operators will deploy a shared cellular network that covers a portion of France. The announcement followed the issuance of the FCA's Opinion No. 13-A-08 of 11 March 2013 on conditions for sharing and roaming on mobile networks in which the FCA developed

37 Article L42-3 of the CPCE.

38 www.arcep.fr/index.php?id=8977.

39 Article R20-44-9-2 of the CPCE.

40 Ibid.

41 Decision No. 2011-1080.

42 Decision No. 2011-1510.

in particular the conditions under which network sharing between mobile phone operators may be permitted without harming competition.[43] The announcement was welcomed by ARCEP, which indicated that resource-pooling agreements can provide telecommunications operators with a way to reduce their costs and increase the benefits passed onto users, including increased coverage and a better quality of service from both operators.[44] However, ARCEP also indicated that the fulfilment of certain conditions remain to be checked. In particular, the two operators must remain independent from one another, in both their business strategies and sales. In addition, it must be ascertained that the agreement will not squeeze certain competitors out of the market. Finally, the agreement must result in better coverage and quality of service provided to end users. These improvements must be quantifiable and verifiable over time. The ARCEP announced that it will work closely with the FCA on performing a detailed examination of the agreement, to verify whether these various conditions have indeed been met. It also remains to be seen how the recent acquisition of SFR by Altice/Numericable will affect the network sharing agreement between SFR and Bouygues Telecom.

iv Spectrum auctions and fees

Spectrum auctions in case of scarce resources

Pursuant to Article L42-2 of the CPCE, when scarce resources such as RF are at stake, the ARCEP may decide to limit the number of licences, either through a call for applications or by an auction. The government sets the terms and conditions governing these licensing selection procedures, and until now such proceedings have always been in the form of calls for applications.

Fees

Depending on their size and their turnover, electronic communication operators are subject to different types and levels of fee.[45] If an operator's licence only covers one region in France or its overseas regions, the fee is reduced by half.

In addition to these fees and pursuant to Articles R20-31 to R20-44 of the CPCE, licensed operators contribute to the financing of the universal services.

V MEDIA

i Restrictions on the provision of service

Media are, in particular, subject to a certain number of content requirements and restrictions.

43 Available at www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13A08.

44 See ARCEP press release on 31 January 2014.

45 Article 45 of the Law of Finance of 1987 as amended.

Content requirements
At least 60 per cent of the audio-visual works and films broadcasted by licensed television broadcasters must have been produced in the EU and 40 per cent must have been produced originally in French.[46]

As to private radio broadcasters they must – in principle – dedicate at least 40 per cent of their musical programmes to French music.[47]

Advertising
Advertising is particularly regulated in television broadcasting.[48] In particular, advertising must not disrupt the integrity of a film or programme and there must be at least 20 minutes between two advertising slots. Films may not be interrupted by advertising that lasts more than six minutes.

Rules governing advertisements are stricter on public channels. In particular, since 2009, advertising is banned on public service broadcasting channels from 8pm to 6am. This prohibition does not, however, concern general-interest messages, generic advertising (for the consumption of apples, dairy products, etc.) or sponsorships, which may continue to be broadcasted.

In addition, some sectors are prohibited from advertising such as alcoholic beverages above a certain level of alcohol or tobacco products.

ii Digital switchover

The digital switchover was carried out in most areas of France and was completed by the end of 2011.

The current landscape of free-to-air DTTV channels is composed of 25 public and private channels,[49] which already represents a wide range according to a recent statement by the CSA (see Section VI.i, *supra*).

As regards pay-DTTV channels,[50] Article 42-3 of the Law of 30 September 1986 as amended by Law No. 2013-1028 now permits the CSA to allow a pay service to broadcast in free-to-air or vice versa. The CSA recently used this new power to reject applications from TF1, M6 and Canal Plus groups to shift three of their respective pay-television channels to free-to-air (see Section VI.i, *infra*). Digital terrestrial radio was technically launched on 20 June 2014 and in July 2014, the CSA announced that approximately 60 stations were broadcasting using digital terrestrial radio. The CSA also

46 Articles 7 and 13 of Decree No. 90-66 of 17 January 1990.

47 Article 28 2° bis of the Law of 30 September 1986.

48 Decree No. 92-280 of 27 March 1992.

49 The list of free-to-air DTTV channels can be found on the CSA website at www.csa.fr/Television/Les-chaines-de-television/Les-chaines-hertziennes-terrestres/Les-chaines-nationales-gratuites.

50 The list of pay-DTTV channels can be found on the CSA website at www.csa.fr/Television/Les-chaines-de-television/Les-chaines-hertziennes-terrestres/Les-chaines-nationales-payantes.

announced that it will release a report on the status of digital terrestrial radio in France in the autumn 2014, a few months after its official launch.[51]

iii Internet-delivered video content

Internet video distribution refers to IPTV services, which can be classified into the three following main categories: live television, time-shifted programming and VOD.

For customers who cannot afford triple-play offers, access to video content is limited to the content of free channels. The regulatory framework for 'social' offers set by the Law of 4 August 2008 is indeed limited to mobile telephony offers, triple play offers being thus outside its scope. Following the FCA's Opinion No. 11-A-10 and in the absence of regulation, France Télécom-Orange launched a 'social tariff' for multi-service offers (telephone and internet) (see Section III.ii, *supra*).

iv Mobile services

Mobile personal television, initiated in 2007, has suffered from substantial delays due to disagreements among operators and content providers on the applicable economic model and on how to finance the deployment of a new network.

Thus, on 8 April 2010, the CSA delivered authorisations to 16 channels (13 private channels selected by the CSA after the call for applications launched on 6 November 2007, together with three public channels selected by the government) for the broadcasting of personal mobile television services.

On 22 April 2010, TDF[52] and the operator Virgin Mobile signed an agreement under which TDF committed to developing the new network with up to a 50 per cent coverage of the 'outdoor' population and 30 per cent of the 'indoor' population, with Virgin Mobile paying TDF a monthly per-customer fee using DVB-H, an airwave broadcasting format that does not allow interaction with the user. However, after Virgin Mobile's decision to withdraw from the project, TDF decided to end the agreement in January 2011 and in June 2011 it announced that it no longer wished to be the DVB-H operator in charge of mobile personal television. Further to TDF's withdrawal, the CSA granted a two-month period to the selected channels to appoint a new operator in charge of mobile personal television. On 14 February 2012, no operator being appointed, the CSA acknowledged that the project was abandoned and withdrew the authorisations it delivered to the 16 channels on 8 April 2010.[53]

VI THE YEAR IN REVIEW

i Reforms on the independence of the French public service broadcasting

On 15 November 2013, the French parliament adopted two Laws (Organic Law No. 2013-1026 and Law No. 2013-1028) aiming at increasing the independence of French public service broadcasting. In particular, the two Laws amend the CSA governance

51 See the CSA press release of 24 July 2014.

52 TéléDiffusion de France.

53 Decision No. 2012-275.

(including its legal nature, composition, the status and appointment procedure of its members and their powers) as well as the procedure for appointment of presidents of the French public broadcasting companies.

CSA governance

Pursuant to the provisions of Law No. 2013-1028, the composition of the CSA board is amended from nine to seven members and their appointment is now shared between the French President, the President of the National Assembly and the President of the Senate. The Chair will be the only member appointed by the French President. The appointment is however subject to a non-veto on the part of parliamentary committees in charge of cultural matters. Requirements relating to future members' experience and expertise have also been introduced.

In addition, to ensure that the CSA's power to impose sanctions fully complies with constitutional and European requirements for due process and impartiality, the new provisions have provided for prosecution and sanction to be handled by two different bodies. Prosecution will be handled by an independent rapporteur, appointed by the Deputy Chairman of the Council of State from among its judges.

Finally, the CSA's status has been modified from that of an independent authority to that of a public independent authority. As a public independent authority, the CSA now enjoys legal personality; as such, it will be better positioned to set its own management priorities, according to the appropriations voted and evaluated on an annual basis by Parliament.

The CSA's new governance scheme has been in effect since 1 January 2014.

Appointment of presidents of the French public broadcasting companies

Pursuant to the provisions of the organic Law No. 2013-1026, the power to appoint presidents of the French public broadcasting companies (France Télévisions, Radio France, French external broadcasting) has been withdrawn from the President of France. French public broadcasting companies will now be appointed by the CSA, as was the case until 2009.

Recent rejection of applications for free-to-air broadcasting

At the beginning of the year, TF1, M6 and Canal Plus groups sought the authorisation by the CSA to shift three of their respective pay-DTTV channels (LCI, a 24-hour news channel, Paris Première, a high-end cultural channel and Planète+, a documentary channel) to free-to-air, pursuant to new Article 42-3 of the Law of 30 September 1986. On 29 July 2014, the CSA rejected the three applications.[54]

The CSA said it based its decision primarily in consideration of three general issues: it first considered that the advertising market remained weak and that there were not enough revenues potential for more free-to-air channels. It also indicated that some free-to-air channels, in particular those launched recently, could be put at risk if the shift was approved. Finally, it indicated that, looking at the overall supply and demand

54 Decisions No. 2014-357 (TF1/LCI), No. 2014-358 (*M6/Paris Première*) and 2014-359 (*Canal Plus/Planète+*) of 29 July 2014.

for television consumption, the current landscape of 25 free-to-air channels already represented a wide range.

In addition, the CSA indicated that it analysed for each channel, whether a shift to free-to-air would be likely to affect the preservation of editorial diversity. As for LCI in particular, the CSA indicated that a shift to free-to-air could destabilise the two other 24-hour news channels (i>Télé, owned by Canal plus group, and BFM TV).

The CSA indicated that the decisions were issued further to an in-depth investigation process and that in particular the CSA asked for FCA's opinion.

It is interesting to note that, a few days after the CSA's decisions were issued, the FCA released its opinion on the matter.[55] The FCA concluded that the main competitive impact would concern LCI's shift to free-to-air. Thus the FCA limited its recommendations to TF1 group only.

In reaction to the CSA's decision, TF1's CEO Nonce Paolini said that it was likely that LCI will shut down after 31 December 2014 if it cannot shift to free-to-air. It remains to be seen how the decision will ultimately affect the viability of the three pay-DTTV channels.

ii Concentration in the telecommunications sector

During spring 2014, the Vivendi group announced that it had chosen the offer of the cable operator Numericable, a subsidiary of the Altice group, to acquire its subsidiary SFR, France's second-largest mobile operator. The FCA, in charge of reviewing the merger, indicated in July 2014 that it considered that the transaction raised serious competition concerns, thus requiring an in-depth investigation (i.e. Phase II merger control procedure).

The final acceptance by Vivendi group of the Altice/Numericable offer at the end of June 2014 ended a long bidding war between Altice and SFR's mobile rival Bouygues Telecom, which launched the debate over a possible consolidation from four to three mobile operators in France. Other European countries have seen such a shift to three mobile operators (in Austria for instance, which used to have five mobile operators). Operators argue that it is only by way of consolidation that they will have the necessary scale to be able to invest in network infrastructure as they are encouraged to do so in the EU by the European Commission in particular.

On the other hand, a recent survey has shown significant prices decreases in mobile services since the entry of the fourth mobile operator (by 27.2 per cent on average in 2013).[56]

During the course of the Phase II procedure, the FCA is to engage in extensive consultation with stakeholders in the markets. It will also consider the opinions of ARCEP and the CSA. In that respect, ARCEP indicated in a press release of 24 July 2014 that it had submitted its opinion to the FCA.

55 Opinion No. 14-A-07 of 18 June 2014.

56 See ARCEP survey 'The index of mobile prices from 2010 to 2013' released in May 2014 (available at www.arcep.fr/fileadmin/reprise/observatoire/indice-prix-mobiles/2010-2013/indice-prix-mobile-2010-2013-mai2014.pdf).

Chapter 8

GERMANY

Laura Johanna Reinlein and Gabriele Wunsch[1]

I OVERVIEW

ICT contributes more to wealth creation in Germany than the traditional technologies of automotive and mechanical engineering. With an annual business volume of approximately €228 billion in 2013,[2] the ICT sector is one of the largest economic sectors in Germany. Constantly growing, it already employs more than 900,000 people in Germany.[3]

ICT has become a driving force in Germany's economy contributing to 4.7 per cent of the national gross value added in 2013. Naturally, the legislator has to adjust the legal framework accordingly.

By focusing on key issues such as convergence, mobility, data protection and internet security, the government has tried to advance the information society through targeted policies to modernise legal and technical frameworks and to promote research and market-oriented development over the past decade. As part of this overall effort, the government adopted specific programmes and strategies tailored to the needs of the ICT sector. Currently, the German federal government is developing the Digital Agenda 2014–2017 focusing on a strategy for the digital future of Germany[4] and planning to

1 Laura Johanna Reinlein and Gabriele Wunsch are associates at Latham & Watkins LLP.

2 See www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html.

3 The German ICT industry has a market share in Europe of 18.9 per cent and thus is Europe's largest ICT market and the fourth-largest worldwide. In 2013 about 77 per cent of the German private households had internet access: www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html.

4 www.bmwi.de/DE/Themen/Digitale-Welt/digitale-agenda.html.

ensure nationwide broadband access with transmission rates of at least 50Mb/s also in rural areas until 2018 with the initiative Netalliance Digital Germany.[5]

The question as to whether media convergence as a technological phenomenon will inevitably lead to a convergence in media and telecommunications law is still the subject of much lively debate in the political and academic fields; the discussion is ongoing in Germany, with no clear trend apparent. The area of application of media law needs to be clarified, in light of the appearance of new and increasingly interconnected services along the convergence trend, and services need to be unambiguously and distinctly assigned to their suitable legal frameworks. Another predominant subject of current discussion is how to ensure internet security and data protection as more than 50 per cent of all German companies in every sector are already depending on the reliability of their own IT systems as well as a secure cyberspace at their disposition.

II REGULATION

i The regulators

Due to the federal policy of considering media as a 'fourth division' of power and a tendency to deregulate and decentralise, there is no single media authority in Germany. All television and radio broadcasters are subject to state control. Public service broadcasters are supervised by internal committees: content-related supervision is carried out by the respective broadcasting council. The respective administrative board, which is appointed by the broadcasting council, supervises all management decisions made by the director.

Private broadcasters, in contrast, are subject to external supervision. The competent authority is the respective state media authority of each German state,[6] whose responsibilities – apart from the supervision itself – includes granting authorisation according to Section 20, Paragraph 1 of the Inter-State Broadcasting Treaty (RStV), and assigning transmission capacities. Private and public television broadcasting in Germany is governed by the RStV, which outlines the side-by-side existence of public and private broadcasting. The provisions of the RStV have been modified 15 times since it came into force in 1987. The 15th amendment to the RStV came into effect on 1 January 2013.[7] Further legal sources, at a federal level, are various interstate treaties, especially

5 The netalliance as a platform for innovation and investment is formed by the government and ICT-companies and commenced its work in 2014 under the guidance of the German minister for transport and digital infrastructure Alexander Dobrindt (see www.bmvi.de/SharedDocs/DE/Artikel/Digitales/startschuss-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html).

6 Several states have joint media authorities, such as Berlin and Brandenburg as well as Hamburg and Schleswig-Holstein.

7 The 15th amendment primarily concerns the reform of the financing of the public broadcasting system; since January 2013, the level of broadcasting fees no longer depends on the kind or number of the receiver devices but a flat fee is charged for every household or office. The 14th modification of 2010 did not become effective because it had not been ratified by the state parliament of North-Rhine-Westphalia.

on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (the JMStV) and European-level directives (e.g., the Audiovisual Media Services Directive (AVMSD), treaties and conventions). In addition, there are individual state media laws.

The state media authorities are responsible for the allocation of the available transfer capacities.[8] They also have a wide range of powers to supervise broadcasters with, such as warnings, prohibitions or withdrawals and revocations of licences.[9]

All private broadcasters require a licence for the purpose of providing broadcasting services. According to Section 20, Paragraph 2 of the RStV, the provider of an electronic information and communications service – if it is to be categorised as broadcast – requires a licence as well. If the competent state media authority determines that this is the case, the provider, after being notified of this classification, must at his choice either submit a licence application within three months or change the service in a way that it is no longer to be qualified as broadcast. If in doubt about the classification of its service, a provider may request a certificate of non-objection stating that the service does not qualify as broadcast.

If an enterprise wishes to obtain a licence as a national broadcasting service provider, it needs to be a natural or legal person who:[10]

a has unlimited legal capacity;
b has not lost the ability to serve in a public capacity as a result of a legal ruling;
c has not forfeited the fundamental right of freedom of expression under the German Constitution;
d has not been banned as an organisation;
e has its residence or seat in Germany, another Member State of the European Union or another state of the European Economic Area (EEA) and can be pursued by the courts; and
f guarantees that in providing broadcasting, it will respect the legal provisions and any administrative acts passed thereon.

The state media authorities work together in a committee (ALM) in respect of licensing and supervision as well as in the development of private broadcasting in fundamental questions, primarily with a view to the equal treatment of private TV and radio broadcasters. The goals of this cooperation are laid down in the 'Basic Principles for the Collaboration of the Association of State Media Authorities in the Federal Republic of Germany' of 17 June 2011 (the ALM Statute). The main focus is on promoting programming diversity and thus freedom of information and opinion in private television and radio. This involves, in addition to controlling media power by means of licensing limitations and licence monitoring, also the promotion of media literacy of viewers and listeners.

8 Section 50ff of the RStV.
9 Section 38, Paragraph 2 of the RStV.
10 Section 20a, Paragraph 1 of the RStV.

The state media authorities are also responsible for the compliance of private TV and radio broadcasts with basic programming principles. They supervise the observance of regulations on advertising limitations, the protection of minors and the protection of pluralism. Their tasks are carried out by committees: the Licensing and Monitoring Commission (ZAK), the Directors' Conference of the State Media Authorities, the Committee Chairpersons' Conference, the Commission for the Protection of Minors in the Media (KJM) and the Commission on Concentration in the Media (KEK).

The compliance of telecommunications companies with the Telecommunications Act is monitored by the Federal Network Agency (BNetzA). The Agency ensures the liberalisation and deregulation of the telecommunications, postal and energy markets through non-discriminatory access and efficient use-of-system charges. It is responsible, *inter alia*, for securing efficient and interference-free use of frequencies and protecting public safety interests. Apart from regulation, the BNetzA performs a number of other tasks related to the telecommunications market such as administering frequencies and telephone numbers, detecting radio interference and offering advice to citizens on new regulations and their implications.

German telecommunications law has developed in accordance with the European Regulations. The 2002 Telecoms Package caused fundamental changes to the previous German telecommunications law and was implemented into the German Telecommunications Act (TKG) on 22 June 2004. Since then, further changes have been made (e.g., on data retention). The amendment of the TKG of 3 May 2012 particularly strengthened consumers' rights, for example, as regards the transparency of costs of telecommunication services and the charging of costs (such as those relating to waiting loops). Moreover, the amendment tackled the further development of broadband networks and spectrum regulation.[11] The amendment of 1 July 2013 substantially extended the rights of security authorities to monitor mobile and online communication and is currently being discussed critically.

ii Regulated activities

German telecommunications law does not generally oblige telecommunications services or network providers to apply for a licence; however, in accordance with the Access Directive (2002/19/EC), it requires certain providers such as public telecommunications network providers or providers of public telecommunications services to notify the Federal Network Agency when they start to provide the services or the network.[12] A notification is not necessary for non-public telecommunications networks or services.

iii Ownership and market access restrictions

Generally, German law makes no distinction between Germans and foreign nationals regarding investments or the establishment of companies. However, it provides for certain restrictions on foreign capital and investments. The German Federal Ministry of Economics and Technology may prohibit certain acts that might interfere with

11 See Scherer and Heinickel, NVwZ 2012, 585ff; Holznagel, NJW 2012, 1622ff.

12 Section 6 of the TKG.

German or foreign interests. *Inter alia*, these interests include the fundamental security of Germany or the prevention of the acquisition of a company or parts of a company that are vital to the security of Germany according to Section 4 of the Foreign Trade Law.[13]

Due to the security-related aspects of telecommunications services, the German Telecommunications Act imposes certain obligations on telecommunications service providers and network operators. Agreements relating to telecommunications services and network access can be negotiated freely (e.g., access, payment terms, currency and billing) with providers and operators, unless one party has significant market power (in which case, price terms and access obligations are regulated by the TKG and a provider with significant market power is not able to choose its customers freely).[14]

The TKG also provides for mandatory maximum liability of telecommunications providers for negligent infringements. The provider's liability for a publicly available telecommunications service is capped at compensation for damages in the amount of €12,500 with regard to an individual end-user if the provider's infringing act was not wilful. The total liability for claims by several end-users caused by a single event is capped at an amount of €10 million if the provider's infringing act was not wilful.[15]

The RStV contains special ownership control provisions[16] that are designed to ensure media-plurality objectives. These rules apply in addition to the general merger control regime under German and European competition law and are administered by the KEK.

iv Transfers of control and assignments

The German merger control provisions are enforced by the Federal Cartel Office (the BKartA) in Bonn. The current legislation can be found in Chapter VII of the Act Against Restraints of Competition (GWB), which deals with the control of concentrations affecting the German market.

The filing of merger notifications in Germany is mandatory if the turnover thresholds according to Section 35, Paragraph 1 of the GWB are met and none of the *de minimis* exemptions[17] apply. In addition, the completion of a (cleared) merger must be announced without undue delay (post-completion notice). If the statutory conditions

13 The Foreign Trade Law was last modified and thereby fully modernised in June 2013 to increase its comprehensibility.

14 See Sections 21 and 28 of the TKG.

15 See Section 44a of the TKG.

16 Section 25 et seq. of the RStV.

17 Two *de minimis* exemptions apply under the following conditions:
a one party to the merger achieved less than €10 million turnover during the preceding fiscal year (in the case of the target including the seller and all its affiliates, provided that the seller controls the target and, in the case of the acquirer, including all its affiliates) (Section 35, Paragraph 2); or
b the relevant market (which must have been in existence for at least five years) had a total annual value of less than €15 million in the last calendar year (*de minimis*' market clause, Section 36, Paragraph 1).

for prohibition are fulfilled, the BKartA will prohibit the merger. It also has the power to order the divestment or the disposal of certain assets where a merger has already been completed.

Mergers that are subject to merger control may not be completed before either the BKartA has cleared the transaction or the relevant waiting periods of one month (first phase) or four months (first and second phases together) after submission of a complete notification have expired without the BKartA having prohibited the transaction.

For the purpose of notification, the GWB, in Section 39, requires – as a minimum – a description of the transaction to be given in the notification, and in addition, sets out the following required information in respect of all participating enterprises:

a name and place of business or registered seat;
b type of business;
c turnover of the parties involved (worldwide, in the EU and in Germany);
d market shares of the parties in Germany and the basis of its own calculation if the combined market shares amount to 20 per cent or more;
e in the case of an acquisition of shares in another company, information about the shares already held in the target company and the shares to be acquired; and
f if the enterprise is not located in Germany, a person in Germany who is authorised to accept service.

There are no legal deadlines for a notification of a concentration, but notifiable concentrations must not be completed before clearance. Therefore, it is advisable to submit a notification well before the envisaged completion date. It is possible to file a pre-merger notification even prior to the signing of the transactional documents. Furthermore, parties should not forget to submit the mandatory post-completion notice to the BKartA, which needs to be filed without 'undue delay' following completion of the transaction.[18] In principle, all parties involved in a merger are responsible for filing. In the case of an acquisition of shares or assets, the vendor must make a notification as well. In practice, the filing is often done by the acquiring firm also on behalf of all other parties involved. The GWB provides for filing fees payable to the BKartA for merger proceedings. The fees can amount to up to €50,000. In cases of minor importance or with insignificant effect on the German market, the filing fees normally range between €3,000 and €15,000.

Submission of an incorrect or incomplete filing constitutes an administrative offence and can lead to a fine of up to €100,000. The same applies to the failure to submit a post-merger completion notice or in cases of incomplete, incorrect or late notice.[19]

18 See Getting the Deal Through: Merger Control 2014, http://gettingthedealthrough.com/books/20/jurisdictions/11/germany.

19 A fine of up to €1 million or, in the case of an undertaking, up to 10 per cent of its total worldwide group turnover in the preceding business year can be imposed if the notifying parties intentionally include or make use of incorrect or incomplete information in the notification with a view to causing the BKartA to refrain from issuing a prohibition decision or from opening a second-phase investigation.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Since the German parliament adopted the Telemedia Act (TMG) on 18 January 2007, last amended on 31 May 2010, all IP-based services are now regulated under this Act. The TMG no longer distinguishes between 'teleservices', which were previously covered by the Teleservices Act and 'media services', which were previously the subject of the Inter-State Agreement on Media Services. Instead, it combines the two concepts: commercial rules for telemedia are covered in the TMG, while aspects relating to journalistic content are regulated in a specific section of the Inter-State Broadcasting Treaty[20] and the JMStV. Telemedia services are permission-free and generally do not need to be registered.

