
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

SIXTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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EDITOR'S PREFACE

This fully updated sixth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs relevant to both existing service providers and start-ups in 29 jurisdictions around the world. It is intended as a business-focused framework for beginning to examine evolving law and policy in the rapidly changing TMT sector.

The burgeoning demand for broadband service, and for radio spectrum-based communications in particular, continues to drive law and policy in the TMT sector. The disruptive effect of these new ways of communicating creates similar challenges around the world:

- a* the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens;
- b* the reality that access to the global capital market is essential to finance that infrastructure;
- c* the need to use the limited radio spectrum more efficiently than before;
- d* 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
- e* the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

A global focus exists on making radio spectrum available for a host of new demands, such as the developing 'Internet of Things,' broadband service to aeroplanes and vessels, and the as yet undefined, next-generation wireless technology referred to as '5G'. This process involves 'refarming' existing bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs. In many cases, an important first step will occur at the World Radiocommunication Conference in November 2015, in Geneva, Switzerland, where countries from around the world will participate in a process that sets the stage for these new applications. No doubt, this conference will lead to changes in long-standing radio

spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Many telecommunications networks once designed primarily for voice are now antiquated and not suitable for the interactive broadband applications that can extend economic benefits, educational opportunities and medical services throughout a nation. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Governments are also re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation are also leading to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector.

Changes in the TMT ecosystem, including the increased reliance by content providers on broadband for video distribution, have also led to a policy focus on 'network neutrality' – the goal of providing some type of stability for the provision of important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented can have profound effects on the balance of power in the sector, and raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers.

These continuing developments around the world are described in the following chapters, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka

Latham & Watkins LLP

Washington, DC

October 2015

LIST OF ABBREVIATIONS

3G	Third-generation (mobile wireless technology)
4G	Fourth-generation (mobile wireless technology)
5G	Fifth-generation (mobile wireless 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

List of Abbreviations

FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node
FTT _x	Fibre to the <i>x</i>
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 (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

List of Abbreviations

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 and John D Colahan¹

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 are 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, either 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 that 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 certain 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 (e.g., through a purchase of shares), 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, including mergers, acquisitions, concentrations and control transactions. 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 (e.g., ownership, management, the range of product lines).

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 Department of Justice (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 assessments 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, the 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 the 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 at 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. However, 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 (e.g., providing elements of a landline telecommunications network) 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 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 the 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 imprisoned 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 imprisonment 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, whether 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 on a case-by-case basis 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 a *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 law (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 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 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 take 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, and 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. At the time of writing, the EU has just opened two public consultations – on broadband access and on the current telecommunications framework – representing continuing progress toward further integration of the EU telecoms 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 has just opened two public consultations – on broadband access and on the current telecommunications framework – representing continuing progress toward further integration of the EU telecoms market.

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 FTC concluded a major investigation of Google with a consent resolution, the EU continues its own investigation of Google. Since the investiture of the new members of the European Commission in November 2014, the new Competition Commissioner announced that several active investigations of possible infringements of the competition rules by Google are under way.

Chapter 7

FRANCE

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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 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, which 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 2014 was once again an important year in many respects for these sectors' business.

The major trends in the telecommunications and internet sectors in 2014 were the acceleration in the transition to superfast broadband on both fixed and mobile networks, both in terms of coverage and subscription numbers; the growing reconfiguration of the sector, brought in particular by Altice's acquisition of SFR, France's second-largest mobile operator; and the legislative intervention on data protection and security through

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Law No. 2015-912 of 24 July 2015 and Law No. 2014-1353 of 13 November 2014.² Wholesale and retail electronic communications markets in France generated €36.8 billion in revenue, marking the fourth consecutive annual decrease. 2014 was, however, marked by a much less significant downward trend in revenues (-3.4 per cent in 2014 against -7.3 per cent in 2013), and in particular in the mobile services sector, due to a less marked drop in prices coupled with an increase in volume of subscriptions and communications. Operators invested €6.9 billion in 2014, increasing their investments particularly in the deployment of fibre networks (€1 billion spent in 2014), in addition to continuing to invest in the deployment of 4G mobile networks.³

In 2014, media markets were marked by an emphasis on diversity, in particular towards better representation in the media of women and people with disabilities.⁴

II REGULATION

i The regulators

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

- a* ARCEP is an 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), imposes sanctions,⁵ resolves disputes and delivers authorisations for postal activities.

2 Law No. 2015-912 of 24 July 2015 on intelligence and Law No. 2014-1353 of 13 November 2014 reinforcing the dispositions related to the fight against terrorism.