Telecommunications services and telemedia services are mutually exclusive. Therefore, telecommunications are excluded from the scope of the TMG. In reality, the distinction is often difficult to make. Moreover, the regulatory structure of telemedia services oscillates somewhere between unregulated press law and the framed supervision the television and radio broadcasters are under. Thus, the state media authorities are also the regulators of telemedia services.

ii Universal service

Germany currently has good broadband penetration, which compares well against international levels. Based on the currently accepted broadband definition of at least 1Mb/s, penetration amounts to approximately 99.9 per cent of German households. Sixty per cent of German households currently have broadband access with transmission rates of 50Mb/s.[21]

The federal government intends to give a further boost to the development of the broadband network, which will be achieved by capitalising on synergies in the construction of infrastructure, using the 'digital dividend', formulating regulation that fosters investment and growth through financial support. Various initiatives exist at the federal, state and local level – especially worth mentioning is the German Broadband Initiative[22] and the Netalliance Digital Germany with the objective to ensure nationwide broadband access with transmission rates of at least 50Mb/s until 2018.[23]

Moreover, the federal government encourages projects to pursue best-practice solutions. For example, small and medium-sized telecommunications companies can

20 Section 54 et seq.

21 TÜV Rheinland, Bericht zum Breitbandatlas Ende 2013 im Auftrag des BMWi; see also: www.zukunft-breitband.de and Holznagel, NJW 2012, 1622 (1626).

22 See www.breitbandinitiative.de.

23 See www.bmvi.de/SharedDocs/DE/Artikel/Digitales/startschuss-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html. The newly competent Federal ministry for transport and digital infrastructure will further develop its broadband portal www.zukunft-breitband.de which had been initiated by the formerly competent Federal ministry for economic affairs. Apart from the yearly Broadband Atlas and best-practice examples, this portal also includes checklists for local authorities and information on financial support.

borrow funds on privileged terms and with adequate risk pricing through the corporate financing programme of Germany's state-owned development bank.[24]

In any event, the existing and modified federal and state loan guarantee scheme is generally available to companies in the telecommunications sector to prevent economically desirable broadband projects from failing due to a lack of suitable finance. With these programmes, the federal states or the federal government and federal states together assume up to 90 per cent of the risk of default for project financing.

The government's policy is to actively encourage people to use the internet and to help them acquire skills in the area of new media by, for example, providing governmental services electronically (e-government),[25] or in relation to transport and health-care telematics and the digitisation of cultural assets.

The 'white areas' in rural Germany are shrinking rapidly, partly due to ongoing investment by the network operators. The reduction has also largely been achieved thanks to the hosting of action programmes offered by the federal states, local authority broadband initiatives in the areas affected and the nationwide activities of associations such as the German Association of Internet Enterprises (eco, see www.eco.de), the Association of the Providers of Telecommunications and Value-Added Services (www.vatm.de) and the Association of Towns and Municipalities (www.dstgb.de).

The National IT Summit, which takes place every year, examines the main challenges and identifies solutions for high-speed networks in Germany. The development of a sustainable broadband network is seen as an essential basis for the opening of new economic potential for growth and innovative business models. The next National IT Summit will take place in Hamburg in October 2014.[26]

The TKG amendment of 3 May 2012 contained special provisions to foster the extension of broadband networks.[27] Terrestrial transmission in Germany is now exclusively digital after the last analogue transmitters were switched off in 2008. Digital satellite reception also continues to expand; the same applies for cable. The terrestrial transmission of public and private TV broadcasts through satellites was terminated on 30 April 2012.

iii Restrictions on the provision of service

The Federal Network Agency is responsible for the surveillance of broadband network owners to comply with the TKG.[28] Whereas previously, the subject of net neutrality appeared to be of no major concern to the German or the European legislators – the

24 www.kfw.de/inlandsfoerderung/Unternehmen/Erweitern-Festigen/Breitbandnetze-finanzieren/.

25 The German parliament passed an 'e-government statute', which came into effect on 1 August 2013, see www.bmi.bund.de/DE/Themen/IT-Netzpolitik/E-Government/E-Government-Gesetz/e-government-gesetz_node.html. This statute facilitates electronic communication with administrative authorities.

26 www.it-gipfel.de/IT-Gipfel/Navigation/start.html.

27 Section 2 (3) of the TKG.

28 See Section 126ff of the TKG.

German legislator in particular trusted that existing competition would ensure neutral data transmission on the internet and other new media – the subject has gained considerable attention over the past years. The amendment of 3 May 2012 of the TKG introduced the concept of net neutrality.[29] The federal government is authorised to draft a regulation that sets out the requirements for non-discriminatory data transmissions and non-discriminatory access to contents and applications in order to preclude an arbitrary deterioration of services or an unjustified deceleration of data traffic.[30] After the German Telekom announced to throttle the speed of data transfers after reaching a certain data volume, the German Federal Ministry of Economics and Technology (BMWi) drafted a proposal for a regulation on net neutrality.[31] The regulation has not been passed yet, however.[32] A consultation process of the market participants and a study by the Body of European Regulators for Electronic Communications (GEREK) are intended to frame the actions that should be taken to safeguard net neutrality.[33] The European Commission published its legislative plans for net neutrality on 12 September 2013 (Connected Continent legislative package).[34] Under the Connected Continent legislative package, companies would, however, be allowed to differentiate their offers – for example, by speed – and compete on enhanced quality of service. The proposal states that 'there is nothing unusual about this – since postal services (express mail) and airlines (economy/ business class) have done this likewise for decades'.

iv Security

The federal government implemented the National Protection Plan for Information Structures (NPSI) based on plans for specific target groups.[35] The aim is to ensure a high level of IT security in the medium and long term. The NPSI addresses all social groups, including citizens and small and medium-sized enterprises. With regard to the latter, the focus is on making them aware of the risks involved in using IT and informing them about the protection mechanisms available. The NPSI was implemented in the KRITIS plan (concerning essential pieces of IT infrastructure) on 6 September 2009.[36] As of 5 December 2007, the Office of the Federal Government Commissioner for Information Technology was created. The Commissioner is the central point of contact for the federal states and the private sector when working with the federal government on IT matters.[37]

29 Sections 2 (2) and 41a of the TKG.

30 Section 41a (1) of the TKG.

31 www.bmwi.de/BMWi/Redaktion/PDF/V/verordnungsentwurf-netzneutralitaet,property=pdf, bereich=bmwi2012,sprache=de,rwb=true.pdf, proposal of 17 June 2013.

32 See Wimmer/Löw, MMR 2013, 636 ff.

33 http://europa.eu/rapid/press-release_IP-12-817_en.htm; also see Frevert, MMR 2012, 510ff.

34 https://ec.europa.eu/digital-agenda/en/node/67489/#open internet.

35 www.bmi.bund.de/SharedDocs/Standardartikel/DE/Themen/OeffentDienstVerwaltung/ Informations gesellschaft/ NPSI.html.

36 www.bmi.bund.de/SharedDocs/Downloads/DE/Broschueren/2007/Kritis.html.

37 www.bund.de/DE/Behoerden/B/Beauftragte/Beauftragte-der-Bundesregierung-fuer-Informationstechnik/Die-Beauftragte-der-Bundesregierung-fuer-Informationstechnik.html.

Unfortunately, there is no single act that regulates all the facets of IT security, so from a legal perspective, the matter is very disjointed.[38]

Cybersecurity

The German parliament passed the Act to Strengthen the Security of Federal Information Technology on 14 August 2009. According to Section 1 of the Act, a Federal Office for Information Security (BSI) will be maintained as a superior federal authority, to be overseen by the Federal Ministry of the Interior. The BSI is responsible for promoting IT security in Germany.[39]

Due to the complexity of IT problems, the spectrum of tasks the BSI faces is wide-ranging. According to Section 3 of the Act, its tasks include developing criteria, procedures and tools to test and evaluate the security of information technology systems or components and to test and evaluate compliance with IT security standards, and developing technical security standards for federal information technology and for the suitability of information technology contractors in special need of protection. Furthermore, the BSI investigates security risks associated with the use of IT and develops preventive security measures, provides information on risks and threats relating to the use of information technology and seeks out appropriate solutions. This work includes IT security testing and assessment of IT systems, including their development, in cooperation with the industry. On 23 February 2011, the German Cabinet enacted a new cyber strategy for Germany.[40] The strategy comprises the creation of a national cyber defence centre, which works together closely with all security and police authorities, and the creation of a national cybersecurity council. The Federal Government Commissioner for Information Technology will be the chairman of the cybersecurity council.[41]

Further, there are plans for an IT security Act in Germany. The Federal Ministry of the Interior presented a first draft of a bill in March 2013.[42] This bill has not been passed yet, so currently there is no IT security Act in Germany. On the EU level, there is a proposal for a directive concerning measures to ensure a high common level of network and information security across the Union.[43]

Privacy and consumer protection

In order to better protect the privacy of individuals against intrusions of modern data processing, in a 1983 decision the Federal Constitutional Court developed the notion

38 Gaycken and Karger, MMR 2011, 3 (6); Beucher/Utzerath, MMR 2013, 362 ff.

39 www.bsi.bund.de.

40 www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Informationsgesellschaft/cyber.pdf?blob=publicationFile.

41 www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2011/02/cyber_abwehr.html;

42 www.bmi.bund.de/SharedDocs/Downloads/DE/Gesetzestexte/Entwuerfe/Entwurf_it-sicherheitsgesetz.pdf?__blob=publicationFile; http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Informationsgesellschaft/eckpunkte_itsicherheitsgesetz.pdf?__blob=publicationFile.

43 COM(2013) 48 final of 7 February 2013.

of an individual's right to decide how its data are to be used.[44] This right means that it is up to each individual to determine what and how much personal information he or she would like to reveal. This right to privacy is an element of the general right to free development of one's personality, which is protected under Article 2(1) in conjunction with Article 1(1) of the German Constitution.

The collection, processing and use of personal data are governed by the German Federal Data Protection Act (BDSG) and state laws. Its requirements are partially supplemented by the German Act Against Unfair Competition with regard to certain methods of marketing – particularly by e-mail and SMS – and by the TMG. The BDSG applies mainly to federal public authorities and to non-public entities, such as corporations.

Every private organisation is generally required to ask a person's consent if it would like to collect, store or process personal data, unless such collection, storage or processing is permitted under a specific section of the BDSG or any other law. Such exception applies, for example, if the data subject is already aware of such collection or storage from other sources or if the data originate from publicly accessible sources. Bodies responsible for processing data are required to correct information if necessary and to delete or block personal data if unlawfully stored or no longer needed. If a body responsible for processing data harms a data subject by unlawfully or incorrectly collecting, processing or using his or her personal data, and in doing so failed to act with due care, that body is liable for damages.

Individuals may request information from public and private organisations about stored data concerning them and the reason for storing these data.

The European Commission plans to harmonise the rules on data protection in the EU. A first draft of an EU Data Protection Regulation was published on 25 January 2012[45] and has been discussed extensively in the European Parliament and European Council since then. The project is supported by the European Network and Information Security Agency (ENISA).

Protection of children

Youth protection provisions applicable to the media can primarily be found in the Law for the Protection of the Youth (JuSchG) and the JMStV.

The Federal Department for Media Harmful to Young Persons (BPjM) is the responsible authority for protecting children and adolescents in Germany from media that might contain harmful or dangerous contents under the JuSchG. The types of media monitored include videos, DVDs, computer games and websites. The BPjM can act only at the request of other administrative institutions, not on its own initiative. Once an official request has been filed, the BPjM is obliged to process the complaint. Possible measures in the event of a violation are the prohibition from publication, blocking the provider and fines up to €500,000.

44 Federal Constitutional Court Decision 65,1 (41).

45 KOM (2012) 11.

The JMStV forms the legal basis for assessing content distributed in broadcast or media services. The compliance of broadcast and media services with the JMStV is controlled by the KJM. The JMStV distinguishes between illegal content and content that impairs the development of minors; illegal content must not be distributed in broadcasting services or in media services. Content that is rated as impairing the development of minors (e.g., a severe depiction of violence), is subject to access restrictions. In the event of a breach of the provisions of the JMStV, the KJM decides on the sanctions to be imposed against the respective media content provider. The measures will depend on the severity of the breach, and can range from a complaint against the content provider to fines or even the issue being handed over to the State Prosecutor.

v The De-Mail Act

On 3 May 2011 the De-Mail Act came into force.[46] De-Mail is a German e-government communications service that makes it possible to exchange electronic documents between citizens, agencies and companies over the internet. Through this it is now possible to offer new services for the communication via the internet whose security is verified and accredited.[47] De-Mail services can be used as the basis for safer electronic legal and business relations. Electronic communication is now legally viewed at the same level as paper-based communication, with additional functionality.[48] The sunrise period for registering domains, which correspond to a '.de' domain under 'de-mail.de' ended on 30 June 2014.[49]

IV SPECTRUM POLICY

i Development

Originally, frequencies in Germany were used exclusively – with a few exceptions – by Germany's federal mail service (Deutsche Bundespost). The Law concerning the Restructuring of Posts and Telecommunications was adopted as early as 1989, and this new law created new regulatory provisions for opening up broader competitive opportunities on the telecommunications markets. With the Telecommunications Act of 1996, the monopoly on both network and telephony was ended and these markets were fully liberalised.

Today's development goes hand in hand with the population's increasing demand for mobile communication services. Not least because of the new technical possibilities opened up by, *inter alia*, UMTS, demand for more bandwidth will continue to rise in line with increasing mobility. Both growing demand and technological innovation call for the availability of adequate frequency spectrum.

46 Last amended in August 2013.

47 Accredited De-Mail service providers are 1&1 De-Mail GmbH, Mentana –Claimsoft GmbH, T-Systems International GmbH and Telekom Deutschland GmbH.

48 Roßnagel, NJW 2011, 1473 (1478).

49 www.cio.bund.de/Web/DE/Innovative-Vorhaben/De-Mail/de_mail_node.html.

Because of its type of use and the current state of technology, the frequency spectrum available is still considered a scarce resource. The Federal Network Agency[50] is the regulatory authority for the use of frequencies, the allocation of which needs a forward-looking, non-discriminatory and proactive frequency regulation. The 'digital dividend' is the frequently used term whenever digitisation results in the freeing up of spectrum.

ii Flexible spectrum use

The use of a spectrum requires its prior allocation.[51] The Telecommunications Act states that the allocation of spectra shall be regulated by a Spectrum Regulation, which requires the Federal Council's consent.[52] Based on the allocation of frequencies and the specifications as set out in the Spectrum Regulation under Section 53 of the TKG, the Federal Network Agency shall divide the spectrum ranges into spectrum uses and related terms of use (Spectrum Plan).[53] Spectra for wireless net access to telecommunication networks must be assigned in a technologically and service-neutral way.[54]

The TKG provides the framework for a flexible use of allocated spectra. Owners of an allocated frequency have the possibility to trade their frequency and to let third parties use their frequency, for example, by way of a lease or a co-use or in the form of a joint use via 'spectrum pooling'. It is necessary, however, that the Federal Network Agency releases such forms of use for a flexible use and specifies the conditions of such use.[55]

iii Broadband and next-generation mobile spectrum use

A few rural areas in Germany still lack high-speed internet connections (white areas). The development costs for fibre-optic networks are estimated to amount to between €70 billion and €80 billion. These costs are up to four times higher in rural areas than in cities. Such investments can hardly be borne by the communities in question without state subsidy. The federal government has refrained, however, from creating any new funding programmes for rural areas in the context of the amendment of the TKG in 2012.[56]

The Federal Network Agency imposed rather strict requirements on the auction purchase of mobile network spectrum in 2010 (see also Section IV.iv, *infra*). Adequate internet access has to be supplied on a size basis: thus every successful bidder had to agree to provide internet access to communities and cities with not more than 5,000 inhabitants, then to those with between 5,000 and 20,000 inhabitants and then to cities with more than 50,000 inhabitants. Further expansion of internet services will not be allowed before supply to 90 per cent of any particular stage has been ensured.

50 See Section II.i, *supra*.
51 Section 55 (1) of the TKG.
52 Section 53 (1) of the TKG.
53 Section 54 (1) of the TKG.
54 Section 54 (2) of the TKG.
55 Section 62 (1), (2) of the TKG; also see Scherer and Heinickel, NWwZ 2012, 585 (591f).
56 Holznagel, NJW 2012, 1622 (1627).

iv Spectrum auctions and fees

If the Federal Network Agency finds that the number of available spectra is not sufficient for their allocation, it can order that the allocation of frequencies must be preceded by a procurement procedure.[57] Often, the procurement is held in the form of a spectrum auction.[58]

Germany held Europe's first 4G mobile broadband spectrum (radio airwave) auction from mid-April to mid-May 2010. The Federal Network Agency was in charge of the auction, which was the first wireless broadband spectrum auction in Germany for nearly a decade. Four operators[59] were allowed to bid for frequencies from the fields at 800MHz, 1.8GHz, 2GHz and 2.6GHz; no new entrants were allowed to bid. The minimum bid price was set at €1.5 million per 5MHz frequency block. After 224 auctions on 27 days in total the auction aggregated a total amount of €4.4 billion for 41 frequency blocks.[60]

As of 1 January 2017, the allocation of frequencies in 700MHz, 900MHz, 1800MHz and 1.5GHz will be renewed. Interested companies are requested to renew or notify their prospected needs until 20 August 2014.[61] Following the merger of Telefónica and E-Plus, Telefónica might sell certain radio frequencies and other assets to an existing or new mobile network operator that might be established in the future.[62]

V THE YEAR IN REVIEW[63]

Numerous skimming affairs and the ongoing public debate within society and politics in Germany about a 'right to be forgotten' (i.e., the right of individuals to have their data deleted from the internet where they are no longer needed for legitimate purposes) show that the desire for efficient supervision of internet companies such as Google or Facebook are primary concerns in Germany, with a strong emphasis on the wish for effective protection of personal data in online communication. In the past 18 months, some important court decisions were rendered and legislative changes passed regarding internet and multimedia law. The great number of judgments and essays published in

57 Section 55 (10) of the TKG.

58 Section 61 of the TKG.

59 Telefonica O2 Germany, T-Mobile, Vodafone and E-Plus.

60 See also www.spiegel.de/wirtschaft/unternehmen/mobilfunkwellen-frequenzauktion-bringt-ueber-vier-milliarden-euro-a-696037.html.

61 www.bundesnetzagentur.de/cln_1931/DE/Sachgebiete/Telekommunikation/UnternehmenInstitutionen/Frequenzen/OeffentlicheNetze/Mobilfunknetze/Projekt2016/Projekt2016.html?nn=265794.

62 https://beck-online.beck.de/default.aspx?vpath=bibdata%2freddok%2fbecklink%2f1033333.htm&pos=2&hlwords=telefonica%u00d0eplus%u00d0+telefonica%2ceplus+%u00d0+telefonica+%u00d0+eplus+%u00d0+telefonicaeplus+#xhlhit.

63 For an overview of the developments in internet and multimedia law in 2013, see Hoeren and Buchmüller, MMR-Beilage 2014, 1 ff.

2013 and so far in 2014 represent an exciting development in this dynamic legal area in Germany.

As regards consumer protection, the legislator further strengthened the position of consumers. In 2012, the legislator adopted a law for the better protection of consumers from cost traps in electronic commerce (the Button Law),[64] which has been incorporated into Section 312g of the German Civil Code. Due to this new regulation every entrepreneur using a telecoms or media service in order to enter into a contract for the supply of goods or the rendering of services must clearly and comprehensibly communicate to the customer all essential facts of the contract in good time prior to sending its order and make sure that the consumer expressly confirms that he or she commits to a payment obligation.[65] In October 2013, the act against dubious business practices[66] came into force; the law capped the legal fees for a first warning letter or a cease and desist request to €155.30 as it had long been criticised that some lawyers illegitimately benefit from the high substantive values involved in sending cease and desist requests for alleged copyright infringements such as file sharing.

IT contract law has again been mostly influenced by the contractual framework conditions of cloud computing, especially regarding questions of data protection and copyright law. Although the growth of the market for cloud computing services has been mitigated after the disclosure of a number of skimming affairs, still 40 per cent of the companies in Germany used cloud-services in 2013 (compared to 37 per cent in 2012) and experts predict high annual growth rates for this market. The federal government recognised this potential and, after launching the 'trusted clouds' technology programme in cooperation with the private sector in 2011, has presented a study on standardisation in the fields of cloud computing.[67] The trusted clouds programme will conclude its work in 2015. The contractual framework for IT outsourcing has also been an important subject.[68] In the field of liability on the internet, the framework for liability of hosts of internet platforms for infringement of intellectual property rights or basic personal rights by the users has been determined further by the German Federal Court of Justice (FCJ). The FCJ reaffirmed its position that a host provider is under no general duty to proactively prevent violations of the aforementioned rights by its users and can only be forced to desist from publishing third party content after he has been notified of the violation (concept of 'Störerhaftung'); the German courts in addition do not grant damages unless the violation has been provoked or adopted by the host. The European

64 See Federal Law Gazette I 2012, 1084. The amendment is based on the Consumer Directive RL 2011/83/EU of 25 October 2011, which aims at harmonising the European distance-selling laws. The directive accounts for other major changes to the German distance-selling law.

65 For a more detailed review of the new law see Raue, MMR 2012, 438ff.

66 BGBl I, 3714; see Köhler, NJW 2013, 3473ff.

67 www.bmwi.de/DE/Themen/Digitale-Welt/Internet-der-Zukunft/cloud-computing.html.

68 For an overview of the ongoing discussion about IT outsourcing, see Mann, MMR 2012, 499.

Court of Human Rights, however, now held in its decision in *Delfi v. Estonia*[69] that a violation of basic personal rights leads to a liability of the forum operator for damages if he or she did not arrange for sufficient spot checks of the available content. This decision in favour of personal rights may affect the jurisdiction of the German courts over the next years.

The admissibility of online archives and file-sharing were other topics on which German courts had to rule. In a decision involving the file hosting service Rapidshare, the FCJ found that a file-hosting service is obliged to conduct a comprehensive periodic monitoring of collections of links that point to its service, if the service encourages copyright infringements to a considerable extent by its business model.[70] Also, Google is under an obligation to prevent violations of personality rights caused by the auto-complete function of its search machine after being notified of such violations.[71] In addition, a recent decision by the ECJ in *Google v. Spain*[72] generated enormous public attention as the ECJ held that Google as a search agent can be forced to delete search results if the individual interest in hiding information exceeds the public information interest. The decision already led to several thousands of extinctions in the Google-search hit list. As far as streaming of content by private users is concerned the ECJ held in its decision in the case of *Newspaper Licensing Agency v. Public Relations Consultants Association*[73] that the caching of copyrighted content does not violate intellectual property rights, at least if the source is legal. Thus, streaming of copyright-protected content – which has been a grey area from a legal point of view in Germany – can be assessed as lawful following the ECJ judgment.

Since the Federal Constitutional Court (FCC) rendered data retention as intended in the TKG of 2007 to be inadmissible,[74] the question of whether and to what extent data retention is in line with national and European law has been discussed extensively. The Federal Ministry of Justice presented drafts of the relevant TKG provisions in 2011 and 2013, neither of which has been adopted. As the ECJ has meanwhile decided that the European Directive setting the framework for data retention (2006/24/EC) is invalid,[75] we do not expect the German legislator to pass a new data retention act before the legal framework has been reset by the EU. In this context, the FCJ, however, recently held that even without the act on data retention telecom and internet access, service providers in Germany may store information on IP addresses used by their customers for a period of seven days in order to enable security measures against cybercrime.[76]

69 Judgment of the ECHR of 10 October 2013, 64569/09.

70 Judgment of the FCJ of 15 August 2013, I ZR 80/12.

71 Judgment of the FCJ of 14 May 2013, VI ZR 269/12.

72 Judgment of the ECJ of 13 May 2014, C-131/12.

73 Judgment of the ECJ of 5 June 2014, C-360/13; see Solmecke/Dam, MMR 2014, 544 f.

74 Judgment of the FCC of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08.

75 Judgment of the ECJ of 8 April 2014, C-293/12 and C/594/12.

76 Judgment of the FCJ of 3 July 2014, III ZR 391/13. The prevailing party Deutsche Telekom AG has been represented by Latham & Watkins LLP Germany.

VI CONCLUSIONS AND OUTLOOK

The ICT sector in Germany is highly important and fast-growing, entailing a fast-paced legal and policy environment.

Convergence presents an abundance of challenges for policymakers, industry and society. Cooperation on a European and global level is vital for most German ICT policy issues, including telecommunication and frequency policies, ICT research, anti-spam measures and consumer, copyright and youth protection in the context of new media. Indeed, it is impossible to separate these international activities from national policymaking.

Chapter 10

HONG KONG

Simon Berry and Carmen Guo[1]

I OVERVIEW

Hong Kong has one of the most developed telecommunications and internet services markets in the world. Its legal and regulatory system promotes competitiveness while at the same time striving to enhance and facilitate business investment.

In terms of telecommunications, there are in total four mobile network operators,[2] 21 local fixed network operators,[3] and 277 external fixed telecommunications service providers[4] serving Hong Kong's population of slightly over 7.18 million in a land area of approximately 1,000 square kilometres. The residential fixed line penetration rate is 101.91 per cent[5] and the mobile subscriber penetration rate is 237.8 per cent.[6] The competition for internet services is also intense with a total of 205 ISPs.[7] The number of registered customer accounts with broadband access exceeds those with dial-up access by

1 Simon Berry is a partner and Carmen Guo is an associate at Latham & Watkins.

2 As at June 2014, provided by the Office of the Communications Authority (OFCA).

3 Those that are authorised to provide facility-based local fixed telecommunications services under fixed telecommunications network services (FTNS) licence, fixed carrier licence (FCL) or unified carrier licence (UCL) using wireline or wireless technology (as of June 2014, provided by OFCA).

4 Those who are authorised to provide facility-based external telecommunications services (ETS) under FTNS licence, FCL, UCL and service-based ETS under services-based operator (SBO) licence (as of June 2014 provided by OFCA).

5 The residential fixed line penetration rate is equivalent to the number of residential fixed lines divided by the number of households (as of April 2014, provided by OFCA).

6 As of April 2014, provided by OFCA.

7 Those who are authorised to provide internet access services under FTNS licence, FCL, UCL and SBO licence (as of June 2014, provided by OFCA).

approximately 1.89 million, and the household broadband penetration rate is 83.1 per cent.[8] According to OFCA, there are nearly 1.3 million IPTV subscribers in Hong Kong,[9] and there are, according to government census, around 2.42 million households in Hong Kong:[10] this means more than half of all households in Hong Kong are using IPTV services. There are more than 28,000 wi-fi access points in the city[11] and the numbers continues to grow. These figures demonstrate that the use of telecommunications services is advanced and widespread in Hong Kong.[12]

Looking at television broadcasting, Hong Kong is a peculiar place in that, despite the fact that there is no limit to the number of licences that can granted, there have only been two domestic free-to-air television programme service providers in the past 30 years. It was until October 2013 that the Chief Executive in Council approved in principle the applications for domestic free television programme service licences of another two applicants, subject to further review and final determination by the Chief Executive in Council of the applications at a later stage. Further, prior to 2000, there was a monopoly in the domestic pay-TV programme service in Hong Kong. Given the potential influence of television programmes (whether domestic free-to-air, domestic pay or others) on the general population, the Broadcasting Ordinance[13] contains stringent requirements with regard to the programmes that are broadcast and generic codes of practice for programme, advertising and other standards.

Apart from domestic free-to-air and domestic pay-TV service providers, there are two other main categories of television broadcasting licences: non-domestic pay-TV programme service licences (mainly satellite television services) and other licensable television programme service licences (mainly hotel rooms television services). Oddly, the four categories of licences are granted by different authorities: domestic television licences are granted and renewed by the Chief Executive in Council (with recommendations from the then Communications Authority (CA)) while the CA issues and renews the licences for the remaining two categories. Confusingly, post-licensing, the responsibility of regulating compliance with rules and regulations and monitoring compliance and non-compliance rests mainly on the CA.

There are in total three providers of analogue sound broadcasting services operating 13 radio channels. Of the three providers, only one is funded by the government (and it does not hold a sound broadcasting licence). Although officially, there are only 13 radio channels, given the proximity of Hong Kong to mainland China, it is not uncommon for radio signals from radio stations of mainland China to be picked up in Hong Kong.

8 As at April 2014, provided by OFCA.

9 As at April 2014, provided by OFCA.

10 According to statistics from March 2014 to May 2014, provided by the Census and Statistics Department of Hong Kong.

11 As at June 2014, provided by OFCA.

12 Certain service providers are permitted to provide more than one type of services and therefore the total number of service providers may be larger than the total number of licensees.

13 Chapter 562 of the Laws of Hong Kong.

In March 2011, the government granted 12-year sound broadcasting licences to three providers for the provision of digital audio broadcasting (DAB) services in Hong Kong. They are required under the licences to provide 24-hour DAB services within 18 months of the licences being granted and launched in stages, with a wide variety of programmes. As of August 2014, there are four providers of DAB services operating 18 radio channels. Of these four providers, one is funded by the government and does not hold an audio broadcasting licence.

The Chief Executive in Council is responsible for the issuing of sound broadcasting licences. Unlike for television, there is no categorisation for radio licences.

II REGULATION

i The regulators

The Telecommunications Authority and the Office of the Telecommunications Authority

Prior to 1 April 2012, the Hong Kong telecommunications industry was regulated by the Telecommunications Authority (TA) through its executive arm, OFTA. OFTA advised and regulated the telecommunications industry with a view to formulating macro-supervisory policies, while at the same time, oversaw licensing of telecommunications services providers (such as unified carriers, space station carriers and mobile virtual network operators). Its other roles included enforcing fair competition in the market, formulating, allocating and managing radio frequency spectrum and satellite coordination. OFTA was also the regulator responsible for supervising and overseeing the implementation and enforcement of measures against unsolicited electronic messages. Finally, OFTA represented Hong Kong in the International Telecommunication Union and other international forums.

The Broadcasting Authority and the Television and Entertainment Licensing Authority

Prior to 1 April 2012, the broadcasting industry in Hong Kong was regulated by the BA, an independent statutory body established under the Broadcasting Authority Ordinance,[14] and comprising members appointed by the Chief Executive of Hong Kong. The BA's responsibilities included handling licence applications and renewals, handling complaints, conducting enquiries, overseeing the enforcement of fair competition and levying sanctions on licensees who breached the laws, rules and regulations. It relied on the Commissioner of the Television and Entertainment Licensing Authority (TELA) to discharge executive functions.

As the executive arm of the BA with regard to broadcasting regulation, TELA was mainly responsible for dealing with complaints against the contents of broadcasting programmes, complaints regarding anti-competitive behaviour and processing applications (new and renewals) for television programme service licences, which were different from those granted by OFTA in that television programme services licences issued by the BA were only for the contents, and the programme service providers needed to apply separately for a carrier licence from OFTA for use of the allocated frequencies.

14 Chapter 391 of the Laws of Hong Kong.

Further, being not only Hong Kong's broadcasting regulator but also the regulatory agency responsible for the entertainment, film and newspapers industries, TELA also monitored publications, handled film censorship and processed applications for other entertainment and gaming licences (such as amusement arcade licences and mahjong licences) and registration of newspapers.

The Communications Authority and the Office of the Communications Authority

In light of the continued blurring of the roles of the BA and the TA, on 1 April 2012, the Communications Authority Ordinance[15] came into operation and the Communications Authority (CA) was set up as a unified regulator to service the broadcasting and telecommunications industries, and the functions of the BA and the TA were transferred to the CA and – like the TA – the CA operates through an executive arm, the Office of the Communications Authority (OFCA). OFCA is a combination of the broadcasting arm of TELA (other existing TELA functions are transferred to other government departments) and OFTA. The Office for Film, Newspaper and Article Administration under OFCA takes over TELA's previous functions in relation to film classification, control of obscene and indecent articles and newspapers registration, but the issuance of entertainment licences has been transferred to the Home Affairs Department. The CA takes over all powers and functions of the TA and the BA, and the TA and the BA were both dissolved on 1 April 2012.[16]

The major pieces of legislation administered by OFCA are:

a the Communications Authority Ordinance;

b the Telecommunications Ordinance;[17]

c the Unsolicited Electronic Messages Ordinance (UEMO);[18]

d the Broadcasting Ordinance;

e the Broadcasting (Miscellaneous Provisions) Ordinance[19]; and

f the Trade Descriptions Ordinance (TDO).[20]

The purpose of the Telecommunications Ordinance is to 'make better provision for the licensing and control of telecommunications, telecommunications services and telecommunications apparatus and equipment'. For this purpose, the ordinance contains provisions regulating, *inter alia*, licensing, preventing some anti-competitive practices and imposing some restrictions on ownership.

The UEMO 'provide[s] for the regulation of the sending of unsolicited electronic messages and for connected purposes' and was adopted in 2007. All forms of commercial electronic messages with a 'Hong Kong link' are regulated so as to monitor and regulate 'professional spamming activities'. Users of telecommunications services in Hong Kong

15 Chapter 616 of the Laws of Hong Kong.

16 Part 2, Section 7 of the Communications Authority Ordinance.

17 Chapter 106 of the Laws of Hong Kong.

18 Chapter 593 of the Laws of Hong Kong.

19 Chapter 391 of the Laws of Hong Kong.

20 Chapter 362 of the Laws of Hong Kong.

now have an option to register on facsimile, short messages and pre-recorded message do-not-call registers. As of June 2014,[21] more than 2.6 million numbers have been registered. However, the effectiveness of this piece of legislation is sometimes queried as service providers in various industries still manage to circumvent the regulations and restrictions and shamelessly make relentless unnecessary and irritating marketing calls, facsimiles and text messages.

The purpose of the TDO is:

> *[to] prohibit false trade descriptions, false, misleading or incomplete information, false marks and misstatements in respect of goods provided in the course of trade or suppliers of such goods; to confer power to require information or instruction relating to goods to be marked on or to accompany the goods or to be included in advertisements; to restate the law relating to forgery of trade marks; to prohibit certain unfair trade practices; to prohibit false trade descriptions in respect of services supplied by traders; to confer power to require any services to be accompanied by information or instruction relating to the services or an advertisement of any services to contain or refer to information relating to the services; and for purposes connected therewith.*

On 19 July 2013, amendments to the TDO came into effect to 'provide greater protection for consumers by extending its coverage from goods to services and specified unfair trade practices',[22] including prohibition of false trade descriptions of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepted payment. The CA, with OFCA as its executive arm, is conferred jurisdiction to enforce these fair trading provisions in relation to the commercial practices of licensees under the Telecommunications Ordinance and the Broadcasting Ordinance that are directly connected with the provision of a telecommunications service or broadcasting service under the two Ordinances.

The Office of the Privacy Commissioner for Personal Data

The Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner) is the only independent privacy commissioner in Asia. The Privacy Commissioner has formulated operational policies and procedures relating to the implementation of privacy protection provisions and is responsible for ensuring the protection of the privacy of individuals with respect to personal data and for overseeing the administration and supervision of the Personal Data (Privacy) Ordinance (PDPO),[23] the legislation that regulates the collection and use of personal data in Hong Kong.

There are six data protection principles under the PDPO that must be adhered to, and the fourth principle deals with the security of personal data. Telecommunications and broadcasting service providers must be prudent at all times to safeguard personal data that are in their possession against unauthorised or accidental access, processing, erasure or other use. There have been several recent incidents in Hong Kong regarding

21 Based on the Registration Statistics on Do-not-call Registers published by OFCA.

22 Press release of the CA dated 15 July 2013.

23 Chapter 486 of the Laws of Hong Kong.

alleged breach of this principle. For example, the leakage of personal data by members of the Hong Kong police force as a result of a peer-to-peer application that was installed on their personal computers. Their alleged lack of awareness of the potential impact of such programmes led to the leakage of important personal data to the public via the internet. A second example is the alleged misuse of personal data of more than 2 million individuals in Hong Kong that had registered under a rewards programme run by the service provider of the biggest electronic payment system in Hong Kong (Octopus).[24] The leak of the personal data of Octopus users was so significant that, for the first time ever, the Privacy Commissioner issued an interim report on its investigation into the matter at the end of July 2010. The final report was published in October 2010.

In response to the increasing concerns of alleged misuse of personal data, the PDPO was amended in 2012 to, among others, address the unauthorised disclosure of personal data by a person who obtained such personal data from a data user, extend the enforcement power of the Privacy Commissioner, clarify the requirements when personal data for direct marketing and when providing personal data to another for use in direct marketing, and provide legal assistance to an aggrieved individual seeking compensation from a data user for damages suffered as a result of the data user's contravention of any requirement imposed by the PDPO in relation to his personal data.

The Privacy Commissioner has published codes and guidelines on personal data privacy protection regarding the internet for information technology practitioners and also mobile service operators.

Sources of law

As previously mentioned, Hong Kong's laws governing broadcasting, communications, media and the publication of books and newspapers are scattered in multiple legislation the including:

a the Communications Authority Ordinance;
b the Broadcasting Ordinance;
c the Film Censorship Ordinance;[25]
d the Interception of Communications and Surveillance Ordinance;[26]
e the Telecommunications Ordinance;
f the UEMO;
g the Books Registration Ordinance;[27]

24 Octopus runs a rewards programme for customers to incentivise the usage of the Octopus card. When one registers for the Octopus reward programme, certain personal data is provided to Octopus. In summer 2010, it was revealed that Octopus had been selling personal data of those registered for the reward programme to other unrelated service providers (such as insurance companies) for direct marketing purposes. Octopus has made a total of HK$44 million selling personal data since early 2006.

25 Chapter 392 of the Laws of Hong Kong.

26 Chapter 589 of the Laws of Hong Kong.

27 Chapter 142 of the Laws of Hong Kong.

h the Registration of Local Newspapers Ordinance;[28]
i the TDO;
j the PDPO; and
k the Competition Ordinance.

The Communications and Technology Branch of Hong Kong's Commerce and Economic Development Bureau (CEDB) is the policy bureau responsible for the policies for broadcasting and telecommunications. However, the responsibility for supervision rests with the CA.

ii Ownership restrictions

The Telecommunications Ordinance

The CA has the power to control the ownership of carrier licence holders by refusing to grant consent to any proposed change in a carrier licence holder. This power also allows the CA to determine whether competitiveness will be affected in the telecommunications market as a result of such change.[29] The CA may conduct investigations whenever a person (whether on its own or together with its associated persons)[30] becomes the beneficial owner or voting controller of: 15 per cent (except for those who do not acquire

28 Chapter 268 of the Laws of Hong Kong.

29 Sections 7P(1), (6) and (16) of the Telecommunications Ordinance.

30 'Associated person' includes:
a in the case of a natural person:
i a relative of such natural person;
ii a partner of such natural person and a relative of that partner;
iii a partnership in which the natural person is a partner;
iv a corporation controlled by the natural person, by a partner such natural person or by a partnership in which the natural person is a partner; or
v a director or principal officer of a corporation referred to in subparagraph (iv);
b in the case of a corporation:
i an associated corporation, which refers to a corporation over which the person has control, a corporation which has control over the person or a corporation which is under the same control as is the person;
ii a person who controls the corporation and where the person is a natural person, a relative of the person;
iii a partner of a person who controls the corporation and, where the partner is a natural person, a relative of the person;
iv a director or principal officer of the corporation or an associated corporation and a relative of the director or principal officer; or
v a partner of the corporation and, where the partner is a natural person, a relative of the partner;
c in the case of a partnership;
i a partner of the partnership and, where the partner is a natural person, a relative of the partner;

more than 30 per cent and are not or do not concurrently become the beneficial owner or voting controller of more than 5 per cent of the voting shares in any other carrier licence holder (nor exercise any power over the affairs of such other carrier licence holder)); 30 per cent; or 50 per cent or more of the voting shares in a carrier licence holder, or acquires the power (whether or not in the form of voting shares) to control the affairs of the carrier licence such that the carrier licence holder must act in accordance with such person's instructions.[31]

The Telecommunications Ordinance disqualifies two categories of persons from controlling an entity with a sound broadcasting licence. Subject to exemptions, disqualified persons are restricted from exercising control (or increasing control) over a sound broadcasting licence holder.[32] 'Disqualified persons' include advertising agents, suppliers of broadcasting materials to other sound broadcasting licence holders, another sound broadcasting licence holder and any person who (as its business) transmits sound or television material, whether in Hong Kong or outside Hong Kong, and domestic free-to-air or a domestic pay-TV licensees, or associate of any of the foregoing persons.[33] The second category of 'unqualified persons' refers to persons who are not for the time being ordinarily resident in Hong Kong[34] and who have not at any time been resident for a continuous period of no less than seven years; or in the case of a company, is not a company that is ordinarily resident in Hong Kong.[35] The aggregate of the voting shares

ii a corporation controlled by the partnership, a partner in the partnership or where a partner is a natural person, a relative of the partner;

iii a corporation of which a partner is a director or principal officer; or

iv a director or principal officer of a corporation referred to in subparagraph (iii).

31 Sections 7P(16) and (17) of the Telecommunications Ordinance.

32 Section 13G of the Telecommunications Ordinance.

33 Section 13A of the Telecommunications Ordinance.

34 'Ordinarily resident in Hong Kong':

a in the case of an individual, means:

i resident in Hong Kong for not less than 180 days in any calendar year; or

ii resident in Hong Kong for not less than 300 days in any two consecutive calendar years; and

b in the case of a company, means a company:

i that is formed and registered in Hong Kong under the Companies Ordinance (Cap 32);

ii in the case of which: if not more than two of its directors take an active part in the management of the company, each of those directors is for the time being ordinarily resident in Hong Kong and each of them has of any time been resident for a continuous period of not less than seven years; or if more than two of its directors take an active part in the management of the company, a majority of those directors are each of them, for the time being ordinarily resident in Hong Kong and each of them has of any time been resident for a continuous period of not less than seven years; and

iii the control and management of which is *bona fide* exercised in Hong Kong.

35 Section 13I of the Telecommunications Ordinance.

that can be held by 'unqualified persons' may not exceed 49 per cent of the total number of voting shares of a sound broadcasting licence holder.

The CA also imposes a disposal restriction within a three-year period after the grant of a sound broadcasting licence.[36] Unless the CA otherwise agrees, the right, title or interest in 15 per cent or more of the shares in a sound broadcasting licence holder may not be transferred or acquired, directly or indirectly, within the three years after the grant date. Any agreement or similar arrangement or understanding that breaches this requirement is void.

The Broadcasting Ordinance

As previously mentioned, the Chief Executive in Council grants licences under the Broadcasting Ordinance for domestic free-to-air and domestic pay-TV programme services, whereas the CA is responsible for granting licences for non-domestic and other licensable television programme services.[37]

Control restrictions for broadcasting licences are set out in Section 8(4) of the Broadcasting Ordinance. In relation to domestic free-to-air and domestic pay-TV programme service licences, such restrictions are as follows:

a It must be proven that the exercise of the control and management of the licence holder is *bona fide* in Hong Kong, and where there are two or more directors (the majority being individuals as opposed to corporates), the individuals who actively participate in the company must satisfy residency requirements.[38] The residency requirement is equally applicable to those directors who actively participate in management and operations, and on the principal officers (being those in charge of the selection, production or scheduling of television programmes) of the licence holder.

b As previously mentioned, no disqualified person or their controlling entities or persons or associates (unless otherwise disclosed in the licence application) can exercise control (or remain in control) over the licence holder. The purpose of this is to restrict cross-media ownership.

The restrictions are less stringent for non-domestic and other licensable television programme service licence holders, which are only required to have at least one director or principal officer to have satisfied the residency requirement.

Broadcasting licences ownership and voting restrictions

Restrictions regarding the holding, acquisition or exercise of voting control of a licence holder (except for domestic pay-to-air television programme licence holders) are set

36 Section 13J of the Telecommunications Ordinance.

37 Sections 8(1) and (2) of the Broadcasting Ordinance.

38 Such individuals must be ordinarily resident in Hong Kong, which means the individual must reside in Hong Kong for no less than 180 days in a calendar year or have done so for no less than 300 days in any two consecutive years (ordinarily resident) and further, such individuals must have ordinarily resided in Hong Kong for a period of not less than seven years.

out in Schedule 1, Part 3 of the Broadcasting Ordinance. There are restrictions on the percentage of voting control of unqualified voting controllers in Schedule 1, Part 3(19) in that unqualified voting controllers cannot exercise voting control in excess of 49 per cent of the total voting control at the time. Further, prior approval of the CA is required for the holding, acquisition or exercise of voting control by an unqualified voting controller of 2 per cent to 6 per cent or 6 per cent to 10 per cent, or more than 10 per cent of a licence holder. If an unqualified voting controller holds more than 10 per cent, only up to 10 per cent of the voting rights can be exercised by such controller. An 'unqualified voting controller' is a controller who is not a qualified voting controller, and a qualified voting controller refers to a voting controller who satisfies the ordinarily resident requirement and who, in the case of an individual, has resided in Hong Kong for a period of no less than seven years or in the case of a corporation, whose directors satisfy the Hong Kong residency requirement.

An additional hurdle for obtaining a domestic free-to-air television programme service licence would be that the licensee must not be a company that is a subsidiary of a corporation.

iii Competition measures

At present, sector-specific competition provisions governing the broadcasting and telecommunications industry are set out in the Broadcasting Ordinance and the Telecommunications Ordinance, respectively. The CA is vested with the powers of investigations and adjudication in enforcing these competition provisions. On 14 June 2012, the Competition Ordinance was passed as a general and cross-sector competition law curbing anti-competitive conduct in various sectors. Under the Competition Ordinance, the CA has jurisdiction concurrent with the Competition Commission to enforce the Competition Ordinance in respect of the conduct of telecommunications and broadcasting licensees, including merger and acquisition activities involving carrier licensees. The competition rules of the Competition Ordinance have not yet commenced operation. Upon commencement of the competition rules of the Competition Ordinance, the competition provisions in the Broadcasting Ordinance and Telecommunications Ordinance will be repealed subject to transitional arrangements.

For the telecommunications industry, the relevant provisions currently in force include Sections 7K (anti-competitive practices), 7L (abuse of position) and 7N (non-discrimination) of the Telecommunications Ordinance. Under Section 7K, any licensee licensed under the Telecommunications Ordinance shall not (unless otherwise exempted pursuant to Section 39 of the Telecommunications Ordinance) engage in acts with the intention of restricting or that would restrict competition in the telecommunications market. When assessing whether certain conduct amounts to anti-competitive behaviour, the CA would consider, without limitation, (1) whether there is a price-fixing element; (2) whether the action would result in the prevention or restriction in the supply of goods or services to competitors; and (3) agreements regarding the sharing of markets on agreed geographical or customer lines. Certain actions prescribed under Section 7K(3) are deemed anti-competitive, such as, for example, entering into agreements, arrangements or understanding that would lead to: (1) anti-competitive conduct; (2) making provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service; or (3) giving an undue preference to, or receiving an unfair advantage from, an associated person placing a competitor at a significant disadvantage or preventing or substantially restricting competition. The CA has the power to determine whether an act is anti-competitive.

Section 7L of the Telecommunications Ordinance states that licensees licensed under the Telecommunications Ordinance that are in a dominant position are not to abuse their position. The CA has the discretion to determine whether an operator is in a dominant position or not, taking into account guidelines set out in the provision and if, in the opinion of the CA (following guidelines set out in the provision), the conduct in question has the purpose or effect of preventing or substantially restricting competition in a telecommunications market then such conduct would be deemed abuse of a dominant position. In addition to the foregoing, as part of the competition measures under the Telecommunications Ordinance, no licensees are permitted to discriminate service recipients on charges or on terms of supply.

The Broadcasting Ordinance also has its own competition provisions, similar to the Telecommunications Ordinance, which prohibit anti-competitive behaviour and abuse of dominance. Section 13 (prohibition on anti-competitive conduct) prohibits a licensee under the Broadcasting Ordinance from engaging in conduct that 'has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market'. When determining whether there is anti-competitive behaviour, the CA will look at, without limitation: (1) whether there is a price-fixing element; (2) whether the action would result in the prevention or restriction in the supply of goods or services to competitors; and (3) agreements regarding the sharing of markets on agreed geographical or customer lines. Any agreement permitting anti-competitive behaviour shall be void. Section 14 (prohibition on abuse of dominance) is similar to Section 7L of Telecommunications Ordinance as it prohibits a dominant market player from abusing its position in the television programme service market. In this regard, the CA will follow guidelines and exercise discretion when assessing whether an entity is in a dominant position and whether there is abuse of such position. The conduct of an associate of a licensee, or the position of the associate in a television programme service market, may be considered when the CA assesses the situation. Where it is of the CA's view that there is anti-competitive behaviour or abuse of position, the CA has the right to serve a cease-and-desist notice on the licensee,[39] to be complied with by a particular date.

III SPECTRUM POLICY

i Development

Spectrum policy in Hong Kong encompasses management, pricing, supply and rights relating to spectrum. It was monitored and regulated by the former TA prior to 1 April

39 Section 16 of the Broadcasting Ordinance.

2012 and is now monitored and regulated by the CA. Since 2007, the approach adopted by the Hong Kong government regarding spectrum management has been the market-based approach[40] and it will not depart from this approach unless there is a public policy reason to do so. The CA is open about the availability of spectrum and pursuant to the Radio Spectrum Policy Framework announced in April 2007, a spectrum release plan governing a three-year period going forward was released. Under the spectrum release plan, industry participants can bid for spectrum use rights through an open bidding or tendering process. To ensure industry participants are kept aware of the availability of spectrum, the release plan is updated every year. Unsurprisingly, spectrum availability determines the number of market players in the industry. Currently, spectrum is auctioned and allocated by the CA through the spectrum release plans. Where a spectrum has been previously allocated under an earlier release plan, it will be clearly stated in the current release plan.

The spectrum release plan for 2014 to 2015 was announced on 21 March 2014 by the CA for the industry participants' and the public's information. The CA has clearly stipulated that the release plan is non-binding, and it is not bound to allocate or assign any spectrum to any industry player. All allocation of spectrum, as and when such allocation is made, is subject to the CA's discretion. The spectrum release plan is updated annually on a rolling basis, or as required, taking into account the latest developments.