3 Electronic Communications and Postal Regulatory Authority (ARCEP) Annual Report, 2014.

4 See Law No. 2014-873 of 4 August 2014 for real equity between women and men, and Charter of 11 February 2014 aimed at supporting the training and employment of people with disabilities in the audiovisual communication sector (available at en.www.csa.fre05d.systranlinks.net/en/Espace-juridique/Chartes/Charte-visant-a-favoriser-la-formation-et-l-insertion-professionnelle-des-personnes-handicapees-dans-le-secteur-de-la-communication-audiovisuelle-11-fevrier-2014).

5 ARCEP's sanctioning power was 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 Post and Electronic Communications Code (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 are specified in Decree No. 2014-867 of 1 August 2014 (see new Articles D594 to D599 of the CPCE).

- b* The Superior Audiovisual Council (CSA) is the regulatory authority responsible for the audiovisual 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 cases of breaches 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 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), and 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 of the TMT sectors. Discussions about merging these entities at the time of the convergence or to limit the powers of ARCEP occurred regularly during the past few years, but such merger was finally 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 CPCE, and regarding audiovisual 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 and 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.⁶ 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.⁷

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, discrimination of non-EU operators is prohibited, and they are subject to the same rights and obligations as EU and national operators.⁸ 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),⁹ 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 2014¹⁰ has expanded the list of sectors in which foreign investors must seek prior authorisation from 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 the operation of networks and electronic communications services.

Specific ownership restrictions applicable to the media sector

French regulations provide for media ownership restrictions 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.

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

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

8 Article L33-1 III of the CPCE.

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

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

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.¹¹

Regarding the radio sector, a single person cannot retain networks whose coverage exceeds 150 million inhabitants or 20 per cent of the aggregated potential audience.¹² This regulation will, however, be subject to modification in the future, as it does not take into account local pluralism challenges. In this respect, a report was submitted to parliament by the CSA in April 2014.¹³

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 1986.¹⁴ Specific rules restricting cross-media ownership also apply.¹⁵

iv Transfers of control and assignments

The general French merger control framework applies to the TMT sectors, without prejudice to the above-mentioned ownership restrictions and to specific provisions for the media sector. The merger control rules are enforced by the FCA.¹⁶

Regarding the telecoms and post sectors, the FCA must provide ARCEP with any referrals regarding merger control, and ARCEP can issue a non-binding opinion.¹⁷

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

12 Article 41 of the Law of 30 September 1986.

13 Available at www.csa.fr/Etudes-et-publications/Les-autres-rapports/Rapport-du-CSA-sur-la-concentration-du-media-radiophonique.

14 Article 40 of the Law of 30 September 1986.

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

16 For recent examples of mergers in the TMT sectors, see FCA Decision 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; see also Decisions of 30 October 2014 No. 14-DCC-160 and of 27 November 2014 No. 14-DCC-179 regarding a series of acquisitions by the Altice group in the telecommunications sector (respectively of SFR, France's second-largest mobile operator, and Omer Telecom Limited, telecoms operator in France under the brand name Virgin Mobile).

17 Article L36-10 of the CPCE.

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.¹⁸

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.¹⁹

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.²⁰

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.²¹ A failure to comply with this obligation constitutes a criminal offence.²²

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.²³

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

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

20 Article L32-1 of the CPCE.

21 Article L33-1 of the CPCE.

22 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.

23 This issue now seems resolved regarding video-sharing sites: see, for instance, the judgment of 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

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’,²⁴ 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 other two 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 fall into two main categories of services:

- a telephone services: 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; and
- b enquiry and directory services (both in printed and electronic versions).

These services must be rendered under 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 an operator guaranteeing the provision of universal services.

Universal service currently only covers telephone provision and not information technologies. However, in 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,

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* and No. 11-10.508, *Parfums Christian Dior*, in which the Supreme Court confirmed an earlier decision of the Paris Court of Appeals 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, Paris Court of Appeals, Pôle 5, ch. 1, 4 April 2012, No. 10-00.878, in which second-hand and antique dealers accused eBay of encouraging illegal practices by providing individuals with the means to compete unfairly against professionals, and in which the Paris Court of Appeals considered eBay as a host provider able to benefit from the liability-exemption regime. The Court of Appeals based its decision on the fact that eBay had no knowledge or control of the adverts 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.

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

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 the event that 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 sectoral fund. In principle, every operator contributes to the financing, with each contribution being calculated on the basis of the turnover realised by the operators in their electronic communications activities.²⁵

iii Restrictions on the provision of service

Net neutrality is a growing policy concern in France.²⁶ 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.²⁷ A new decision dated 18 March 2014²⁸ introduces two main changes to the system established in 2012: it distinguishes the installed and configured capacity on each interconnection link covered by the decision; and 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 2012²⁹ 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 opening additional capacity. The MegaUpload website – which has since been shut down by the US authorities – was a Cogent customer that used to send, via Cogent, to subscribers of France Télécom’s subsidiary, Orange, very significant traffic

25 Article L35-3 of the CPCE.

26 See the French Digital Council Opinion issued on 1 March 2013 (available at www.cnumerique.fr/wp-content/uploads/2013/03/130311-avis-net-neutralite-VFINALE.pdf).