As part of the spectrum management policy, Hong Kong is also considering spectrum trading so as to create a market for secondary trading of spectrum use. We understand that the government has commissioned feasibility studies but has yet to release any conclusions from such studies.[41] Until the government announces the results of the feasibility report, the telecommunications industry in Hong Kong will not know what potential changes there may be (and the extent of such changes) in relation to spectrum. If spectrum trading is adopted, relevant competition measures may be required, and there may be allocation of spectrum bands that are permitted for secondary trading and a new licence category for spectrum use may need to be created. The CA's view is that this subject should be dealt with in the long term[42] and two Hong Kong TV stations were fined by the OFCA in November 2013 for renting transmission capacity, constituting illegal spectrum trading under the current legislation.

40 'Market-based approach' for spectrum management means 'methods relying on market forces to ensure the efficient use of spectrum as a public resource'. (From Radio Spectrum Policy Framework (April 2007) published by the Communications and Technology Branch of the Commerce, Industry and Technology Bureau of Hong Kong).

41 OFTA's 2008/2009 Trading Fund Report.

42 'Arrangements for the Frequency Spectrum in the 1.9-2.2 GHz Bank upon Expiry of the Existing Frequency Assignments for the Provision of 3G Mobile Services and the Spectrum Utilisation Fee' issued by the CA and the Secretary for Commerce and Economic Development on 15 November 2013.

ii Spectrum auction and fees

The government imposes fees on the use of spectrum since it is a limited resource, but demand is high. Such fees are referred to as the spectrum utilisation fee (SUF) and are applicable to all use of spectrum save for those reserved for government use. As an example, in January 2009, the 2.3GHz and the 2.5/2.6GHz bands were made available for auction. In the end, a total of 90MHz in the 2.5GHz band sold for approximately HK$1.5 billion to three bidders.[43]

The results of the latest auction of spectrum (the 2.5/2.6GHz band) for the provision of wireless broadband services was announced by the OFCA on 19 March 2013. The four winners to the auction each paid the SUF (amounting to a total of HK$1.54 billion) and provided the CA with a performance bond in return for a total of 50MHz of radio spectrum. The four winners will be assigned the acquired spectrum under a 15-year unified carrier licence expiring in May 2028 and are required to provide a minimum coverage of 50 per cent of population of Hong Kong as regards its mobile services, or a minimum coverage of 200 commercial or residential buildings as to its fixed services within five years from the grant of the licences.

IV MEDIA

i Digital switchover

Digital television was first introduced in 2000 by a pay-TV service provider, and then followed by other pay-TV service providers. Broadcasting of digital television by pay-TV service providers are through cable, satellite and broadband. It was not until December 2007 that Hong Kong's only two domestic free-to-air television service providers commenced simulcast, that is, provided both analogue and digital terrestrial broadcasting services. These service providers broadcast digital television via radio communications. With television services becoming digital, consumers will have access to HDTV, interactive TV, electronic programme guides and datacasting services.

It is the intention that digital television will solve technical issues, such as bad reception, while at the same time expanding consumers' choice of programming. Further, spectrum will become available once analogue broadcasting is switched off since analogue broadcasting requires more spectrum than digital broadcasting even if the same amount of information is carried, and the released spectrum can then be used for other telecommunications services, including more television channels. The two domestic free-to-air television service providers have, as a result of the introduction of digital broadcasting, introduced more television channels originating from Hong Kong, mainland China and also Taiwan.

The results of a survey conducted in March 2011 showed that only approximately 63 per cent of the households in Hong Kong are receiving DTTV services, which is far from the target of 89 per cent by end of 2010 that was originally anticipated by the

43 Please refer to Section VII, *infra*, for details regarding the latest spectrum auction, which was completed in June 2010.

CEDB.[44] As a result, the Hong Kong government has deferred the plan to switch off analogue television services from the end of 2012 to 2015 to bring it in line with the actual implementation and market situation of DTTV development in Hong Kong, even though as of January 2012, the coverage of DTTV is over 96 per cent of the population.

V THE YEAR IN REVIEW

i The Competition Ordinance[45]

A very important piece of legislation, the Competition Ordinance, was passed by the Hong Kong Legislative Council on 14 June 2012. Although not solely related to broadcasting or telecommunications, the Competition Ordinance spans various sectors and business. The Competition Ordinance has not come into full operation, and the government intends to implement the legislation in phases so that the public and the business section can familiarise themselves with the new legal requirements during the transition period. When it fully comes into operation, relevant competition provisions that are currently embedded in the Telecommunications Ordinance and the Broadcasting Ordinance (and any subsidiary regulations) will be amended or repealed (as applicable). Amendments and changes to the Telecommunications Ordinance and the Broadcasting Ordinance are set out in Schedule 8, Parts 4 and 9 of the Competition Ordinance. Some more important changes are described below.

The Competition Commission was established in April 2013 under the Competition Ordinance as an independent statutory body responsible for the general competition regulations. The Competition Commission will develop regulatory guidelines to provide clear guidance about the commission's interpretation and implementation of the competition rules. It is expected that the draft guidelines will be released for public consultation in September 2014 and will be finalised by the first half of 2015.[46]

Pursuant to Part 11 of the Competition Ordinance,[47] the CA will have concurrent jurisdiction with the Competition Commission with regard to telecommunications and broadcasting-related competition matters. The CA will have jurisdiction over: (1) entities licensed under the Telecommunications Ordinance or the Broadcasting Ordinance; (2) unlicensed entities whose activities require them to be licensed under the Telecommunications Ordinance or the Broadcasting Ordinance; and (3) entities exempted pursuant to Section 39 of the Telecommunications Ordinance. There is a very specific 'merger rule' set out in Schedule 7 of the Competition Ordinance, which only applies to the telecommunications sector. Except as otherwise exempted, undertakings that are subject to this merger rule are prohibited from 'directly or indirectly, carrying out a merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong'. Factors that can be taken into account in determining whether there

44 Press release of the CEDB dated 22 June 2011.

45 No. 14 of 2012 of the Government of the Hong Kong SAR Gazette.

46 Press release and FAQs issued by the Competition Commission.

47 Part 11, Sections 159 to 161 of the Competition Ordinance.

is a substantial lessening of competition are set out in Schedule 7 of the Competition Ordinance.

Further, there is a mechanism in the Competition Ordinance whereby competition matters can be transferred between regulators with concurrent jurisdictions.

Sections 7K (anti-competitive practices), 7L (abuse of position), 7N (non-discrimination) and 7P (Authority may regulate changes in relation to carrier licensees) in the Telecommunications Ordinance and Section 13 to 16 in the Broadcasting Ordinance are to be repealed when the Competition Ordinance comes into full operation. They will be replaced by the conduct rules set out in Part 2 of the Competition Ordinance. A new Section 7Q (exploitative conduct) will be added to the Telecommunications Ordinance. As at August 2014, the effective dates of the provisions of the Competition Ordinance that affect the Broadcasting Ordinance and the Telecommunications Ordinance have not been gazetted.

One other potential area of change that may take place as a result of the coming into operation of the Competition Ordinance will be in relation to the codes and guidelines that are currently in issue. The CA has issued its own guidelines on competition-related matters, such as in relation to its approach to analysis, handling of competition complaints and enforcement of competition procedures under the Telecommunications Ordinance and the Broadcasting Ordinance respectively. Section 35 of the Competition Ordinance states that the Competition Commission must, *inter alia*, 'issue guidelines (a) indicating the manner in which it expects to interpret and give effect to the conduct rules [...]' after having consulted the Legislative Council and any persons it considers appropriate. Pursuant to Section 161 of and Schedule 6 to the Competition Ordinance, upon coming into operation of the said section, the CA and the Competition Commission are required to sign a memorandum of understanding that must provide for, *inter alia*, the joint authorship of educational materials or guidelines on competition matters. In the circumstances, it is not clear whether the Competition Commission will waive its right under Section 35 of the Competition Ordinance and allow the CA to issue new guidelines on broadcasting and telecommunications-related competition matters pursuant to the concurrent jurisdiction provision.

ii Charging scheme in respect of administratively assigned spectrum

In contrast to those assigned by auction, those bands of radio spectrum without congestion that are assigned administratively (not by auction) are not subject to any form of spectrum utilisation fee (SUF). In November 2010, the government issued a public consultation paper relating to the proposed implementation of a charging scheme in respect of SUF for such spectrum, including relevant guiding principles, the proposed SUF and its calculation methodology and the implementation details. The stated purpose of the charging scheme is to encourage spectrum users to use the spectrum wisely and effectively. The government envisaged the return of any surplus spectrum for subsequent reassignment to other users. To encourage the return of surplus spectrum, a one-off grant capped at 10 per cent of the annual SUF applicable to the spectrum is proposed. This grant is also available where users migrate to other means of providing their services.

It is proposed that SUF be imposed on spectrum in frequency bands that are currently congested (that is, 75 per cent occupied) and are anticipated to be more congested in the future. As a result, eight frequency bands used as fixed links, electronic news gathering or outside broadcast links and selected satellite links will be subject to SUF. SUF will be determined based on the estimated opportunity cost of the spectrum. The proposed SUF will be payable annually and there will be a transition period of five years before the charging scheme is fully in force. SUF bands are also proposed to be reviewed every five years.

Having considered the views on the consultation paper of 10 market participants, the Secretary for Commerce and Economic Development and the former TA issued a consultation conclusion on 23 September 2011 and decided to proceed with the implementation of the SUF charging scheme for spectrum assigned administratively based on the lists of frequency bands, SUF levels and implementation arrangements in early 2012 after a grace period of two years. To implement the scheme, the Hong Kong government will make the necessary amendment to the Telecommunications (Designation of SUF) Order[48] and make regulations to specify the level of SUF under section 32I(2) of the Telecommunications Ordinance.

iii The Personal Data (Privacy) (Amendment) Ordinance 2012

As a result of the increasing concerns regarding the alleged misuse of personal data, the Personal Data (Privacy)(Amendment Ordinance) came into operation on 1 October 2012, with the exception of those provisions relating to direct marketing and legal assistance which came into operation on 1 April 2013.

The Amendment Ordinance introduces various amendments to the PDPO and tightens the regulatory framework to improve the protection of personal data privacy. Following the passing of the Amendment Ordinance, it is now an offence for a person to disclose any personal data he obtained from a data user without the latter's consent and with the intent to obtain gain for himself or another person, or to cause loss to the data subject.[49] It is also an offence if the unauthorised disclosure, irrespective of its intent, causes psychological harm to the data subject.[50] The penalty for these two new offences is a fine of up to HK$1 million and imprisonment for up to five years.[51]

Amendments have also been made to the PDPO to define 'data processor', expand the existing grounds on which a data user might refuse to comply with a data access request, extend the enforcement power of the Privacy Commissioner, clarify the requirements when personal data for direct marketing and when providing personal data to another for use in direct marketing, and provide legal assistance to an aggrieved individual seeking compensation from a data user for damages suffered as a result of the data user's contravention of any requirement imposed by the PDPO in relation to his personal data.

48 Chapter 106Y of the Laws of Hong Kong.

49 Section 64(1) of the PDPO.

50 Section 64(2) of the PDPO.

51 Section 64(3) of the PDPO.

iv The Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012

In response to the public demands for greater protection of consumers against unfair trade practices in consumer transactions, the Trade Descriptions (Unfair Trade Practices) (Amendment) Ordinance 2012 was enacted on 17 July 2012 and came into effect on 19 July 2013.

The Amendment Ordinance is intended to provide greater protection for consumers by extending its coverage from goods to services and specified unfair trade practices, including prohibition of false trade descriptions of services,[52] misleading omissions,[53] aggressive commercial practices,[54] bait advertising,[55] bait-and-switch[56] and wrongly accepted payment[57] and introduction of relevant criminal offences. The amendments also include an introduction of a civil compliance-based mechanism under which the law enforcement agencies may, as an alternative to criminal prosecution, accept an undertaking from a trader whom the enforcement agencies believe has engaged in a prohibited unfair trade practice to stop that practice.[58]

The Customs and Excise Department is the principal agency responsible for enforcing the TDO. The CA, with OFCA as its executive arm, is conferred concurrent jurisdiction to enforce these fair trading provisions in relation to the commercial practices of licensees under the Telecommunications Ordinance and the Broadcasting Ordinance that are directly connected with the provision of a telecommunications service or broadcasting service under the two Ordinances[59]. In this regard, the Commissioner of Customs and Excise and the CA have entered into a memorandum of understanding for the purpose of coordinating the performance of their functions.[60] A public consultation was conducted by the Commissioner of Customs and Excise and the CA for the period from 7 December 2012 to 17 March 2013 on the drafting of the Enforcement Guidelines for the fair trading sections in the TDO. Having considered the views and comments on the consultation paper, the Commissioner of Customs and Excise and the CA published the Enforcement Guidelines on 15 July 2013 setting out the manner in which they will exercise their enforcement powers and provide guidance on the operation of the new legislative provisions.

52 Section 7A of the TDO.
53 Section 13E of the TDO.
54 Section 13F of the TDO.
55 Section 13G of the TDO.
56 Section 13H of the TDO.
57 Section 13I of the TDO.
58 Section 30L of the TDO.
59 Section 16E of the TDO.
60 Section 16G of the TDO.

Chapter 28

UNITED KINGDOM

Omar Shah and Gail Crawford[1]

I OVERVIEW

The establishment of the Office of Communications (Ofcom) and the entry into force of the Communications Act 2003 (the Act) fundamentally altered the UK communications landscape. The Act mirrored the technological neutrality of the EU regulatory framework (i.e., that all transmission networks and the provision of services should be covered by a single regulatory framework). It also reflected the EU's desire to progressively eliminate *ex ante* sector-specific regulation in the largely liberalised communications markets. In addition, the creation of Ofcom saw the consolidation of a patchwork of five previously distinct regulators with authority over telecommunications and broadcasting into a single unified regulator. Following the enactment of the Postal Services Bill, Ofcom also took over the duties of Postcomm in regulating the postal sector and, in particular, the incumbent postal operator, Royal Mail, which was privatised by way of a majority of shares being floated on the London Stock Exchange on 15 October 2013. Ofcom's current priorities are set out in its 2014–15 Annual Plan.[2] A key priority for Ofcom in the period covered by the plan will be the carrying out of the public service broadcasting (PSB) review, pursuant to which Ofcom will review whether public service broadcasters have fulfilled the purposes of PSB, and how to maintain and strengthen qualities and standards.

1 Omar Shah and Gail Crawford are partners at Latham & Watkins LLP. The authors would like to acknowledge the kind assistance of their colleagues Frances Stocks, Andrea Stout, Lore Leitner, Julia Samso, Deborah Kirk and Lucy Tavener in the preparation of this chapter.

2 Available at www.ofcom.org.uk/content/about/annual-reports-plans/1262045/annual-plan-2014-15/.

II REGULATION

i The regulators

Ofcom is the independent communications regulator in the UK. The Department for Culture, Media and Sports (DCMS) remains responsible for certain high-level policy formulation and the promulgation of legislation (a role held by the Department for Business, Innovation and Skills before 2011) but most key policy initiatives are constructed and pursued by Ofcom. Ofcom has largely delegated its duties for radio and TV advertising to the Advertising Standards Authority (ASA) and a number of new regulatory bodies have been established within the ASA (such as the Broadcast Committee of Advertising Practice). The current 10-year contract between Ofcom and the ASA with respect to regulation of advertising standards will expire in November 2014, however, in May 2014 Ofcom announced its intention to renew that contract with minor changes for another 10 years. A consultation on this proposal (whereby all interested parties were invited to comment) closed on 30 May 2014 and publication of Ofcom's decision is expected later in 2014.[3]

Ofcom's principal duty is 'to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition'. This is embodied in Ofcom's strategic purposes, which were first developed in 2011 and renewed in 2013/2014. They remain unchanged for 2014/2015 and include:

a promoting effective and sustainable competition and informed choice;
b promoting the efficient use of public assets, particularly with respect to the spectrum;
c promoting opportunities to participate;
d providing appropriate assurances to audiences on standards and maintaining audience confidence in broadcast content;
e protecting consumers from harm; and
f contributing to and implementing public policy defined by Parliament (in relation to (a)–(e)).

Ofcom's priorities and major work areas (which in some cases draw directly from the strategic purposes) for the year are set out below:

a promote effective competition and informed choice;
b secure optimal use of spectrum;
c maintain audience confidence in broadcast content;
d availability – ensuring the availability of communications services;
e quality of service;
f cost and value; and
g adoption.

3 Available at http://stakeholders.ofcom.org.uk/consultations/asa-reauthorisation/ and http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/summary/Letter-to-Lord-Smith.pdf.

Ofcom's specific duties fall into six main areas:

a ensuring the optimal use of the electromagnetic spectrum;
b ensuring that a wide range of electronic communications services – including high-speed data services – are available throughout the UK;
c ensuring a wide range of TV and radio services of high quality and broad appeal;
d maintaining plurality in the provision of broadcasting;
e applying adequate protection for audiences against offensive or harmful material; and
f applying adequate protection for audiences against unfairness or the infringement of privacy.

In addition, the Body of European Regulations in Electronic Communications (BEREC), formed after the adoption of Regulation (EC) 1211/2009,[4] is now playing an increasingly significant role at a European level. The BEREC replaces the European Regulators Group and acts as an exclusive forum and vehicle for cooperation between national regulatory authorities (NRAs) and between NRAs and the European Commission (the Commission).

The prevailing regulatory regime in the UK is contained primarily in the Act, which entered into force on 25 July 2003. Broadcasting is regulated under a separate part of the Act, in conjunction with the Broadcasting Acts of 1990 and 1996. Other domestic legislation also affects this area, in particular, the Wireless Telegraphy Act 2006; the Digital Economy Act 2010; the Data Protection Act 1998; the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011); the Freedom of Information Act 2000; the Regulation of Investigatory Powers Act 2000; the Data Retention and Investigatory Powers Act 2014; the Enterprise Act 2002; and the Competition Act 1998.

Following the review of the European Framework for Electronic Communications Regulation (the Revised Framework),[5] the government adopted the Electronic Communications and Wireless Telegraph Regulations 2011 on 4 May 2011, which amended the Act, the Wireless Telegraphy Act and other primary and secondary

4 Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

5 Available at: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Copy%20of%20Regulatory%20Framework%20for%20Electonic%20Communications%202013%20NO%20CROPS.pdf.

legislation, and implemented most aspects of the EU Better Regulation Directive (2009/140/EC)[6] and the Citizens' Rights Directive (2009/136/EC).[7]

The wholesale review of the European data protection regime continues following the release in 2012 of a draft general data protection regulation[8] (the Draft Data Protection Regulation), and subsequent responses and opinions at a European level. The Draft Data Protection Regulation proposes significant changes to the current European framework, and would be directly applicable in each European Member State without the need for implementing legislation. The Draft Data Protection Regulation was approved by the European Parliament on 12 March 2014, and is currently under discussion by the Council of the EU, which has scheduled the first reading of the draft regulation for 9/10 October 2014.[9]

In May 2011, the DCMS also launched a review of communications regulation intended to lead to a new communications regulatory framework to be in place by 2015. It focused on three key aspects: growth innovation and deregulation; a communications infrastructure that provides the foundations for growth; and creating the right environment in which the content industry may thrive. In June 2012 the DCMS announced that following responses to its May 2011 review it had concluded that a complete overhaul of the legislation was not required, but it recognised the need to update the regulatory framework to ensure that it is fit for the digital age. To inform the development of the regulatory framework the government held a range of seminars to obtain industry and public opinion on topics including: driving investment in TV content; competition in the content market; the consumer perspective; maximising the value of spectrum; and supporting growth in the radio sector. It was originally anticipated that the DCMS would publish a white paper in the early part of 2013 with a communications bill to follow shortly thereafter. In July 2013, the DCMS published a policy paper titled: 'Connectivity, content and consumers – Britain's digital platform for growth' (the Strategy Paper).[10] In line with the government's view that a large-scale

6 Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

7 Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

8 Proposal [2012] COD 0010 and Proposal [2012] COD 0011.

9 Available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/fc/140297.pdf.

10 www.gov.uk/government/uploads/system/uploads/attachment_data/file/225783/Connectivity_Content_and_Consumers_2013.pdf.

overhaul of the existing legislation is unnecessary, the Strategy Paper focused on specific and incremental legislative changes to a number of areas including the following:

a a consumer rights bill that will introduce a new category of digital content in consumer law, together with a set of statutory rights for the quality standards that this content should meet, and the remedies available to consumers when digital content does not meet these standards;

b changes to improve spectrum management and amendments to the Wireless Telegraphy Act 2006;

c amending the Electronic Communications Code to make it easier for communications companies to use land for broadband infrastructure; and

d scaling back Ofcom's duty to review public service broadcasting (PSB) at least every five years and draft PSB reports.

The Department for Business, Innovation and Skills introduced a consumer rights bill to Parliament in January 2014, which includes rights in respect of the quality of digital content and digital services. This bill passed its second reading in the House of Lords in July 2014. It is due to go to the House of Lords Committee stage for review in October 2014 after Parliament returns from summer recess. DCMS issued its spectrum management strategy in March 2014, recognising the need for, *inter alia*:

a a uniform system for the valuation of spectrum to set licence fees;

b the government to work together with Ofcom in order to encourage efficient use of spectrum, in particular in the release of spectrum, the transfer of spectrum, and the assignment of spectrum to new users; and

c encouragement of innovation; and

d a strategy to address increased demands on spectrum that will evolve from the growth of the 'internet of things', machine-to-machine communication (M2M) and 5G.

DCMS's strategy was followed in April 2014 by Ofcom's spectrum management strategy, discussed in more detail below.

A proposal to reduce Ofcom's duty to review PSB, such that the duty would arise only upon the demand of the Secretary of State, was withdrawn in February 2014. In August 2014, DCMS issued a consultation paper seeking input on the goals and policies set out in the July 2013 report and explored further in a framework published in February 2014. The August 2014 consultation considers the extent to which government intervention is desirable to facilitate and encourage growth in coverage and investment, preserve and create infrastructure, and ensure a functioning telecommunications market. Specific areas of focus include the roll-out of broadband, consumer switching, access to and development of infrastructure, and the efficiency of spectrum use. The consultation will run until October 2014. The results will be used to develop the government's communications strategy. As part of its focus on ensuring that the UK becomes a 'leading digital nation', the UK government has set up a Ministerial Digital Taskforce to develop networks including infrastructure.

ii Regulated activities

Ofcom oversees and administers the licensing for a range of activities, including, broadly speaking, mobile telecommunications and wireless broadband, broadcast TV and radio, postal services and the use of radios for maritime, aeronautical and business purposes.

The Act replaced the system of individual licences with a general authorisation regime for the provision of ECNs or ECSs. Operators of ECNs and ECSs must comply with the General Conditions of Entitlement as specified in the Act. As well as the General Conditions, individual ECN or ECS operators may also be subject to further conditions specifically addressed to them. These may fall into four main categories: universal service conditions, access-related conditions, privileged supplier conditions and conditions imposed as a result of a finding of significant market power (SMP) of an ECN operator or an ECS provider in a relevant economic market.

Mobile and satellite services require licences under the Wireless Telegraphy Act 2006 to authorise the use of the operators' radio transmission equipment and earth stations on specified frequencies. Under the Act, Ofcom should adopt decisions on the rights of use for radio frequencies allocated for specific purposes within the national frequency plan within six weeks and, in any other case, as soon as possible after receipt of the application. Since 30 April 2014,[11] radio transmission equipment and earth stations mounted on mobile platforms (ESOMPs) on aircraft have been exempt from licensing requirements when operating within the 1,800 or 2,100MHz bands, provided they comply with European Telecommunications Standards Institute requirements.[12] From 27 June 2014, pursuant to the Wireless Telegraphy (Exemption and Amendment) Regulations 2014,[13] land-based transmission equipment and ESOMPs are exempt from licensing requirements across all frequencies, provided they comply with certain technical specifications.[14]

iii Ownership and market access restrictions

No foreign ownership restrictions apply to authorisation to provide telecommunications services, although the Act directs that the Secretary of State for Culture, Media and Sport (the Secretary of State) may require Ofcom to suspend or restrict any provider's entitlement in the interests of national security.

In the context of media regulation, although the Act and the Broadcasting Acts impose restrictions on the persons that may own or control broadcasters, there are no longer any rules that prohibit those not established or resident in the EEA from holding broadcasting licences. At the end of 2011, Ofcom was asked by the Secretary of State to report on measuring media plurality in light of the proposed acquisition of British Sky Broadcasting Group Plc (BSkyB) by News Corporation. In 2013, Ofcom

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11 Pursuant to The Wireless Telegraphy (Mobile Communication Services on Aircraft) (Exemption) Regulations 2014, SI 2014/953.

12 Available at: www.etsi.org/standards/list-of-harmonized-standards.

13 SI 2014/1484.

14 Available at: http://stakeholders.ofcom.org.uk/binaries/spectrum/spectrum-policy-area/spectrum-management/research-guidelines-tech-info/interface-requirements/IR_2093.pdf.

submitted two reports to the Secretary of State advising on approaches to measure media plurality. Ofcom gave evidence and provided advice to the Leveson Inquiry, including advice on models of media regulation. In February 2014, the House of Lords Select Committee on Communications produced a report into media plurality, including advice on the scope and flexibility of any assessment of media plurality.[15] The report includes a recommendation that Ofcom should conduct a review of media plurality every four or five years, that there be a higher threshold for intervention and that there be a reform of the system for reviewing mergers in the media sector. The DCMS produced a Media Ownership and Plurality Consultation Report on 6 August 2014 setting out a framework to assess media plurality, from which Ofcom will develop a set of indicators of an ideal market.[16]

iv Transfers of control and assignment

The UK operates a voluntary merger control regime (i.e., there is no requirement to seek clearance prior to completing a merger in the UK).[17]

The administrative body currently responsible for UK merger control is the Competition and Markets Authority (CMA), which was established on 1 April 2014 by merging the function of the former Office of Fair Trading (OFT) and the former Competition Commission (CC) in accordance with the Enterprise and Regulatory Reform Act 2013. The CMA consults Ofcom when considering transactions in the broadcast, telecommunications and newspaper publishing markets.[18]

The Secretary of State also retains powers under the Enterprise Act to intervene in certain merger cases, which include those that involve 'public interest considerations'. In the context of media mergers, such considerations include, for example, the need to ensure sufficient plurality of persons with control of media enterprises serving UK audiences; the need for the availability throughout the UK of high-quality broadcasting calculated to appeal to a broad variety of tastes and interests; and the need for accurate presentation of news, plurality of views and free expression in newspaper mergers. In such cases, the Secretary of State may require Ofcom to report on the merger's potential impact on the public interest as it relates to ensuring the sufficiency of plurality of persons with control of media enterprises. Ofcom is also under a duty to satisfy itself as to whether a proposed acquirer of a licence holder would be 'fit and proper' to hold a broadcasting licence pursuant to Section 3(3) of each of the 1990 and 1996 Broadcasting Acts.

15 www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf.

16 www.gov.uk/government/publications/media-ownership-plurality-consultation-report.

17 Note, however, that changes in control of certain radio communications and TV and radio broadcast licences arising as a result of mergers and acquisitions may in certain circumstances require the consent of Ofcom.

18 The CMA and OFCOM have signed a Memorandum of Understanding in respect of their concurrent competition powers in the electronic communications, broadcasting and postal sectors. This is available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/320900/MoU_CMA_and_OFCOM.pdf.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

As previously noted, the Act is technology-neutral and as such there is no specific regulatory regime for internet services. ISPs are also ECNs or ECSs depending on whether they operate their own transmission system and are entitled to provide services under the Act in compliance with the general conditions and, where applicable, specific conditions.

VoIP and VoB are specifically subject to a number of general authorisation conditions under the Act, such as those related to emergency call numbers.

Following various market reviews, Ofcom has imposed conditions on access to the internet on BT and KCOM (formerly Kingston Communications) where it found that these had SMP. As part of these conditions, both companies must make regulatory financial statements. Since April 2014 BT has been required to increase the amount, and improve the clarity, of information in these statements. Conversely, KCOM's reporting requirements have been reduced.[19]

In the context of the 'net neutrality' debate, the Revised EU Framework adopted a range of internet traffic management provisions allowing national regulatory authorities such as Ofcom to adopt measures to ensure minimum quality levels for network transmission services and to require ECN and ECS operators to provide information about the presence of any traffic-shaping processes operated by ISPs. These provisions were implemented into UK telecoms legislation following the legislative changes approved by the government on 4 May 2011.

In June 2010, Ofcom published a consultation paper in order to open the debate on what, if any, regulatory intervention should be required in connection with internet traffic management. Following this consultation, Ofcom announced in November 2011 that market forces should be sufficient to address issues in relation to internet traffic management, but Ofcom will consider using its powers to impose minimum quality of service levels if innovation is under threat from traffic management. In September 2013, Ofcom published a consumer guide on traffic management to help consumers make an informed choice when deciding which ISP they want to use. This information was provided to address an 'awareness gap' regarding the application of traffic management. The lack of consumer awareness, and a commitment to educating consumers was noted in Ofcom's annual plan for 2014/2015. In this plan, Ofcom reiterated its view from 2011 that market forces should be sufficient to address traffic management issues.

In a statement of November 2010 setting out its views on net neutrality, the coalition government announced that it does not propose to legislate further to regulate traffic management, though it stressed the importance of maintaining an open internet in which all users could access any legal content, ensuring that ISPs' traffic management

19 'Changes to BT and KCOM's regulatory and financial report 2013/14 update' available at: http://stakeholders.ofcom.org.uk/binaries/consultations/btkcomreporting/statement/BT_KCOM_1314_Statement.pdf.

policies are transparent to consumers, and allowing ISPs to manage their networks to ensure a good service, which will in turn encourage investment and innovation.

In March 2011, the Broadband Stakeholders' Group (BSG) published a voluntary industry code of practice on traffic management transparency for broadband services introducing transparency requirements on IPSs' traffic management practices. Subsequently, in July 2012, major ISPs published the Open Internet Code of Practice that commits ISPs to providing full and open internet access. This includes a commitment not to use traffic management practices to target or degrade services offered by competitors. The Code also establishes a new process that allows content providers to protest against discrimination by ISPs and refer unresolved cases to the BSG.

The net neutrality debate also continues at EU level. In April 2011, the Commission published its Communication on the open internet and net neutrality. In November 2011, the European Parliament adopted a resolution on net neutrality in Europe calling upon the Commission to monitor the development of internet traffic management practices in particular. In July 2012, the Commission issued a consultation on specific aspects of net neutrality including transparency, traffic management and switching. In June 2013, the EU Commissioner for Digital Agenda, Neelie Kroes, announced plans to legislate net neutrality on an EU level. The initiative to standardise transparency for customers, in particular with respect to costs and contractual provisions, set out rules for switching providers and regulate how ISPs are permitted to offer access at various speeds to different customers was introduced to the European Parliament in September 2013.[20] The measure passed its first reading in the European Parliament in April 2014 and has been referred back to the Commission for comment on the European Parliament's amendments.[21]

ii Universal service

Universal service is provided under the Act by way of the universal service order. Universal service obligations in the UK cover ECNs and ECSs and activities in connection with these services. Ofcom designated BT and KCOM as universal service providers (USPs) in the geographical areas they cover.

In September 2008 and March 2010, the Commission launched a consultation on whether broadband services should be included within the scope of the universal service. The Commission's Europe 2020 Strategy of March 2010 includes aiming for broadband access for all by 2013, and access for all to internet speeds of 30Mb/s or above by 2020. An October 2013 report of the Commission announced that the 2013 basic

20 Proposal [2013] COD 0309.

21 European Parliament legislative resolution of 3 April 2014 on the proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC, 2002/22/EC, and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM(2013)0627 – C7-0267/2013 – 2013/0309(COD)) (Ordinary legislative procedure: first reading).

target had been met, although high-speed broadband coverage remains low.[22] To support the Digital Agenda for Europe, the EU Parliament and the Council passed a Directive[23] in May 2014 aiming to cut the costs of the high speed roll-out. By 1 July 2016, Member States must apply measures to, *inter alia*, better coordinate civil works, provide greater access to, and information regarding infrastructure, and reduce the time taken to grant permits required to lay down networks.

The current coalition government has confirmed that it supports the former Labour government's policy of universal access to broadband at a speed of 2Mb/s. Even though the target was initially set for 2012, in July 2010, the Secretary of State for DCMS publicly stated that it would be 2015 before every home in the UK had at least a 2Mb/s broadband connection. The coalition government has stated that it expects the private sector to lead the necessary investment but it confirmed in the spending review of October 2010 that it is committed to investing £530 million until 2015 to help deliver superfast broadband to more rural and hard-to-reach areas. After receiving EU state aid clearance in November 2012, some rural local authorities started to sign contracts with broadband network developers. A further £300 million will be available by 2017 as part of the TV licence fee settlement. In September 2012, the government announced £144 million in investment across 10 of the UK's largest cities to help provide them with superfast broadband: London, Belfast, Cardiff, Edinburgh, Birmingham, Bristol, Leeds, Bradford, Manchester and Newcastle received £94 million between them, while smaller cities will share a £50 million fund. The scheme was extended to Aberdeen, Brighton and Hove, Cambridge, Coventry, Derby, Londonderry, Newport, Oxford and Perth in December 2012. Following legal challenges by two of the UK's biggest networks, the UK government withdrew its related state-aid application at EU level. Consequently, public funds for the super-connected-cities scheme had to be withdrawn in July 2013, before the DCMS diverted the allocated sums to a scheme that allows small and medium-sized enterprises to apply for vouchers to install faster internet connections in August 2013. The plan to install wireless access points across the super-connected cities, however, was re-emphasised in July 2013. In January 2014, DCMS announced a £10 million fund for a pilot programme to extend superfast broadband to hard-to-reach areas. In February 2014, a further £12 million was allocated to provide superfast broadband to Wales. Both funds opened for bids in March 2014. An August 2014 report from DCMS confirmed that the roll-out of superfast broadband to 95 per cent of UK homes and businesses remains on track for completion by 2017, and that it intends to focus on extending the roll-out to the final 5 per cent.

The development of superfast broadband will require the roll-out of fibre-optic cable throughout the UK telecommunications network infrastructure. In June 2014, Ofcom published its follow-up conclusions to a December 2010 review of the wholesale broadband access market setting out remedies to promote competition and investment in current and superfast broadband services.

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22 http://europa.eu/rapid/press-release_IP-13-968_en.htm.

23 Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks.

Access and interconnection are regulated in the UK by EU competition law and by specific provisions in the Communications Act 2003 aimed at increasing competition. The general conditions require all providers of public ECNs to negotiate interconnection with other providers of public ECNs. Specific access conditions may also be imposed on operators with SMP. Though prices charged to end-users are not regulated, Ofcom may regulate wholesale rates charged by certain operators to alternative operators for network access. This is the case, *inter alia*, of wholesale fixed termination rates, wholesale mobile call termination rates, wholesale broadband access rates (as detailed above), local loop unbundling and wholesale line rental services, etc.

In connection with this, Ofcom has decided to impose specific conditions on BT and KCOM in certain areas where they enjoy SMP so as to allow alternative operators to compete in the retail broadband market. These include an obligation to provide general and non-discriminatory network access to BT and KCOM's wholesale broadband products to alternative operators on a reasonable request; an obligation to maintain separate accounts between the services to alternative operators and its own retail division as well as other related transparency obligations; and a charge control on BT to ensure that charges for its broadband wholesale products are based on the costs of provision. Network access obligations will include virtual access to new fibre lines laid by BT (through its access service division Openreach), allowing alternative operators to combine their own electronics with physical infrastructure rented from BT.

iii Restrictions on the provision of service

The Digital Economy Act 2010 empowers the Secretary of State to impose obligations on ISPs to limit the internet access of subscribers who engage in online copyright infringement. Under the Digital Economy Act 2010, Ofcom has proposed a code of practice (in the absence of a code put forward by the industry) governing the 'initial obligations', which require ISPs to send notifications to their subscribers following receipt of reports of copyright infringement from copyright owners. ISPs must also record the number of reports made against their subscribers and provide copyright owners, on request, with an anonymised list that enables the copyright owner to see which of the reports it has made are linked to the same subscriber (also known as the copyright infringement list). Despite the Court of Appeal's dismissal of an appeal against the Digital Economy Act 2010 by BT and TalkTalk in March 2012, there are still arguments as to whether the information to be collected by ISPs on copyright offenders might infringe data protection legislation and which costs are to be borne by ISPs. A second draft of the Code of Practice that will implement the Act was published in June 2012. This version and legislation on cost sharing have to be approved by both Houses of Parliament and then subjected to EU scrutiny before coming into effect. In June 2012, Ofcom had expected that the first notification letters would be sent out in early 2014. Due to delays in implementing legislation, Ofcom announced in May 2013 that the first letters will not be sent out until the latter half of 2015. The government has not revealed a timetable detailing how this will be achieved. In September 2013, to accelerate the process, music and film companies tried to convince ISPs to sign up to a voluntary code of practice that would also require them to create a database of repeat offenders. In July 2014, DCMS announced a scheme named 'Creative Content UK' spearheaded by ISPs and media industry leaders and supported by a government contribution of £3.5 million, to raise awareness of copyright infringement and warn internet users whose accounts are used to illegally access and share copyright material. In addition to voluntary involvement in this scheme, ISPs' responsibilities include blocking access to websites that provided unauthorised links to content protected by copyright, following two recent court decisions: a decision of the Court of Justice of the European Union (CJEU) in February 2014,[24] which held that providing a hyperlink to material protected by copyright can constitute a communication to the public of that material, was followed days later by UK High Court decision that required six UK ISPs to block access to websites providing hyperlinks to copyrighted content.[25]

iv Security

Privacy and consumer protection

In the UK, consumers' personal data is primarily protected by the Data Protection Act 1998 (DPA), which implements the EU Data Protection Directive (the Data Protection Directive),[26] and by the Privacy and Electronic Communications (the EC Directive) Regulations 2003 as amended by the Privacy and Electronic Communications (the EC Directive) (Amendment) Regulations 2011 (the e-Privacy Regulations), which implement the EU Directive on Privacy and Electronic Communication,[27] as amended by EU Directive 2009/136/EC (the e-Privacy Directive, and together with the Data Protection Directive, the EU Directives).

The DPA is based around the principles in the Data Protection Directive that impose strict controls on the processing (including disclosure) of personal data including but not limited to the following:

a providing one or more listed conditions, such as that the individual has consented or that the processing is necessary for the purposes of fulfilling a contract, that must be met to ensure personal data is processed fairly and lawfully;

b the requirement that data can generally only be processed for the purpose for which it was obtained, must be kept accurate and up to date and for no longer than is necessary, and must not be excessive;

c the requirement that data be kept secure (i.e., be protected against unlawful processing and against accidental loss, destruction or damage);

d the restriction that data cannot be transferred to countries outside the EEA unless certain conditions are met, such as through the Safe Harbour Framework whereby personal data can be transferred to US entities that have undertaken a process of self-assessment to determine that is meets an 'adequate' standard of privacy protection; and

24 *Svensson and others v. Retriever Sverige AB*, Case C- 466/12, 13 February 2014.

25 *Paramount Home Entertainment International Ltd and others v. British Sky Broadcasting Ltd and others* [2014] EWHC 937 (Ch).

26 Directive 95/46/EC.

27 Directive 2002/58/EC.

e personal data must be processed in accordance with the rights of the data subject under the DPA, including that the individual has a right to access the personal data held about them and a right in certain circumstances to have inaccurate personal data rectified or destroyed, among various other rights. The restrictions in the DPA may affect the ability of a business to disclose information that includes personal data to third parties, including public bodies, unless certain conditions are met.

The e-Privacy Regulations introduced further rules for the electronic communications sector including:

a controls on unsolicited direct marketing;
b restrictions on the use of cookies; and
c rules on the use of traffic and location data.

The Draft Data Protection Regulation (the Draft Regulation) would significantly change the current UK – and broader European – data protection framework. The proposed draft continues to be discussed and negotiated at a European level and in March 2014 the EU Parliament formally adopted the text of the Draft Regulation, which had been approved by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs in October 2013.[28] The European Council and the European Parliament will continue to negotiate the Draft Regulation until a final agreement is reached, which is not expected until early 2015.

The broad themes of the revised European regime are a strengthening of individual privacy rights, an emphasis on responsibility and accountability, and a desire to simplify and harmonise the rules across Europe. In the European Commission's view, the proposed regime will bring various cost savings to organisations operating in Europe (by harmonising the rules across EU Member States and simplifying certain administrative requirements), will lead to more efficient cooperation between national regulators and businesses and will set the 'gold standard' for data protection law. There has, however, been significant criticism by numerous industry groups, and by various directorates-general within the European Commission, on the basis that certain protections are disproportionately restrictive, create additional administrative and operational burdens for businesses to an inappropriate and unjustified extent, and dilute the potential benefits of the harmonising effect of the regulation by reserving various powers for Member States to put in place additional national rules.

The key changes under the Draft Regulation include:

a the form of the new rules as a regulation, rather than a directive, which will be directly applicable in every Member State;
b the removal of the requirement to notify or register data processing activities with the national regulator;

28 European Parliament legislative resolution on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).

c the introduction of an extraterritorial effect, resulting in the regulation applying not only to organisations established within the EEA, but also to organisations established outside the EEA but offering goods or services to, or monitoring the behaviour of, individuals in the EEA (though it remains unclear how this will operate in practice);

d a tightening of the requirements for valid consent, with the effect that consent will only be deemed to be valid if it is freely given, specific, informed and explicit;

e a stricter approach to the export of data outside the EEA, resulting from the general standards of data protection being raised throughout the draft regulation as a whole;

f the introduction of mandatory data breach notification requirements (including notification within strict time periods to both the national regulators and to data subjects affected by the breach);

g the introduction of a right to be forgotten and a right to data portability; and

h maximum fines of 5 per cent of an organisation's annual global turnover for breaches.

The future of the Safe Harbor Framework also remains unclear following a resolution passed by the European Parliament that calls for the suspension of the Safe Harbor Framework stating that it does not adequately protect European citizens.[29] As the Safe Harbor Framework was not negotiated by the European Parliament, the resolution will not have immediate effect as any changes must be renegotiated with the Commission itself, which is currently reviewing the terms of the Safe Harbor Framework.

Under the current DPA framework, the Information Commissioner's Office (ICO) is responsible for the implementation and enforcement of the DPA and the e-Privacy Regulations as well as the Freedom of Information Act 2000 (which provides individuals with the ability to request disclosure of information held by public authorities).

The ICO continues its increasing focus on enforcement generally, and on the use of monetary penalties (of up to £500,000) in particular. In the 12 months up to June 2014, the ICO issued civil monetary penalty notices totalling over £1.6 million, under 15 separate penalties, down from £2.6 million under 23 separate penalties in the same period of 2013. As evidenced via this trend in enforcement actions, the ICO maintains an increasingly pragmatic approach to the implementation and enforcement of the EU Directives, perhaps taking a more balanced view of the commercial reality of the international business community than some other European regulators. The vast majority of civil monetary penalty notices are issued against the health and local government sectors, including a total of over £1 million in penalties issued against various NHS bodies. The largest fine imposed by the ICO on a private business to date is the £440,000 civil monetary penalty notices issued under both the e-Privacy Regulations and the DPA against Tetrus Telecoms, following a spam text message scam, whereby

29 European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various member states and their impact on EU citizens' fundamental rights and on the transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)).

Tetrus Telecoms obtained personal details from individuals and sold them on as sales leads to third parties.

The most common ground for large fines and enforcement action is loss of data and other major data security breaches, though there is also a current focus on tackling cold calls and spam text messages. The ICO takes a serious view of the loss of unencrypted data. Where financial institutions are involved, the ICO often works in conjunction with the Financial Conduct Authority (previously the FSA). For example, Zurich was fined a record £2.3 million by the FSA in August 2010 for loss of an unencrypted back-up tape.

Individual data subjects have the right under the DPA to notify a data controller to cease or not to begin processing their personal data for the purposes of direct marketing. Under the e-Privacy Regulations, an organisation must obtain prior consent before sending a marketing message by automated call, fax, e-mail, SMS text message, video message or picture message to an individual subscriber. There is a limited exemption for marketing by electronic mail (both e-mail and SMS) that allows businesses to send electronic mail to existing customers provided that they are marketing their own goods or services; such goods and services are similar to those that were being purchased when the contact information was provided; and the customer is given a simple opportunity to opt-out free of charge at the time the details were initially collected and in all subsequent messages. The same maximum fine (of £500,000) also applies to breaches of the e-Privacy Regulations.

Under the e-Privacy Regulations, location data (any data that identifies the geographical location of a person using a mobile device) can be used to provide value added services (e.g., advertising) only if the user cannot be identified from the data or the customer has given prior consent. In order to give consent, the user must be aware of the types of location data that will be processed, the purposes and duration of processing that data, and whether or not the data will be transmitted to a third party to provide the value-added service.

The requirements for the use of cookies and similar devices have changed significantly following the amendments to the e-Privacy Regulations (implementing amendments to the e-Privacy Directive brought in by EU Directive 2009/136/EC) in May 2011.

The revised e-Privacy Regulations require the consent of the user of the relevant terminal equipment, unless the cookie is strictly necessary to provide an online service requested by the user (such as online shopping basket functionality, session cookies for managing security tokens throughout the site, multimedia flash cookies enabling media playback, or load-balancing session cookies).

In practice, steps have been taken by most reputable UK websites to comply with these consent requirements, ranging from banner notices with tick boxes or that require an active step to make them disappear to one-time banners or pop-overs giving brief information and allowing the user to take steps to disable the site's cookies if they wish to do so before continuing to use the site. Between April and June 2014, the ICO received only 38 reports concerning cookies, down from over 250 received between the same period in 2012. Its current approach is to focus on sites that are not doing enough to raise awareness of cookies, or obtain their users' consent, particularly those most visited sites in the UK.[30]

A variety of different approaches can be seen across those countries that have implemented the consent rules, though there is a general trend towards an implied consent approach rather than a strict express consent approach.

A further change brought in by the e-Privacy Regulations is the introduction of mandatory data-security-breach notification requirements. These obligations fall on the providers of public ECNs or ECSs, and require such service providers to promptly inform the ICO of a personal data security breach and, where that breach is likely to adversely affect the personal data or privacy of a customer, that customer must also be promptly notified.

Data retention, interception and disclosure of communications data

The Regulation of Investigatory Powers Act 2000 (RIPA) imposes a general prohibition on the interception of communications without the consent of both the sender and recipient, unless a warrant is issued by the Secretary of State (interception warrants). Interception warrants can be requested by a limited number of individuals heading various security and law enforcement bodies, HMRC or by another state under a mutual assistance treaty. The grounds for issuing warrants are that the interception is in the interests of national security, for the purpose of preventing or detecting serious crime or for the purpose of safeguarding the economic well-being of the UK.

Public telecommunications service providers who provide (or intend to provide) services to more than 10,000 users may be required to maintain interception capabilities on receipt of a notice from the Secretary of State (interception capability notice).[31] In certain circumstances, contributions will be made towards the costs of implementing intercept capabilities or responding to warrants. There is a similar prohibition on the disclosure of communications data (e.g., subscriber, traffic and location data); however, no warrant is needed to allow disclosure. Disclosure can be made on request by a far wider range of public bodies and the grounds on which requests can be made are far broader including that the request is in the interests of public safety, for the purpose of protecting public health or for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department. RIPA was amended in July 2014 by the Data Retention and Investigatory Powers Act 2014, which is described in more detail in Section VI *infra*.

Protection for children

Currently, there is no legislation in England that is specifically and expressly targeted at protecting children online in the UK. The Article 29 Data Protection Working Party opinion on the protection of children's data states that businesses dealing with children's data should give regard to what is in the best interests of the children and the child's

30 See ICO website – Enforcement Actions – Cookies.

31 Regulation of Investigatory Powers (Maintenance of Interception Capability) Order 2002.

right to privacy.[32] Under the Data Protection Act 1998, in order to fulfil the principle that children's data is processed 'fairly', stronger safeguards should be in place and age-appropriate language is required for privacy notices to ensure that children's lack of maturity or understanding is not exploited.

The ICO[33] has indicated, in relation to the collection of personal data from children online, that consent of a parent or guardian will normally be necessary to collect personal information from children under the age of 12. However, whether consent will be valid, and the nature of the consent, will depend on the complexity of the data usage and the degree of risk associated with sharing the information in question. For example, the publication of photos of a child, and potentially of friends and family, would require a more demanding form of parental consent and control (such as requiring the parent to register and actively consent on the site and provide additional identification such as a credit card number), in comparison to requesting a child's e-mail address for the sole purpose of sending a fan club newsletter that they have requested (in which case, a tick box consent on the site for the child to tick and clear unsubscribe instructions may be considered more appropriate).

Parental or guardian consent is recommended by the ICO when the collection of information from a child is likely to result in:

a disclosure of the child's name and address to a third party, for example as part of the terms and conditions of a competition entry;

b use of a child's contact details for marketing purposes;

c publication of a child's image on a website that anyone can see;

d making a child's contact details publicly available; or

e the collection of personal data about third parties (for example, where a child is asked to provide information about his or her family members or friends).

The provisions of the Draft Data Protection Regulation include specific provisions on processing personal data of children, which require parental consent for children aged under 13 years and grant the Commission delegated responsibility to introduce additional rules to protect children. Children aged between 13 and 18 years are subject to the relevant provisions governing the age of consent in each Member State.

The Child Exploitation and Online Protection Centre (CEOP) works to prevent exploitation of children online; it is made up of a large number of specialists who work alongside police officers to locate and track possible and registered offenders. CEOP was previously affiliated with the Serious Organised Crime Agency, however, following its abolishment under the Crime and Courts Act 2013, the Centre became part of the National Crime Agency (NCA).[34] CEOP also offers training, education and public awareness in relation to child safety online.

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32 Article 29 Data Protection Working Party – Opinion 2/2009 on the protection of children's personal data.

33 ICO's Personal Information Online – Code of Practice.

34 Crime and Courts Act 2013.

In its annual report for 2013, CEOP revealed that more than 2.6 million primary and secondary age children took part in the Thinkuknow programme, a free educational programme aimed at empowering and protecting children against sexual abuse and exploitation, both online and offline, through age-appropriate resources.[35] Website and software operators may also apply for the Kitemark for Child Safety Online. This has been developed through collaboration between the BSI (the UK's national standards body), the Home Office, Ofcom and representatives from ISPs and application developers. BSI will test internet access control products, services, tools and other systems for their ability to block certain categories of websites (e.g., sexually explicit, violent or racist activity). The UK Council for Child Internet Safety's 'Good practice guidance for the providers of social-networking and other user-interactive services – Updated 2010' recommends that websites should offer easy-to-use privacy settings and when dealing with child website visitors (those under 18 years' old), these privacy settings should be set to the maximum protection level by default.[36]

Cybersecurity

The government has consolidated its focus on cybersecurity, announcing an additional investment of £210 million for 2015/16 following the 2013 spending review.[37] Following the passage of the Crime and Courts Act 2013, the government brought the National Cyber Crime Unit (NCCU) under the remit of the NCA. The NCCU brings together cybercrime response operations and uses information on cybersecurity threats collected from the private sector via the Cyber-Security Information Sharing Partnership (known as CISP). To reduce the risk of cyber attacks, the government established the Computer Emergency Response Team in March 2014[38] to take a lead in administrating the UK's response to national cybersecurity incidents. The Computer Misuse Act 2000 (as amended by the Police and Justice Act 2006) sets out a number of provisions that make hacking and any other forms of unauthorised access, as well as denial of service attacks and the distribution of viruses and other malicious code, criminal offences. Further offences exist where an individual supplies 'tools' to commit the aforementioned activities.

At a European level, the European Parliament approved a revised draft of the Network and Information Security Directive in March 2014, which introduces, among other things, mandatory breach notification requirements for certain organisations and sets out minimum security requirements.[39] The Directive aims to ensure a uniform level of cybersecurity across the EU as part of the Commission's wider Digital Agenda for Europe.

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35 CEOP Annual Review 2012-2013 and Centre Plan 2013-2014.

36 UK Council for Child Internet Safety – Good practice guidance for the providers of social networking and other services – Updated 2010.

37 www.gov.uk/government/topical-events/spending-round-2013.

38 www.gov.uk/government/news/uk-launches-first-national-cert.

39 European Parliament legislative resolution of 13 March 2014 on the proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security access across the Union.

IV SPECTRUM POLICY

i Development

The Framework Directive and the Authorisation Directive, part of the Telecoms Reform Package, requires the neutral allocation of spectrum in relation to the technology and services proposed by the user (for example, mobile network operators and radio broadcasters). Following on from the Telecoms Reform Package, the Commission required Member States to adopt measures including greater neutrality in spectrum allocation, the right of the Commission to propose legislation to coordinate radio spectrum policy and to reserve part of the spectrum from the digital dividend (from the switchover to digital television services) for mobile broadband services through the Better Regulation Directive and the Citizens' Rights Directive.

In the UK, Ofcom is responsible under the Act for the optimal use of the radio spectrum in the interests of consumers. This includes, *inter alia*, monitoring the airwaves to identify cases of interference and taking action against illegal broadcasters and the use of unauthorised wireless devices.

ii Flexible spectrum use

As the uses of the radio spectrum have increased, the allocation of spectrum by the regulator has developed from a centralised system, where use was determined by the regulator, to a market-based approach, where users compete for spectrum. Currently, auctions are the primary market tool used to implement the allocation.

Spectrum trading was introduced in the UK for the first time in 2004 and is permitted under the Wireless Telegraphy Act 2006 and the associated regulations. Broadly, the trading of spectrum is subject to a multi-stage process that, *inter alia*, requires a decision by Ofcom about whether to consent to the trade. On 22 September 2009, Ofcom published a consultation document on proposals to streamline the spectrum trading process to make the spectrum market more dynamic and efficient. In 2011, following the consultation process, Ofcom concluded that it should proceed to simplify the transfer process, in particular, by removing the need to obtain its consent for proposed trades in most cases. In December 2010, the government also directed Ofcom to make tradeable spectrum used for mobile telecommunications, which it implemented in 2011, including permitting 2G spectrum to be used for the provision of 3G services by amending current licences. The changes, set out in the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011, are directed at making more efficient use of the available spectrum, and improvements in mobile services to meet the demand for faster and more reliable services for consumers. Under the regulations, the licensee can transfer all or part of the rights and obligations under its licence. A partial transfer, or 'spectrum leasing', can be limited to a range of frequencies or to a particular area. Ofcom also plans to simplify the process for time-limited transfers in line with the revised Framework Directive.

In July 2013, Ofcom lifted the restrictions on spectrum currently licensed for 2G to allow the provision of 3G and 4G services and the trading of spectrum. Ofcom also amended the terms of current 3G licences, so that the licences become indefinite as well as allowing users to trade spectrum. In return, users will pay an annual fee from

2021, when the licences in their current form are due to expire. Ofcom consulted on its fee proposals in October 2013, and made further proposals in response in August 2014. These August 2014 proposals, which are the subject of a consultation that closed in September 2014, use the bids received in the auction of the 800MHz and 2.6GHz spectrum in February 2013 as the relevant basis to establish the market value of the 3G bands and thus set the annual fees for current 3G licences.

In September 2013, the Ministry of Defence announced that Ofcom would be made responsible for the award of 190MHz of spectrum across current military bands, 2.3GHz and 3.4GHz, for civil use. Ofcom plans to award licences for the use of these bands in the 2015/2016 financial year.

In April 2014, Ofcom published its spectrum management strategy setting out the approach to and priorities for spectrum management over the next 10 years.[40] The strategy noted in particular the increasing use of wireless services across the UK and the need to meet the increased demands with which the spectrum is faced. Ofcom proposed that it use a combination of market forces and regulations to support its strategic goals, which includes increasing quality of radio frequency performance, providing greater information on spectrum use, repurposing some spectrum bands and providing for shared access to spectrum. As part of this, Ofcom has in May 2014 published a consultation on the future use of the 700MHz band, considering particularly whether the band should be made available for mobile broadband use. Consultation closes on 29 August 2014 and a decision is expected in late 2014 or early 2015.

iii Broadband and next-generation mobile spectrum use

In August 2012, Ofcom published its decision to allow Everything Everywhere (formed by the merger of Orange UK and T-Mobile UK in 2010) to vary its 1.8GHz 2G spectrum licences to allow the use of 4G (LTE and WiMax) technologies. Hutchison 3G will also benefit from the licence variation as the buyer of a portion of Everything Everywhere's 1.8GHz band, which the company was required to divest until the end of 2013 as a result of its merger in 2010. A legal challenge, which was expected to be brought by O2 (Telefónica) and Vodafone against Ofcom's decision, was avoided when Ofcom gave assurances that it would bring the release of new spectrum forward to September 2013. Acknowledging that its decision might give an advantage to Everything Everywhere, Ofcom did not want to delay the release of 4G services to customers in the UK any further and Everything Everywhere launched its 4G services in October 2012.

By retuning television services that used the 800MHz spectrum, further 4G services were rolled out on these bands from August 2013, increasing the capacity of the existing 3G network by more than 200 per cent to meet the growing demand from consumers.

The technology is expected to provide more capacity at faster speeds for mobile services on smartphones such as video streaming, e-mail and social networking sites.

40 Available at http://stakeholders.ofcom.org.uk/binaries/consultations/spectrum-management-strategy/statement/statement.pdf.

iv White space

Following an earlier consultation, 2011 has seen Ofcom set out the use of free spectrum, or 'white space', made available from the UK's switch from analogue to digital TV and radio, for applications such as mobile broadband (particularly in rural areas) and enhanced wi-fi. Ofcom has estimated that the bandwidth available is equivalent to the spectrum available to current 3G services. The UK is the first country in Europe to progress its plans. A white space device will search for spectrum that is available and check a third-party database to find out what radio frequencies are available to ensure that it does not interfere with existing licensed users of the spectrum. The white space devices will be licence-exempt, on the condition that they do not interfere with existing users. New white space radios use frequencies that are allocated for certain uses elsewhere but are empty locally. Flawless management of spectrum is required to avoid interferences. A pilot for innovative white space equipment began in December 2013 with several database premier contracts having already been signed. The final version of the ETSI Harmonised European Standard for white space devices[41] has been published and delivered to the European Commission.

v Spectrum auctions

In February 2013, Ofcom announced the results for the auction of the 800MHz and 2.6GHz bands. The auctioned spectrum, which was previously used for digital TV and wireless audio devices, was cleared by retuning TV signals in July 2013 and is now used for further 4G mobile services. After more than 50 rounds of bidding, Vodafone, O2 (Telefónica), Everything Everywhere and Hutchinson 3G UK secured various bands of the newly released spectrum. Consequently, all major mobile networks in the UK started to provide 4G services from September 2013 in addition to Everything Everywhere.

As Ofcom's auction process is designed to promote competition and coverage, Ofcom attached a coverage obligation to one of the 800MHz lots that was won by O2 (Telefónica). The provider accepted the obligation to widen the coverage of its mobile broadband for indoor reception to at least 98 per cent of the population.

To ensure competition between the national operators, Ofcom introduced a floor and cap on the amount of spectrum that each of the operators can win and imposed safeguard caps to prevent an operator from holding too much spectrum. To diversify the market Ofcom also reserved parts of the spectrum for a fourth national wholesaler. The reserved lots were won by Hutchison 3G UK.

Despite the fact that the UK government budgeted a surplus of £3.5 billion for the auctioned spectrum it only raised a total of £2.34 billion.

vi Emergency services bandwidth prioritisation

The Universal Services Directive, a further part of the Telecoms Reform Package, introduces several extended obligations in relation to access to national emergency numbers and the single European emergency call number (112). Prior to the Universal Services Directive, obligations to provide free and uninterrupted access to national and

41 ETSI EN 301598 V.1.0.0(2014-02).

European emergency numbers applied to providers of publicly available telephone services only. Under this Directive, however, these obligations are extended to all undertakings that provide to end-users 'an electronic communication service for originating national calls to a number or numbers in a national telephone numbering plan'; the UK has mirrored this wording in its revisions to General Condition 4 under the Act. Such electronic communication service providers are therefore required to ensure that a user can access both the 112 and 999 emergency call numbers at no charge (and without the use of any cards or coins), and, to the extent technically feasible, make caller location information for such emergency calls (meaning information indicating the geographical position of the terminal equipment of the caller) available to the relevant emergency response organisations. The recent spectrum auction for 4G services has again sparked debate on the need for a separately allocated bandwidth for emergency calls only, as in the United States.

V MEDIA

The UK media and entertainment industry continues to feel the effects of the advent of digital content and converged media platforms. The transition from traditional forms of media distribution and consumption towards digital converged media platforms is changing the commercial foundations of the entertainment and media industry in the United Kingdom. Politicians, lawyers, economists and members of the industry are all grappling with new business models to monetise content and control frameworks to provide sufficient protection for the rights of content creators and consumers alike.

i Restrictions on the provision of service

The service obligations and content restrictions described for the UK communications landscape in Sections I to IV of this chapter apply to providers of digital content and converged media platforms. The regulatory framework described in these paragraphs applies to network operators and content providers alike in the context of the transmission of digital content across these converged media platforms.

ii Superfast broadband

The government's roll-out of superfast broadband has reached more than 1 million homes and businesses across the UK. The £1.7 billion nationwide roll-out is on track to extend superfast broadband to 95 per cent of UK homes and business by 2017. Eight different projects have had successful bids for the £10 million innovation fund to explore ways to take superfast broadband to the most remote and hardest to reach places in the UK.

It is estimated that faster broadband will not only improve profits for UK businesses, but will create an additional 56,000 jobs in the UK by 2024. The work involved in the current roll-out is expected to provide a £1.5 billion boost to local economies and by 2024 it is hoped that the government's current investments in faster broadband will be boosting rural economies by £275 million every month, or around £9 million every day.[42]

iii Internet-delivered video content

Digital content has driven new forms of consumption of, and interaction with, media and entertainment content in the UK. This is primarily taking place on the internet and, as in other parts of the world, the UK has seen a rapid rise in the use of Web 2.0 and IPTV on converged media platforms.

Web 2.0

Web 2.0 is characterised as facilitating communication, information sharing, interoperability and collaboration for users of the internet. Users are empowered and encouraged to play a more active role in the creation and consumption of content, which has given rise to the concept of user-generated content (UGC). UGC has created issues of liability and ownership that have been addressed to some extent by legislation (see the references to the Digital Economy Act in Section III.iii, *supra*) and in court. The application of the Digital Economy Act is reliant on the ability of copyright owners to notify ISPs of potential copyright infringement. To do this, copyright owners will send details of the infringement, including IP addresses, to ISPs. However, courts in the UK continue to cast doubt over the use of an IP address as evidence that an individual has downloaded content unlawfully. Given this, as well as US authorities suggesting that a provider of Web 2.0 content will not be liable for copyright infringement if it removes material from its site when notified by the copyright owner, along with the formal challenges to the Digital Economy Act (see Section III.iii, *supra*), it remains to be seen how the Digital Economy Act will be interpreted in the UK in the future.

On 26 June 2012, Ofcom issued a consultation on the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order (the Sharing of Costs Order), which was laid before Parliament. The consultation, which closed in September 2012, addressed how Ofcom should calculate the level of charges that participating copyright owners will have to pay to Ofcom for the costs of setting up and running a scheme for reporting online copyright infringement under an 'initial obligations code' for ISPs. However, in February 2013, the Sharing of Costs Order was withdrawn over concerns that it may not comply with the Treasury's Managing Public Money guidelines. In response to a freedom of information request, Ofcom disclosed that it had spent £1.8 million on taking action against online copyright infringements in accordance with the Digital Economy Act in 2011–2012. Following the Treasury's announcement, the DCMS stated in May 2013 that technical changes to the draft Sharing of Costs Order were required.

In a Select Committee Report published in September 2013, the Committee criticised the delay in the implementation of the Digital Economy Act and urged the government to set a clear timetable for resolving the impasse. However, the process is

42 Ofcom – The Office of Communications Annual Report and Accounts for the period from 1 April 2013 to 31 March 2014.

expected to be delayed, however, as it requires notification to the European Commission.[43] The government has welcomed work by the industry to develop a voluntary-led process.

In 2015, the Voluntary Copyright Alert Programme (VCAP) is expected to begin following years of discussions between ISPs and the creative industries. It is a voluntary agreement between copyright owners and ISPs whereby owners will send evidence of copyright infringement to ISPs, who will respond by sending up to four letters of warning to their subscribers. There is currently no plan of punitive action, but it is presumed that the letters will assist copyright owners in the event there is illegal action.

IPTV

IPTV typically describes a platform that allows users to stream television content using the internet or mobile telephone networks. The key benefit of IPTV is that it allows a user to interact with the content because data can flow both ways in an IP network. IPTV is growing rapidly in the UK and this growth is predicted to continue, particularly in light of the new spectrum being made available as a result of the digital switchover.

IPTV is made available by a range of content providers in the UK, including public broadcasters (BBC's iPlayer, ITV's ITV Player, Channel 4's 4oD), cable and satellite providers (both Virgin Media and BSkyB offer broadband-based VOD products), mobile operators (including Vodafone, Everything Everywhere, O2 (Telefónica) and Hutchison 3G), fixed-line operators, ISPs, online aggregators and websites. The mobile operators continue to investigate mobile television offerings and this technology should see dramatic acceleration following the launch of 4G services in 2013 (see Section IV.v, *supra*).

To further facilitate user access to IPTV, the BBC, ITV, Channel 5 and BT have collaborated on an open-technology offering so that viewers with Freeview or Freesat and a broadband connection can access catch-up and on-demand programming via their televisions from online services such as BBC iPlayer in an initiative called YouView (previously known as Project Canvas). Since its launch in July 2012, YouView has been marketed heavily at UK consumers. In July 2014, an agreement was signed guaranteeing five more years of funding by all seven shareholders, including BT and TalkTalk, giving YouView further scale in the UK market.

According to Ofcom's Communications Market 2014, UK adults spend on average four hours and 17 minutes per day viewing audio-visual content through a variety of media – 10 per cent of this is spent viewing online content (5 per cent of on-demand catch up services such as BBC iPlayer or 4oD, 3 per cent on downloaded or streamed services such as Amazon Prime Video or Netflix, and 2 per cent on short video clips).[44] Trend data shows that visits to BBC iPlayer and ITV player decreased significantly, however, Ofcom attributes this decline to people accessing catch-up TV content through other devices other than through their PCs, such as smartphones, tablets and internet-enabled devices.

43 Select Committee Report – Supporting the Creative Economy.

44 Ofcom – The Communications Market 2014.

iv Mobile services

In its annual report for 2013/2014, Ofcom details how it worked with the government to minimise disruption to the digital terrestrial TV (DTT) services by securing the early release of DTT broadcasting frequencies for use of the 4G network.[45] Four operators (EE, Hutchinson 3G, Telefónica O2 and Vodaphone) are now offering 4G mobile services and more than 5 million consumers are enjoying the benefits offered by superfast broadband, up from 0.3 million in the previous year. Services are currently available across 70 per cent of the UK. Ofcom aims to make these services available to at least to 98 per cent of the population (by one operator) indoors and even more outdoors, by the end of 2017 at the latest.

In July 2014, the Supreme Court handed down a decision in BT's favour with respect to termination charges. Ofcom had exercised its dispute resolution powers after complaints from mobile operators T-Mobile, Vodafone, O2 and Orange, in response to BT's proposed changes to the termination rates it charges for 080, 0845 and 0870. Ofcom found that the proposals were not fair and reasonable. This decision was overturned by a decision of the CAT in August 2011, which was in turn overturned by the Court of Appeal in July 2013. The Supreme Court found that BT's proposed changes to its termination charges were not unfair or unreasonable, and Ofcom's decision was based merely on an opinion that the changes may have a distortive impact on competition.

VI THE YEAR IN REVIEW

Sky – wholesale broadcasting rights

The Court of Appeal in February 2014 referred back to the Competition Appeals Tribunal (CAT) a dispute regarding Sky's actions in respect of its wholesale broadcasting rights. Ofcom published findings in March 2010 regarding the operation of the pay-TV market and concluded that Sky had market dominance in the wholesale and retail market for premium movies and sports channels. As a consequence of this decision, Ofcom required that Sky Sports 1 and Sky Sports 2 be offered to other broadcasters at a price below or equal to a price set by Ofcom (known as 'wholesale must offer' (WMO)). The imposition of the WMO triggered an appeal by Sky to the CAT, which found in Sky's favour in March 2013. BT was granted permission to appeal against this ruling. The Court of Appeal found that the CAT had failed to consider whether Sky's use of discounted 'rate card prices' and other discounts referable to Sky's penetration rates had affected the ability of new entrants, particularly BT, to compete with Sky in the premium broadcasting market. As a consequence, the Court of Appeal remitted the decision back to the CAT for reconsideration. In the interim, Ofcom has decided to review the WMO. Ofcom is separately considering a complaint from BT regarding Sky's alleged abuse of its dominant position in respect of the supply to BT's YouView platform of Sky Sports 1 and 2.

45 Ofcom Annual Report and Accounts 2013/2014.

Right to be forgotten

In May 2014, the CJEU delivered a judgment following its consideration of Google's right to freedom of expression under the ECHR in contrast to an individual's fundamental right to privacy and protection of personal data under the EU's Charter of Fundamental Rights and found that the balance was tipped in favour of an individual's right to privacy. This brought into existence a 'right to be forgotten' ahead of its legislative adoption in the still pending Data Protection Regulation.

On 30 July 2014, the European Union Committee of the House of Lords published a review of the CJEU decision in its report titled 'EU Data Protection law: a 'right to be forgotten'?' in which it criticised the judgment as 'unworkable' and burdensome on ISPs.[46] Google contributed to the report by demonstrating that by 30 June 2014, approximately six weeks after the judgment, it had received more than 70,000 removal requests. The Committee suggested that small and medium-sized internet companies would find it difficult to accommodate these requests and that the costs of doing so could potentially hinder economic growth. The ruling has also been criticised as it leaves internet providers in a position where it is their responsibility to determine if information appears to be 'inadequate, irrelevant or no longer relevant' to the data subject and therefore should be removed. Leaving such judgements to commercial enterprises is at best controversial.

The Data Retention and Investigatory Powers Act 2014

The Data Retention and Investigatory Powers Act 2014 (DRIP) came into force on 17 July 2014, following a fast-tracked procedure that meant it passed through all stages of Parliament within four days (a process that often takes months or even years) on the basis that its enactment was required for continued national security. The Act addressed two key issues: (i) the obligation to retain communications data by communications providers and (ii) the extraterritorial expansion of powers under RIPA, which enable warrants for intercept communications data to be served on companies outside the UK.[47] The first part of DRIP was implemented in response to the declaration of invalidity of Directive 2006/24/EC (the Data Retention Directive) by the CJEU in April 2014, which found that it violated an individual's right to privacy and was disproportionate to its aims. Under the Data Retention Directive, public communications providers (e.g., providers of fixed-network telephony, mobile telephony and internet access, internet e-mail or internet telephony) had to retain traffic, subscriber and, where relevant, location data (but excluding content data) for a period of 12 months.[48] The decision in the UK to reintroduce data retention laws is in stark contrast to the rest of Europe where Germany, the Czech Republic, Romania, Austria, Cyprus, Belgium, Ireland and Bulgaria have already deemed similar provisions unlawful.

The first part of DRIP grants the Secretary of State the power to issue notices to telecommunications operators requiring them to retain communications traffic data

46 www.publications.parliament.uk/pa/ld/201415/idselect/ideucom/40/4002.htm.

47 Data Retention and Investigatory Powers Act 2014.

48 Judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*.

(e.g., time of call and who it was made to, but not the content of communications) for a period of up to 12 months for the purposes of investigating crime or issues of national security. DRIP provides for the retention of 'relevant communications data', which, in the case of internet data, is 'generated or processed in the UK' (which could, for example, include internet data stored on servers outside the UK by foreign companies) and includes:

a data necessary to trace and identify a source of communication such as user IDs and IP addresses;

b data necessary to identify the destination of a communication such as the user ID or telephone number of the intended recipient of a call through the internet;

c data necessary to identify the date, time and duration of a communication, such as the date and time of log-on and log-off from the internet or an e-mail service;

d data necessary to identify the type of communication, such as the email service provider or internet telephony provider used; and

e data necessary to identify users' communication equipment, such as the calling telephone number for dial-up internet.

The latter part of DRIP amends RIPA to clarify that interception warrants may now be served on telecommunications providers based outside the UK if they provide services to UK users, requiring them to provide data to the UK government or risk civil sanctions or criminal prosecution under RIPA, which could result in directors facing up to two years in prison for non-compliance. There is a defence in the text of DRIP related to compliance with extraterritorial warrants. Previously, RIPA included a clause stating that compliance with the steps required under a warrant will only be required so far as is reasonably practicable. This section is expanded in DRIP to state that what is reasonably practicable will be determined by the laws of that country and so far as is reasonably practicable communications providers are required to give effect to the warrant 'in a way which does not breach such requirements or restrictions'. In other words, the intent seems to be that compliance with an extraterritorial warrant is only required where it does not breach the laws of the other country.

DRIP also clarified that interception capability notices under RIPA may be issued to telecommunications providers outside the UK in relation to conduct outside the UK.

VII CONCLUSIONS AND OUTLOOK

In terms of privacy, the regulatory landscape has undergone significant overhaul in the last year, with the overturn of the Data Retention Directive prompting the UK to introduce new legislation at great speed and with minimal consultation. The resulting legislation, DRIP, has greatly strengthened the powers of the UK to require public services providers to retain and intercept data, for the purposes of investigating crime and national security, to the consternation of campaigners and civil rights organisations. It remains to be seen how DRIP will affect major internet service providers located outside of the UK and where the discussions will end up in the fast-paced battle over rights to data in an increasingly complicated web of domestic laws, targeting an international industry. The long-term impact of the controversial 'right to be forgotten' decision and the introduction of the Data Protection Regulation in 2015 will add another element of controversy to the UK's privacy and data protection framework.

Ofcom has set its policy priorities for 2014 to 2015 to include the following: promoting effective competition and informed choice, securing optimal use of spectrum, promoting opportunities to participate, protecting consumers from harm and maintaining audience confidence in broadcast content. In addition, Ofcom plans to contribute to and to implement public policy defined by Parliament.[49]

49 Ofcom's Annual Plan 2014/5.

Chapter 29

UNITED STATES

John P Janka and Jarrett S Taubman[1]

I OVERVIEW

This chapter provides an overview of telecommunications, broadband internet access and media regulation in the United States. Given the complexity of such regulation – which is constantly evolving in response to technological advances, market shifts and political dynamics – this chapter is not intended to be comprehensive. Rather, it is intended to demonstrate the nature and scope of such regulation, and to identify some of the more significant legal and policy developments of the past year.

II REGULATION

i The regulators

Regulation of telecommunications, broadband internet access, and media in the United States is governed primarily by the following authorities, within parameters established under federal and state statutes and constitutions.

The Federal Communications Commission

The Federal Communications Commission (FCC) is an independent US regulatory agency established by the US Congress pursuant to the Communications Act of 1934, as amended (the Communications Act). The FCC is charged with regulating all non-federal government use of the radiofrequency spectrum, all interstate telecommunications, and all international telecommunications involving an end-point in the United States. Together with the US State Department Office of Communications and Information Policy, the FCC participates in international spectrum negotiations and related matters at the International Telecommunication Union.

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The National Telecommunications and Information Administration

The National Telecommunications and Information Administration (NTIA) is an executive agency of the federal government within the US Department of Commerce. The NTIA has primary responsibility for regulating all use of the radiofrequency spectrum by federal government users, and works with the FCC to coordinate spectrum use between federal and non-federal users.

State and local regulators

Telecommunications within a single US state are governed by individual state regulatory agencies, typically having jurisdiction over telephone companies and other 'public utilities' providing services within the state, as well as over many consumer protection matters. State or local authorities typically issue franchises to operators of CATV systems whose service lines cross locally-controlled, public rights-of-way. Such authorities also have jurisdiction over the siting of telecommunications facilities. The jurisdiction of state public utility commissions (PUCs) and of other state and local authorities over these types of matters is limited by state constitutions and statutes as well as by federal supremacy. For example, in case of a conflict between the FCC and state or local regulations, the state or local regulation is typically pre-empted, unless the US Congress or the FCC expressly permits state or local authorities to enforce their own regulations. The FCC has effectively exercised exclusive jurisdiction over most matters involving internet access services, due to the interstate and international nature of the internet.

The Federal Trade Commission

The Federal Trade Commission (FTC) protects consumer interests in such areas as online marketing and telemarketing. Both the FTC and the FCC have oversight over certain telemarketing matters. Both the FTC and the US Department of Justice (DoJ) antitrust division police market concentration by examining mergers and other major transactions in the sector, along with the attorneys general of the 50 US states.

Other executive branch agencies

Other executive branch agencies play an important but less direct role in the regulation of telecommunications, broadband internet access and media. First, these agencies often provide input as the FCC explores substantive issues and implements regulations through its rulemaking and licensing processes, occasionally engaging in public disagreements with the FCC over such matters. In addition, executive branch agencies with national security and law enforcement responsibilities typically are consulted (or may otherwise provide input) in connection with proposed transactions that would result in legally cognizable non-US ownership of FCC-regulated businesses. Notably, Team Telecom, an informal group made up of staff from the DoJ, the Federal Bureau of Investigation, the Department of Homeland Security and the Department of Defense, routinely participates in FCC proceedings reviewing such transactions and often gathering additional information from the parties. Because the FCC typically will not consent to such transactions until Team Telecom has 'signed off', Team Telecom effectively has the power to delay if not block a transaction until its concerns are addressed. FCC-regulated businesses (like other US businesses) are also subject to potential review by the Committee on Foreign Investment in the United States (CFIUS), a multi-agency group with the statutory authority to review proposed investments in US businesses from non-US sources. Because CFIUS can recommend that the President block or impose significant conditions on such transactions even after they have closed if they have not been 'cleared' by CFIUS, parties often request CFIUS on a 'voluntary' basis prior to closing.

ii Sources of federal telecommunications and media law and policy

In the US, federal telecommunications law is derived principally from statutes enacted by Congress (and signed by the President) as well as administrative regulations, orders and policies adopted by the FCC.

The Communications Act

The FCC's governing statute, codified in Title 47 of the United States Code, establishes the framework for federal regulation of telecommunications, broadband internet access, and media in the United States. The Communications Act, as amended, consists of seven major sections, or 'Titles'. The most significant of these are Title I (establishing the FCC and defining the scope of its authority), Title II (governing the activities of telecommunications carriers), Title III (governing the use of radio spectrum, including by wireless carriers and mass media broadcasters) and Title VI (governing the provision of cable television services). The Communications Act was substantially amended by the Telecommunications Act of 1996, which opened the US domestic market to greater competition in many respects.

Ancillary authority

Section 4(i) of the Communications Act provides that the FCC 'may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions'. In a number of instances, the FCC has attempted to use this 'ancillary authority' to regulate subject matter outside of the traditional scope of its jurisdiction (e.g., broadband internet access services) although, as discussed below, these attempts have met with mixed results.

Forbearance authority

Section 10(a) of the Communications Act enables the FCC to 'forbear' from applying any provision of the Act to a Title II 'telecommunications' carrier or service (but not other types of services or providers) if the FCC determines that: (1) enforcement of such provision is not necessary to ensure just, reasonable and non-discriminatory rates, terms, and conditions of service; (2) enforcement of such provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision is consistent with the public interest. The FCC has used this authority to free telecommunications carriers from restrictive common carrier regulations, particularly where the relevant market sector is competitive.

FCC regulations and orders

In fulfilling its statutory mandate, the FCC plays a quasi-legislative role by promulgating administrative regulations, after providing notice to the public and an opportunity for public comment, as required by the Administrative Procedure Act. The FCC also plays a quasi-judicial role in interpreting existing law in evaluating any number of disputes and applications (e.g., licence applications or petitions for interpretation of the law). The resulting orders and regulations constitute an extensive body of administrative law governing telecommunications, broadband Internet access, and media in the United States.

Judge-made law

The judicial branch of the US government also plays an important role in US lawmaking, at both the state and the federal level, reviewing administrative agency decisions for consistency with the governing statutes, and reviewing statutory law for compliance with the federal and state constitutions. Any party with a legally cognizable interest in the matter may seek review of an FCC action in a federal court of appeals. The courts review FCC decisions for consistency with its governing statutes and the US Constitution. In general, the FCC is entitled to deference in interpreting the Communications Act where it is ambiguous and capable of more than one reasonable interpretation. In addition, the courts review FCC decisions to ensure that they are not 'arbitrary or capricious' – for example, the FCC may not depart from its own precedent without a reasoned basis for doing so, and more generally must have a reasoned basis for its decisions.

The FCC's National Broadband Plan

The FCC's National Broadband Plan (the Plan), published in 2010, was intended to serve as a comprehensive blueprint for US broadband policy, and includes a number of recommendations for expanding access to broadband services in areas deemed 'unserved' or 'underserved' by the FCC's standards. Initially, the Plan recommended that all Americans should have dedicated internet access at speeds of at least 4Mb/s downstream and 1Mb/s upstream. The Plan also recommended that 100 million Americans should have access to 100Mb/s downstream and 50Mb/s upstream broadband transmission capability by 2020, and sought to facilitate the deployment of wireless broadband services in particular. The Plan makes only recommendations; the FCC must seek public comment before adopting any new rules to implement the Plan. The FCC has a number of proceedings pending regarding proposals that seek to achieve these goals. While the Plan is now somewhat dated, and reflects the views of a prior Chairman, it remains the only comprehensive FCC statement with respect to broadband policy.

iii Regulated activities

Among other things, the Communications Act requires a party to obtain authority from the FCC prior to constructing or operating an 'apparatus for the transmission of energy or communications or signals by radio' or engaging in the provision of interstate or international telecommunications services. The specific procedures for obtaining such authority vary based on a number of factors, including the nature of the underlying authorisation, the nature of the proposed service, and the suborganisation of the FCC with primary responsibility for that service.

In most cases in which an applicant must file an application to obtain authority from the FCC, that application must be placed on 'public notice', giving interested parties an opportunity to comment during a specified period (e.g., 30 days). Certain types of applications (e.g., many non-common carrier wireless applications, requests for short-term authority or experimental licences) are subject to more streamlined processing, which may circumvent the need for public notice and comment in the first instance. Notably, the FCC now permits most applications to be filed electronically, and also allows the public to track the status of such applications through electronic filing systems (databases) accessible over the internet.

The FCC has granted certain types of operating authority by rule, obviating the need for individual users to seek and obtain separate authority from the FCC. For instance, the FCC has authorised by rule all common carriers to provide domestic interstate telecommunications services (this does not obviate the general need for wireless service providers to obtain separate spectrum licenses, as discussed below) and, in certain cases, has eliminated the requirement to obtain authority before constructing radio facilities. The FCC also has permitted certain wireless operations to proceed on an 'unlicensed' basis, provided that the equipment used in such operations has been evaluated and authorised in accordance with the FCC's procedures.

iv Ownership and market access restrictions

Foreign ownership restrictions

Sections 310(a) and (b) of the Communications Act restrict foreign ownership of common carrier, aeronautical and broadcast spectrum licences, and of US entities holding those licences. These statutory sections provide that foreign individuals and entities may not directly hold more than 20 per cent of the equity or voting interests in an entity that holds one of these types of FCC licences. Higher levels of indirect foreign ownership of a licensee are permissible where such ownership is held through US entities. More specifically, where the FCC licensee is owned and controlled directly by another US company: (1) the 20 per cent limit effectively increases to 25 per cent, and (2) the FCC may allow foreign ownership in excess of 25 per cent at or above the US parent company level where it determines that allowing such ownership would serve the 'public interest'. In addition, as the result of a forbearance order issued in 2012 (which effectively overrides certain arcane language in the text of the Communications Act), the FCC will now permit higher levels of indirect foreign ownership in common carriers held through a non-controlling US company where the FCC concludes that such ownership would serve the 'public interest'. Often, the FCC has permitted up to 100 per cent foreign ownership of common carriers. The FCC has found that higher levels of foreign ownership from WTO member states presumptively serve the 'public interest'. Historically, the FCC generally has not waived the 25 per cent limit with respect to broadcast licensees. However, in late 2013, the FCC indicated that, in order to facilitate foreign investment, it generally now would consider such waivers on a case-by-case basis, taking into account any concerns raised by other executive branch agencies with respect to national security, trade policy and law enforcement.

Even transactions that are consistent with the foreign ownership limits described above may be scrutinised, and effectively blocked, as a result of review by Team Telecom or CFIUS (described above).

Market access

Generally, the FCC does not authorise facilities located entirely outside of the United States to serve the US market. An exception arises with respect to non-US-licensed satellites, which may serve the US if (1) the satellite is licensed by a non-US jurisdiction that permits US satellites to serve that jurisdiction without undue restrictions (such access is presumed where the non-US jurisdiction is a WTO member), (2) the satellite complies with the same FCC technical and service requirements that apply to US satellites, and (3) the satellite's operation would not give rise to any national security, spectrum policy or other policy concerns. In reviewing requests for US market access, the FCC increasingly considers the extent to which the relevant non-US-licensed satellite enjoys 'priority' to the spectrum in question as a result of filings made by the its licensing administration with the ITU.

Multiple or cross-ownership

With the exception of its broadcast licences, the FCC generally does not limit the number of spectrum licences that may be held by or 'attributed' to (i.e., deemed to be held by) a single individual or entity. However, in evaluating the likely competitive effects of significant wireless transactions, the FCC has utilised a 'spectrum screen' to identify local markets that merit closer scrutiny by looking at the total amount of spectrum that would be controlled by one individual or entity, and the FCC has initiated a proceeding to re-examine its use and definition of such spectrum screens. The FCC also has imposed certain limitations on the ability of authorised parties of one type to hold licences or authorisations of another type. For example, the FCC's rules prohibit cable service providers from holding an attributable interest in the incumbent local exchange carrier serving the same market, and vice versa. The FCC has explicit limits on the number of broadcast stations (radio and TV) an individual or entity can own in a given local market, as well as the percentage of households nationwide that can be covered by television stations attributable to a single individual or entity. The FCC also has adopted rules limiting the cross-ownership of radio and television stations, as well as the cross-ownership of broadcast stations and newspapers. Several of these rules are under review by the FCC and the courts.

v Transfers of control and assignments

Under Section 310(d) of the Communications Act, FCC approval must be obtained prior to assigning most types of radiofrequency-based licences, permits or authorisations from one party to another, or transferring 'control' of a holder of such radiofrequency authority from one party to another. Exceptions exist for certain *pro forma* transactions, and certain types of licences. Similarly, under Section 214 of the Communications Act, FCC approval is required prior to assigning interstate or international telecommunications authorisations or transferring control of a US carrier that provides interstate or international telecommunications services. In reviewing such applications, the FCC typically attempts to gauge whether the application will serve the 'public interest, convenience, and necessity' by weighing the expected benefits of the proposed transaction against its expected harms, including the effects on competition and consumers. Most states have similar requirements applicable with respect to intrastate activities, and some require prior approval or notice regarding the issuance of debt by, or changes in the debt structure of, entities that are subject to their jurisdiction. State statutes sometimes require that other factors be considered as well, such as the expected effect on jobs in the state.

The time frames for obtaining FCC approvals in connection with mergers, acquisitions or other major transactions can vary widely. The FCC's non-binding goal is to process combined applications for major transactions within six months. The FCC has exceeded this time frame on many occasions, typically when a transaction poses competitive concerns, or is contested by third parties, in which case approval can take nine to 12 months, or possibly longer. More routine transactions often are processed in a shorter period, but there can be no assurance that the FCC will act by any deadline.

Within the past year, the FCC has completed its review of several major telecommunications and media transactions. Most notably:

a In August 2014, the FCC approved a series of related applications filed by Verizon Wireless, Cincinnati Bell Wireless, and Grain Spectrum involving commercial wireless spectrum in the greater Cincinnati and Dayton, Ohio metropolitan areas. These transactions involve several interrelated transactions, through which Grain acquired spectrum rights from Cincinnati Bell Wireless and then assigned or leased certain of those rights to Verizon Wireless.

b In July 2014, the FCC approved Sinclair Television Group's acquisition of eight full-power television stations from Allbritton Communications – despite objections raised by a number of parties.

c In March 2014, the FCC approved the merger of AT&T and Leap Wireless. As expected, the FCC agreed that the merger did not pose the types of competitive concerns that had forced AT&T to abandon its earlier attempt to merge with T-Mobile (a wireless carrier with far more extensive operations than Leap Wireless).

d In December 2013, the FCC approved Tribune Broadcasting's acquisition of 17 full-power television stations from Local TV Holdings. In doing so, the FCC waived certain of its multiple and cross-ownership rules that otherwise would have blocked Tribune's ability to acquire stations in certain local markets.

e Also in December 2013, the FCC approved Gannett Co's acquisition of Belo Corp and 13 full-power television stations (seven other stations previously owned by Belo were sold to third parties as part of the overall transaction).

f In November 2013, the FCC approved applications filed by Media General Communications and Young Broadcasting to seek FCC consent to merge their broadcast television operations. At closing, the combined company owned 32 full-power broadcast television stations and 17 low-power broadcast television stations.

The FCC has also initiated but not yet completed its review of several other major transactions. For example:

a In February 2014, Frontier Communications and AT&T Inc – both providers of wireline telecommunications services – filed applications seeking FCC consent to facilitate the assignment and transfer of licences and authorisations held by AT&T's wholly owned subsidiaries, the Southern New England Telephone Company and SNET America Inc, to Frontier.

b In April 2014, Comcast Corp (a broadcasting and CATV company) and Time Warner Cable Inc (a CATV company) the filed applications seeking FCC consent to Comcast's acquisition of Time Warner Cable. As part of the underlying transaction, Charter Communications would acquire a subset of the cable subscribers currently served by Time Warner Cable.

c In May 2014, AT&T Inc (the largest provider of mobile and fixed wireline telephone services in the US) and DirecTV (a DBS operator) filed applications seeking FCC consent to AT&T's acquisition of DirecTV. As part of the underlying transaction, AT&T would divest its interest in America Movil, a telecommunications company headquartered in Mexico.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol transmission regulation

Thus far, the United States has used a relatively light touch with respect to the regulation of ISPs and BIAPs, relying largely on market forces instead of prescriptive regulation. By many accounts, this 'hands-off' approach has contributed to the rapid growth of the US internet-based sector over the past 15 years. Nevertheless, recent activity at the FCC suggests that it may soon be playing a more active role in the regulation of internet-based services.

ii Universal service

The Communications Act directs the FCC to take steps to facilitate the universal availability of essential telecommunications services through, among other things, the use of a federal universal service fund (USF). The USF supports various programmes that seek to promote the availability of quality telecommunications services at just, reasonable and affordable rates on a nationwide basis to high-cost areas, low-income individuals, schools, libraries and rural health-care facilities. The recent contribution factor fluctuates during the course of the year, but has been above 15 per cent of covered revenues for most of 2014. The USF is funded through revenue-based contributions from all providers of interstate and international telecommunications and interconnected VoIP services, as well as certain other providers of 'telecommunications'. Universal service programmes and contribution obligations are administered by the Universal Service Administrative Company (USAC) – an independent legal entity that is subject to the FCC's oversight.

The National Broadband Plan recommends that the FCC modify existing 'universal service' subsidy programmes to target broadband expansion into areas where the FCC asserts BIAPs would not find it economically viable to provide broadband service, in the absence of this type of financial support. Consistent with this recommendation, the FCC has established a new Connect America Fund (CAF) to support the deployment of broadband infrastructure to areas that are currently 'unserved', and to phase out legacy universal service support mechanisms in the process. Under the FCC's implementing rules, wireline incumbents enjoy significant funding preferences through, among other things, a 'right of first refusal' in connection with available funding. These rules, in their current form, also would result in a significant reduction in the level of support available to competitive providers. That said, the FCC has acknowledged that the framework established by these rules may need to be modified, and the agency now is examining ways to increase participation by competitive providers, particularly in light of difficulties encountered attracting incumbent participation in Phase I of the CAF. Currently, the FCC is preparing to launch Phase II of the CAF programmes, and many details with respect to the implementation of that phase remain to be decided. The FCC also must decide whether and how the requirement to contribute to the universal service fund should be extended to BIAPs – the principal subject of a proceeding begun by the FCC in April 2012 but not yet completed. These changes are being coupled with changes to the existing – and exceedingly complex – 'intercarrier compensation' scheme by which local and long-distance service providers pay or receive compensation for traffic that is handed off to each other's networks.

The FCC's initial implementing rules on extending the reach of its universal service programme remain subject to administrative reconsideration and judicial appeals – although certain of these appeals have been resolved in the past year (in the agency's favour). Regardless of exactly how these questions are resolved, the FCC's decision to subsidise broadband internet access services may provide a foundation for the eventual regulation of such services – whether or not supported with universal service funds.

iii Restrictions on the provision of service

Common carriage

The Communications Act subjects all providers of 'telecommunications services' to common carrier regulation (e.g., the duty to provide service to all members of the public, including other carriers, without unreasonable discrimination). 'Telecommunications services' are defined to include the provision of 'telecommunications' to the public for a fee. 'Telecommunications', in turn, are defined to include the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. Notably, this definition does not encompass the creation or publication of mere 'content'. Telecommunications carriers tend to be heavily regulated by both the FCC and the state PUCs.

In contrast, 'information services' are defined to include the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilising or making available information via telecommunications. These services typically involve what is called a 'net protocol conversion' – essentially, a change in the form, structure, or substance of the underlying communication. Providers of 'information services' are not subject to common carrier regulation and are traditionally have been lightly regulated at the federal level. State and local jurisdiction over internet services is severely circumscribed, as the services are considered 'interstate' for most purposes.

As communications technologies have continued to evolve, the lines between 'telecommunications services' and 'information services' have blurred, and the FCC has been slow to classify new service offerings. The FCC thus far has declined to classify VoIP services, creating uncertainty as to which regulations apply at both the federal and state levels. This uncertainty has been exacerbated by the FCC's attempted use of its 'ancillary' authority to extend a number of common carrier-type requirements to such otherwise-unregulated services.

Because the classification of a service is of critical importance in determining the regulations applicable to that service, the reclassification of a service can have significant consequences. The FCC's treatment of internet access services provides a vivid illustration of this fact. Broadband internet access services require, among other things, the transmission of data between an end-user and an ISP, and any number of other individuals or entities. For years, the FCC viewed this transmission capability as a 'telecommunications service', and required BIAPs to offer it to competitors on a stand-alone, common carrier basis. However, in a series of orders issued during the 2000s, the FCC reclassified broadband internet access services as 'information services' functionally integrated with a 'telecommunications' component, such that BIAPs are no longer required to make the transmission capability available to competitors (unless that capability is offered to the public voluntarily on a non-integrated, stand-alone basis).

More recently, the pendulum has begun to swing in the opposite direction. As noted above, the FCC has attempted to use its 'ancillary' authority to impose certain common carrier regulations (e.g., emergency calling (911) and outage reporting requirements, USF contribution obligations) on VoIP services without reclassifying those services as 'telecommunications services'. The FCC also has attempted to impose 'net neutrality' regulations on BIAPs. Although these initial attempts have been rejected by the courts in large part on jurisdictional grounds, the FCC continues to explore alternative bases for regulation that it hopes would survive judicial scrutiny. In short, the scope of the FCC's authority over 'information services' generally, and internet access services specifically, remains unclear and is likely to remain uncertain for the foreseeable future.

Price regulation

The Communications Act gives the FCC the authority to regulate the rates charged by common carriers in connection with the telecommunications services they provide, and ensure that those rates are 'just and reasonable'. Prior to the passage of the Telecommunications Act in 1996, rate regulation was accomplished through the filing of tariffs with the FCC and state PUCs. More recently, the FCC has eliminated much of its tariffing regime and instead relied upon market competition (backed by a complaint mechanism) to ensure that rates are 'just and reasonable'. Notably, the FCC's authority to regulate rates does not extend to 'information services' – including broadband internet access services.

Net neutrality

In recent years, one of the most significant policy debates at the FCC has focused on an 'open internet policy' or 'net neutrality'. Although the meaning of 'net neutrality' is itself a subject of debate, net neutrality advocates generally aim to constrain the rights of broadband network providers to block, filter or prioritise lawful internet applications, websites and content.

The FCC's direct involvement with net neutrality policy began in 2005 with the issuance of its Broadband Policy Statement. Although the FCC's authority under the Communications Act to regulate the Internet was not clearly articulated, the Broadband Policy Statement expressed four principles that the FCC indicated were intended to preserve the 'open' nature of the internet for consumers, without discouraging broadband deployment by network operators. The FCC stated that consumers are entitled to

(1) gain access to the lawful internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) benefit from competition among network providers, application and service providers, and content providers, all subject to a service provider's right to engage in 'reasonable network management'.

In 2008, the FCC ruled that Comcast, the largest US CATV company, had violated the Broadband Policy Statement by inhibiting users of its high-speed internet service from using BitTorrent and other file-sharing software – a practice Comcast claimed was a type of 'reasonable network management' designed to block pirated content and alleviate network congestion. Comcast appealed this decision, arguing, among other things, that the FCC lacked the statutory authority to adopt or enforce net-neutrality requirements. In early 2010, a US Court of Appeals agreed with Comcast and vacated the FCC's order. In doing so, the court rejected the FCC's attempt to rely on its 'ancillary' authority as a basis for its enforcement of the Broadband Policy Statement against Comcast, insofar as the FCC had failed to identify a source for such authority in the Communications Act.

The FCC then adopted new rules on broadband internet access services, applicable only to 'mass-market retail services', which:

- *a* required all broadband internet access service providers to disclose the network management practices, performance characteristics, and terms and conditions of their services;
- *b* prohibited fixed broadband internet access providers from blocking lawful content, applications, services, or non-harmful devices;
- *c* prohibited mobile wireless broadband internet access providers from blocking lawful websites, or applications that compete with their voice or video telephony services; and
- *d* prohibited fixed broadband internet access providers from unreasonably discriminating in transmitting lawful network traffic.

In 2014, the US Court of Appeals for the District of Columbia Circuit vacated the FCC's 'anti-discrimination' and 'anti-blocking' rules, finding that they amounted to impermissible common-carrier regulation of internet access services since the FCC had classified those services as 'information services' not subject to Title II of the Communications Act (the court upheld the FCC's disclosure or transparency requirements). However, the court also suggested that the FCC could adopt modified versions of these rules under Section 706 of the Telecommunications Act of 1996, which potentially grants the FCC relatively broad authority to promote the 'virtuous circle' of internet-related innovation. In May 2014, the FCC launched a new rulemaking to explore whether new 'net neutrality' rules could be adopted pursuant to Section 706, or whether the FCC instead should regulate BIAPs as 'Title II' common carriers. Much of the debate in the resulting proceeding also has focused on: (1) whether and how the FCC should regulate 'blocking' and 'throttling' by BIAPs; (2) whether the FCC should preclude BIAPs from offering 'fast lanes' to content and other 'edge providers' on a fee-for-service basis; (3) whether the FCC's net-neutrality rules should apply with equal force to fixed and mobile BIAPs; and (4) whether the FCC should attempt to regulate 'blocking' and discrimination by edge providers.

iv Security

US regulatory approach to emergency preparedness

Because US commercial communications networks are privately owned, the FCC's role in ensuring emergency preparedness primarily is one of gathering and disseminating information and coordinating among different governmental agencies. For more than 15 years, the FCC has also required facilities-based telecommunications service providers to participate in industry-run working groups focused on developing best practices to ensure network reliability, to report network outages, and to be prepared to restore network services as rapidly as possible in the event of an outage. The recommendations of this group do not have the binding force of law, but have played an important role in shaping industry practice and have prompted some limited FCC rulemaking activity. For example:

a FCC rules now require all wireline and wireless telecommunications service providers to maintain on site a back-up power source (typically, a generator) capable of keeping networks functioning for a minimum number of hours.

b Under the Telecommunications Service Priority programme, service providers must afford priority service to federal, state and local governments and other critical institutions.

c The FCC has adopted outage reporting rules, which require network operators to notify the FCC of significant outages that may impact end-user communications, and recently, extended these rules to VoIP providers.

d The FCC has established rules governing the Emergency Alert System (EAS), a national public warning system that requires broadcasters, CATV operators, satellite broadcasters, and others to provide communications capability to the President to address the American public during a national emergency. The system also may be used by state and local authorities to deliver important emergency information, such as AMBER alerts and weather information targeted to specific areas.

The FCC also is responsible for the emergency preparedness of US network operators, the radiofrequency spectrum needs of non-federal 'first responders' (police, fire, ambulance and emergency medical teams), and coordination among network operators and various governmental organisations to address cybersecurity concerns. Much of this activity has focused on ensuring adequate spectrum for public safety users, and ensuring the interoperability of different public safety networks.

Congress has authorised the creation of a nationwide, interoperable, high-speed network dedicated to public safety applications. This network will be managed by FirstNet – a newly formed independent entity within the NTIA that is overseen by a Board including representation from the public safety community, wireless experts, and current and former federal, state and local government officials. Notably, a significant portion of FirstNet operations would be funded by the proceeds of spectrum auctions, which are not expected to occur until late 2014 or early 2015.

The Communications Assistance for Law Enforcement Act

The Communications Assistance for Law Enforcement Act (CALEA) requires 'telecommunications carriers' to implement specific capabilities in their networks to permit law enforcement agencies to intercept call identifying information and call content pursuant to a lawful authorisation. For this purpose, the term 'telecommunications carriers' is defined broadly to include facilities-based BIAPs and interconnected VoIP providers. CALEA establishes both minimum capacity requirements and capability requirements. CALEA does not specify the means by which providers must comply with these capability requirements, but creates a safe harbour for carriers that implement industry standards. CALEA does not grant law enforcement agencies any surveillance authority beyond what otherwise exists under US law.

Cybersecurity

US cybersecurity policy following the completion of the federal government's Cyberspace Policy Review has sought to create or enhance shared situational awareness of network vulnerabilities, threats, and events and the ability to act quickly to reduce current vulnerabilities and prevent intrusions; enhance US counterintelligence capabilities and increase the security of the supply chain for key information technologies; and strengthen the future cybersecurity environment by expanding cyber education, coordinating and redirecting research and development efforts, and working to define and develop strategies to deter hostile or malicious activity in cyberspace. Consistent with these goals, the FCC has explained that one of its core objectives is 'to strengthen the protection of critical communications infrastructure'.

In August 2010, the FCC proposed to develop a two-year plan to address 'vulnerabilities to communications networks or end-users and to develop countermeasures and solutions in preparation for, and response to, cyber threats and attacks' in coordination with other US federal agencies such as the Department of Homeland Security, and the Federal Bureau of Investigation. Since then, the FCC has taken no further action to develop a concrete plan of this type, other than supporting calls for Congress to increase the FCC's authority to regulate in this area. The FCC also has attempted to educate consumers and small businesses about the importance of cybersecurity.

Online protections for children

The Children's Online Privacy Protection Act of 1998 restricts the ability of website operators to collect personal information from children under 13 years of age. The type of 'verifiable parental consent' that is required before collecting and using information provided by children under 13 is based upon a 'sliding scale' set forth in an FTC regulation that takes into account the manner in which the information is being collected and the uses to which the information will be put. While children under 13 can legally give out personal information with their parents' permission, many websites disallow underage children from using their services due to the regulatory burdens involved.

Protection of personal data and privacy

The Communications Act protects the privacy of 'customer proprietary network information', which includes the date, time, duration and location of a call, type of service used, and other details derived from the use of a telecommunications service. US law also protects the contents of any telecommunications message from eavesdropping, recording, use or disclosure by a third party without a user's consent. Users of online services enjoy similar protection from eavesdropping or disclosure of their communications. Exceptions apply where access to, or use or disclosure of such information is necessary for law enforcement, which in most cases requires prior approval by a judge. In addition, the NTIA has formed an Internet Policy Task Force, which has recommended the adoption of voluntary codes of conduct by industry participants, and continues to examine 'the nexus between privacy policy and innovation in the Internet economy'.

Notably, this legal framework is targeted at carriers and other private actors, as opposed to the US government. But in 2013 it was the policies and practices of the latter that prompted the most significant privacy concerns, and added fuel to the ongoing debate over how much privacy should be sacrificed by individuals in the name of national security. The controversy erupted in June 2013 when the British newspaper *The Guardian* published a series of exposes containing information leaked to it by Edward Snowden, who had been employed as a contractor for the US National Security Agency (NSA). More specifically, Snowden disclosed classified information regarding NSA surveillance programmes – including NSA efforts to compile a database containing the metadata for hundreds of billions of telephone calls made through the largest US carriers and collect stored internet communications from large internet companies like Google. While some of these activities apparently were authorised by special courts established under the Federal Intelligence Surveillance Act, the activities of these courts are not subject to public scrutiny and have been criticised as little more than a rubber stamp for proposed executive branch activities. While the full implications of the Snowden scandal have yet to be seen, it is sure to affect policies and practices for years to come, and could result in significant congressional legislation or rule changes at the FCC.

IV SPECTRUM POLICY

i Flexible spectrum use

In recent decades, the FCC increasingly has adopted a flexible approach to defining the uses to which a particular radiofrequency band may be put, or the optimal scope of licences that an entity can use to meet its business needs. For example, the FCC has granted many licensees (but not broadcasters) flexibility to redefine their own service territory, dividing or combining geographically bounded licences, and to subdivide their assigned spectrum and sell or lease a portion to another user. The FCC has also adopted more fluid service definitions, for example, permitting fixed and mobile operations, or terrestrial and satellite operations, in the same band.

The FCC has been examining ways to increase flexibility and efficiency in the use of available spectrum resources. It has recognised that one key failing of its spectrum policy is that administrative rigidities historically have prevented more efficient use of the spectrum resource. As a result, the FCC's spectrum policy has evolved towards more flexible and market-oriented regulatory models.

For example, in order to facilitate the development of secondary markets in spectrum usage rights involving terrestrial radiofrequency-based services, the FCC has adopted rules to facilitate two types of leasing arrangements: a 'spectrum manager' lease, in which a lessee is permitted to use spectrum subject to the oversight and control of the initial licensee; and a '*de facto* transfer' lease, in which the lessee assumes many of the obligations of a licensee, and exercises control over its own spectrum operations. The FCC also has examined ways to facilitate unlicensed use of certain spectrum bands, provided that such use does not interfere with licensed operations (if any) in those bands. Among other things, the FCC has adopted rules permitting certain devices to operate on a secondary, unlicensed basis in unused broadcast television spectrum, also known as 'white spaces'.

ii Broadband and next-generation mobile spectrum use

Federal law and policy has sought to encourage the growth of mobile broadband networks, including through access to additional spectrum. More specifically, Congress has directed the FCC and the NTIA to make additional federal government spectrum available for commercial use. In response to this and similar mandates, in November 2014 the FCC will auction non-federal spectrum rights in the 1,695–1,710MHz, 1,755–1,780MHz, and 2,155–2,180MHz bands (the AWS-3 bands).

More generally, the FCC and the NTIA are exploring ways that commercial users might share federal government spectrum, consistent with recommendations offered in a report published by the President's Council of Advisors on Science and Technology (PCAST). That report concludes that the traditional practice of clearing portions of federally held spectrum for exclusive commercial use is not a sustainable basis for future spectrum policy, and recommends that the best way to increase the availability of commercial spectrum is to use new sharing technologies – including dynamic frequency management, spectrum databases, and improved interference mitigation technologies. PCAST contends that this approach could increase the effective capacity of federal spectrum by a factor of 1,000. PCAST recommends that shared spectrum be organised into three tiers, consisting of: (1) incumbent federal users, which would be entitled to full interference protection from new spectrum users; (1) secondary users, which would receive short-term priority authorisations to operate within designated geographic areas and would have limited interference protection against other spectrum users; and (3) general access users, which would be entitled to use the spectrum on an opportunistic basis and would not be entitled to any interference protection at all.

The FCC also has identified existing commercial spectrum that could be reallocated and thus used more efficiently in support of mobile broadband services. In particular, the FCC has recognised that some of the most desirable spectrum for wireless communications (based on propagation characteristics) currently is being used by broadcast television stations. Because today's digital television signals do not require a broadcaster to use all of its spectrum for a single programming channel, the FCC also has recognised that a television station could transmit its historical programming channel over a narrower segment of spectrum without impacting the viewer experience significantly. In the alternative, the FCC has suggested that a broadcaster could cease free, over-the-air broadcast transmissions altogether and instead deliver its programming through a cable system, a phone company, a satellite company, or over the internet, which could require existing television viewers to incur new costs to watch television.

In either case, additional spectrum could be made available to be auctioned for mobile broadband use.

To this end, Congress in 2012 enacted legislation that allows television broadcasters to 'turn in' some of the spectrum they use for their television channels, in return for a portion of the proceeds when the spectrum is re-auctioned by the FCC for mobile broadband use. In 2014, the FCC adopted rules implementing this legislation and is planning to conduct its first broadcast 'incentive auction' in mid-2015 (after finalising certain auction procedures during the first quarter of 2015). It remains to be seen how many broadcasters will choose to take advantage of this opportunity once the specific structure of and procedures for the auction have been determined.

iii Spectrum auctions and fees

Where spectrum is to be assigned to an individual licensee, and more than one party applies to use such spectrum (i.e., mutually exclusive applications are received by the FCC), the FCC may choose from several mechanisms under the Communications Act by which to designate the 'winning' licensee. Most new spectrum assigned since 1993 has been licensed through the use of competitive bidding (i.e., spectrum auctions). The statute excludes certain specific types of spectrum licences (international satellite, public safety, non-commercial broadcast, etc.) from the scope of the FCC's auction authority. The FCC has completed or scheduled almost 100 radiofrequency spectrum auctions to date.

Historically, proceeds from all spectrum auctions have gone to the US Treasury. In February 2012, the US Congress authorised a new type of auction, known as the incentive auction. Under this auction model (the first of which is expected to occur in mid-2015), current licensees would have the option to contribute spectrum in exchange for a portion of the proceeds from the auction of that spectrum for mobile broadband use.

V MEDIA

i Regulation of media distribution outlets generally

The regulation of media distribution outlets and content varies depending on the business model and technology being used. As previously noted, internet-based content delivery is very lightly regulated in the US. Traditional media outlets historically have been regulated more heavily by the FCC.

Regulation of content and content providers

The First Amendment to the US Constitution guarantees the freedom of speech, and limits the ability of the government to regulate the content of a broadcaster's programming, or content providers directly. Several decades ago, the courts recognised the FCC's authority to prohibit 'indecent' programming by free, over-the-air broadcasters, based on the government's interest in ensuring that scarce spectrum rights are used in a manner that serves the public interest, and the unique pervasiveness of broadcast media in the lives of Americans and their children. As discussed below, those rules do not apply to the CATV and satellite video and audio service providers whose coverage extends throughout the

US. It is unclear whether the FCC's rules remain constitutional in today's media-rich market where many different media outlets serve the same household.

In recent years, the FCC has fined stations that aired 'fleeting expletives' (incidental words or gestures that are broadcast despite the reasonable precautions taken by the licensee to avoid indecent broadcasting). For example, in 2006 the FCC fined affiliates of the ABC and Fox networks millions of dollars for airing such material during their programming. Both networks subsequently challenged these fines in the courts. In June 2012, the US Supreme Court invalidated the fines on due process grounds, finding that the FCC had not fully articulated its rule against fleeting expletives until after the programmes in question had been aired. In taking this approach, the Court left open broader questions as to whether the FCC's 'fleeting expletives' policy violates the First Amendment or otherwise is unconstitutional.

Terrestrial broadcasting

Television and radio stations broadcasting video content for free to listeners and viewers via terrestrial radiofrequency spectrum are subject to extensive regulation by the FCC, which has exclusive licensing authority for such stations in the United States. Among other things, the FCC has adopted detailed technical rules governing this type of broadcaster, restricted their ability to air 'indecent' programming, imposed political broadcasting and other 'public interest' obligations on them, and adopted multiple ownership restrictions. These regulations are largely premised on the idea that radiofrequency spectrum is a scarce resource, and thus the FCC should promote localism, diversity of ownership and service in the public interest.

Subscription media

Entities providing electronic media services by subscription – CATV, direct-broadcast satellite (DBS) service, subscription radio, or even subscription over-the-air TV stations – generally are subject to less restrictive content regulation than terrestrial 'free over-the-air' broadcasters ('obscene' material is prohibited, but not material that is merely 'indecent'). Because subscribers pay for their service, by definition, arguments that they must be protected from unwittingly accessing 'indecent' content are less convincing. Subscription satellite radio providers and multichannel video programming distributors (MVPDs), such as DBS and CATV providers, remain subject to FCC regulation with respect to their use of radio frequency spectrum and certain other matters. Moreover, terrestrial CATV operators also are subject to franchising by state or local authorities for the use of public rights-of-way.

Carriage of broadcast television programming by MVPDs and other parties

When Congress imposed a variety of obligations on cable operators with respect to their carriage of local broadcast television signals in 1992, it was concerned that the MVPD industry posed a threat to broadcast TV stations (given better transmission quality, greater choice of programming, etc.). Congress also was concerned that MVPDs would become the predominant means of distributing video programming to consumers and then could use that market position to preclude local broadcasters from reaching those consumers effectively. To address this concern, Congress established a statutory framework allowing each over-the-air TV station, on a local-MVPD-by-MVPD-basis, to elect either 'must carry' status (ensuring mandatory carriage on an MVPD serving the local market of that station) or 'retransmission consent' (requiring an MVPD to obtain the station's consent before carrying its signal). This new right supplemented the compulsory copyright license established in the Copyright Act, under which content owners receive a statutory fee from MVPDs in connection with their retransmission of broadcast signals, but MVPDs do not need the consent of those content owners.

Initially, most local broadcasters were unable to negotiate cash compensation in exchange for granting 'retransmission consent' to MVPDs; at best, they typically were able to negotiate 'in kind' deals, such as commitments from MVPDs to purchase advertising time. More recently, local broadcasters have begun to demand cash compensation, and many have indicated they would withhold 'retransmission consent' from an MVPD unless they are paid for the carriage of their signal. For example, in 2013, the CBS network declined to extend its grant on retransmission consent on existing terms, and carriage of that network on a major MVPD was disrupted in a number of major U.S. markets for several weeks. But in March 2014 the FCC took action that should increase MVPDs' bargaining position somewhat; specifically, the FCC revised its rules to preclude the joint negotiation of 'retransmission consent' agreements by multiple broadcast television stations that are (i) ranked among the top four stations in a local market and (ii) not commonly owned. The FCC explained that such action was necessary to ensure that broadcasters did not enjoy undue leverage in such negotiations.

These developing trends have caused much controversy. Broadcasters argue that the retransmission consent system is working as intended, and that the fees being demanded and paid merely reflect the substantial investments made in valuable programing and fair compensation for the very services for which MVPDs collect a monthly fee from their subscribers. MVPDs respond that Congress never intended retransmission consent fees to subsidise the provision of network programming over local TV stations. MVPDs have made a number of additional reform proposals. It remains to be seen how or even if the FCC or Congress will respond.

In addition to the 'retransmission consent' requirements described above, any party that retransmits broadcast programming must comply with US copyright law. Federal law creates compulsory licences allowing 'cable systems' and other MVPDs to retransmit such programming without obtaining specific licences from every relevant copyright holder in the programming stream. Other types of services do not benefit from this compulsory licence and must respect relevant copyright – as the US Supreme Court confirmed in June 2014 when it released its decision in *American Broadcasting Cos v. Aereo*, Inc Aereo provided a service that leased each subscriber an individual remote antenna that allowed that subscriber to receive broadcast signals and retransmit that signal over the internet for near-live viewing. The court concluded that Aereo's retransmission of these signals constituted a 'public performance' of programming material that infringed on the rights of copyright holders. In the wake of the decision, Aereo ceased operations. The *Aereo* decision does not address how US copyright law could apply to other 'retransmission' services on a going-forward basis, and in particular does not fully resolve whether modest changes to the structure of an Aereo-like service (e.g., recording programming for later viewing instead of engaging in near-live retransmission) would change the outcome.

ii Internet-delivered video content

The regulatory status of internet-delivered video content turns in part on whether it can be considered 'video programming' under the Communications Act. This term encompasses 'programming provided by, or generally considered comparable to programming provided by, a television broadcast station'. Much online video content does not fall into this category, and as such lies outside of the FCC's jurisdiction.

Also significant is the manner and form in which 'video programming' is delivered to the viewer. 'Video programming' may be subject to minimal regulation if it is incorporated into an 'information service' by virtue of the use of the internet or other broadband technologies as a delivery mechanisms. Moreover, the FCC has identified a category of 'interactive television' services – defined as 'a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams' – but it has not decided what requirements, if any, should apply to such services. The manner in which these classification issues are resolved can have significant implications in other regulatory areas. For example, IP-delivered video programming in the form of a traditional cable service arguably falls outside the scope of the FCC's net-neutrality rules. Notwithstanding general uncertainty with respect to the regulatory status of internet-delivered video content, IPTV services delivered by telecommunications companies have been subject to franchising as 'cable' systems under some state and local requirements. In order to expedite competitive entry into the IPTV market, to facilitate competition to entrenched cable TV operators, several states have adopted state-wide franchising, and have pre-empted separate approval requirements in individual municipalities. The FCC encourages rapid approval of competitive franchising requests and has indicated that it may pre-empt states that do not promptly act on such requests.

iii Mobile services

Consumer demand for access to audio and video programming through mobile platforms is one of the primary drivers of increased demand for mobile broadband access generally. As noted above, the National Broadband Plan aims to free additional spectrum resources for such services. The advent of these services, many of which would not use 'broadcast' spectrum, reflects increasing convergence in the communications industry, and could lead to increased pressure to reconcile regulatory frameworks that treat similar services differently.

VI CONCLUSIONS AND OUTLOOK

The FCC's efforts to extend broadband service to all Americans will continue to play a central role in US communications regulation for the foreseeable future. The FCC is likely to continue its efforts to repurpose certain spectrum for mobile broadband use, and the implementation of the first incentive auction will be a focus of agency activity and public scrutiny. At the same time, the FCC is likely to continue to explore other sources of potential spectrum, including spectrum previously and even currently allocated solely for federal government use (which would be made available through spectrum sharing initiatives). The FCC will need to reconcile competing commercial and governmental interests as it moves forward with its plans.

The FCC also will be required to continue to expend significant energy completing the implementation of its recently revised universal service and intercarrier compensation regimes. Again, the FCC will need to balance competing policy interests within a heavily politicised environment. Because there will be some winners and some losers no matter what the FCC does, and given the amount of money at stake, these issues will almost inevitably occupy the courts for years to come.

Looming over the horizon, the possibility remains that either Congress will substantially modify the FCC's authority with respect to broadband services through a significant amendment (or even a rewrite) of the Communications Act, or the federal courts will clarify the scope of the FCC's authority. Such action could provide the FCC with the authority that it needs to regulate the provision of internet access services, while shoring up the unsure foundation of existing regulations (e.g., of net neutrality and VoIP services). Even in the absence of such action, the FCC is likely to attempt to expand the scope of its authority to regulate such services – at least until that attempt is affirmatively checked by Congress or the courts.

Appendix 1

ABOUT THE AUTHORS

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Simon Berry is a counsel in the Hong Kong office of Latham & Watkins and a member of the corporate department.

Mr Berry has extensive experience in regulatory law. His practice also focuses on a broad range of mergers and acquisitions, reorganisations, post-acquisition integration and corporate finance transactions involving regulated entities such as banks, insurance companies and financial institutions.

His experience in regulatory matters includes licensing and advisory work covering a wide range of regulated activities including securities, commodities, futures and other derivatives, asset management and proprietary trading including offerings of investment products, outsourcing, e-commerce-related issues, data privacy, internet securities trading and e-banking matters. He has advised on the acquisition and disposal of a number of licensed entities as well as members of stock exchanges, futures exchanges, clearing companies and other regulated entities.

His experience in mergers and acquisitions includes takeover offers, sales and purchases of businesses and companies, direct investments, private equity, joint ventures, mergers by legislation, schemes of arrangement and other commercial agreements. He has also advised on transactions involving television companies and radio broadcasting companies. He is the chairman of the Competition Law Committee of the Law Society of Hong Kong.

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Mr Colahan is based in Latham & Watkins' London office and divides his time with the Brussels office. Prior to joining Latham & Watkins, Mr Colahan was the international antitrust counsel, based in London, for The Coca-Cola Company where his responsibilities included advising all operating groups on strategic planning and implementation of a wide variety of international joint ventures and acquisitions as well as the conduct of international antitrust litigation and investigations. Mr Colahan has also served as a legal adviser on European law to the European secretariat of the UK Cabinet Office and has represented the UK in numerous cases.

He represents clients before the European Commission, national authorities in Europe and internationally, as well as conducting litigation in the European courts and numerous national courts. He has advised on a wide variety of international antitrust matters, including structuring and implementation of international mergers, acquisitions and joint ventures, cartel enforcement, single firm conduct and compliance counseling. Mr Colahan has worked in a broad range of sectors including, fast-moving consumer goods, alcoholic and non-alcoholic beverages, retail, media and publishing, pharmaceuticals, aviation, manufacturing, agricultural, defence, bulk chemicals, maritime, energy, software, supply of professional services, telecommunications and finance.

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Gail Crawford is a partner in the London office. Her practice focuses primarily on technology, data privacy and security, intellectual property and commercial law and includes advising on technology licensing agreements and joint ventures, technology procurement, data protection issues and e-commerce and communications regulation. She also advises both customers and suppliers on multi-jurisdictional IT, business process and transformation outsourcing transactions. Ms Crawford has extensive experience advising on data protection issues including advising a global corporation with operations in over 100 countries on its compliance strategy and advising a number of US e-commerce and web businesses as they expand into Europe and beyond. She also advises online businesses and providers of communications services on the impact of the UK and European restrictions on interception and disclosure of communications data.

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Carmen Guo is an associate in the Hong Kong office of Latham & Watkins and a member of the corporate department.

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John P Janka is a partner in the Washington, DC office of Latham & Watkins LLP, where he is chair of the communications law practice group. For 26 years, Mr Janka has counselled international telecommunications operators and ISPs, content providers, investors and banks on a variety of regulatory, transactional and controversy matters. His experience includes the purchase, sale and financing of communications companies, the procurement and deployment of communications facilities, global spectrum strategies and dispute resolution, the provision of communications capacity, content distribution, strategic planning, and effecting changes in legal and regulatory frameworks. His clients include satellite, wireless and other terrestrial communications companies, video programming suppliers, information service providers, television and radio broadcast stations, and firms that invest in and finance these types of entities.

Mr Janka has served as a United States delegate to an ITU World Radio-communication Conference in Geneva, and as a law clerk to the Honorable Cynthia Holcomb Hall, United States Court of Appeals for the Ninth Circuit. Mr Janka holds a JD degree from the University of California at Los Angeles School of Law, where he graduated as a member of the Order of the Coif, and an AB degree from Duke University, where he graduated *magna cum laude*.

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His practice focuses on outsourcing and technology transactions, including business process, information technology, telecommunications, systems and software procurement and integration. He also has extensive experience advising clients on all the commercial and legal aspects of technology development, licensing arrangements, web hosting, manufacturing, distribution, e-commerce, entertainment and technology joint ventures.

Mr Juhan is in particular cited in *Chambers Europe 2014*, *Option Droit & Affaires 2014* and *Legal 500 Paris 2014*: '"Great negotiator" Jean-Luc Juhan, who is "very sharp and down-to-earth" and has "a very good knowledge of the industry", advises high-profile French and international groups on large outsourcing, telecommunication and integration system projects.'

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Mr Lipsky is a partner in the Washington, DC office of Latham & Watkins. He is internationally recognised for his work on both US and non-US antitrust and competition law and policy and has handled antitrust matters throughout the world. He served as Deputy Assistant Attorney General for Antitrust in the Reagan Administration. Having served as Chief Antitrust Lawyer for The Coca-Cola Company from 1992 to 2002, Mr Lipsky has incomparable experience with antitrust in the US, EU, Canada, Japan and other established antitrust-law regimes, as well as in new and emerging antitrust-law regimes in scores of jurisdictions that adopted free-market policies following the 1991 collapse of the Soviet Union. He has been closely associated with efforts to streamline antitrust enforcement around the world, advocating the reduction of compliance burdens and the harmonisation of fundamental objectives of antitrust law.

Mr Lipsky was the first International Officer of the American Bar Association Section of Antitrust Law. He served on the Editorial Board of Competition Laws Outside the United States (2001), the most ambitious annotated compilation of non-US competition laws yet produced. He has held a variety of senior positions among the officers and governing council of the Section of Antitrust Law and continues to serve as Co-Chair of its International Task Force. He is admitted to practise before the US Supreme Court and various federal appellate courts.

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She has developed specific expertise in the area of privacy and personal data, including advising clients on their transborder data flows, handling claims raised by the French Data Protection Authority and setting up training sessions on the personal data protection framework in general and on specific topics. She also has expertise in cross-border issues raised in connection with discovery or similar requests in France.

Ms Saarinen is named among leading practitioners in commercial litigation, data privacy and IT (*The Legal 500 Paris 2014*, *Chambers Europe 2013*, *Chambers Global 2013*).

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