27 ARCEP Decision No. 2012-0366 of 29 March 2012.

28 ARCEP Decision No. 2014-0353 of 18 March 2013.

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

volumes (up to 13 times greater than in the other direction) of essentially video content downloaded by web users. In view of the severely asymmetric traffic running to its detriment and exceeding the maximum ratio stated in its peering policy, France Télécom wished to charge for opening additional interconnection capacity. The FCA considered that such practice did not 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 was confirmed by the Paris Court of Appeals in a decision of 19 December 2013³⁰ and by the French Supreme Court in a decision dated 12 May 2015.³¹

The French regulatory framework is therefore undergoing changes to enhance net neutrality among top internet platforms. On 18 June 2014, the Prime Minister added several measures to France's digital strategy framework, including introducing the principle of net neutrality into the legislation as well as the ability of all internet users to shift their personal data from one service to another. In addition, in a report submitted on 13 June 2014 to the government, the French Digital Council called for the creation of neutrality rating agencies in France.

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 that 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.³²

Finally, French e-consumers benefit from consumer law provisions and from specific regulations. In particular, they are protected against certain unsolicited communications via e-mail if their consent has not been obtained prior to the use of their personal data.³³ Moreover, consumers must be provided with valid means by which they may effectively request that such unsolicited communications cease.³⁴ In addition, a Decree of 19 May 2015 provides for the implementation of an opposition list on which

30 Court of Appeals of Paris, Pôle 5, ch. 5-7, 19 December 2013, No. 2012/19484.

31 French Supreme Court, 12 May 2015, No. 14-10792.

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

33 The CNIL is particularly attentive to the obligation of obtaining prior consent that is free, specific and informed. On 1 June 2015, the CNIL imposed a €15,000 fine on Prisma Media for not giving enough precise information regarding the nature of a newsletter to which its customers may subscribe.

34 See Article L34-5 of the CPCE.

any consumer can add his or her name so that advertising material may not generally be sent to him or her.³⁵

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. In addition, pursuant to Law No. 2015-912 of 24 July 2015 (new Article L851-3 of the Internal Security Code) and only for the purpose of preventing terrorism, the Prime Minister may impose on providers of electronic communication services the obligation to implement an automated data-processing system for a maximum period of two months (renewable only upon a new decision) with the aim of detecting connections likely to reveal a terrorist threat.

Further, 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.³⁶ The new regime, which entered into force on 1 January 2015,³⁷ authorises the collection of 'information or documents' from operators as opposed to the collection of simply 'technical data' that 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 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.³⁸ 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

35 See Article L121-34 of the Consumer Code.

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

37 Article 20 IV of the LPM.

38 See CNIL Decision No. 2011-238 of 30 August 2011, confirmed by the French Administrative Supreme Court on 23 March 2015 (Conseil d'Etat, 10th and 9th subsections, No. 353717), imposing a €10,000 fine on the database Lexseek for not respecting the right to opposition applicable to the processing of personal data.

of such processing to the CNIL.³⁹ Although it is considered as such by the CNIL, there is currently discussion about whether an IP address can be considered as personal data.⁴⁰

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.⁴¹ Exceptions are provided, however, in particular for the prevention of terrorism and in the pursuit of criminal offences.

Data used for the purpose of location identification are also considered as personal data within the meaning of 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 sectoral legislation. To increase the efficiency of the existing provisions meant to prevent children against 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.⁴² Law No. 2010-788, dated 12 July 2010 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.⁴³

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 in Article 226-4-1 of the French Penal Code and empowers police officers, upon judicial authorisation and only

39 In that respect, see the French Supreme Court's recent decision, according to which the fact that an employee is informed of the existence of a monitoring system is not sufficient: the system controlling the flow of data received and sent by an employee constitutes an automated data-processing system that requires prior declaration to the CNIL (Cass Soc, 8 October 2014, No.13 14991).

40 See Court of Appeals of Rennes, 28 April 2015, No. 14/05708.

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

42 Article 6 of the Law of 21 June 2004.

43 Article L5231-3 of the Public Health Code.

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. This helps with the detection of infringements, the collection of evidence and the 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 individuals, and recognises that the CNIL has jurisdiction over the control of video protection systems.

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 2004.⁴⁴

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 bands open in the secondary market is publicly accessible. 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). The transfer of frequency licences is subject either to prior approval of ARCEP⁴⁵ or to notification to ARCEP, which may refuse the assignment under certain circumstances.⁴⁶ 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.

44 Article L42-3 of the CPCE.

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

46 *Ibid.*

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.

In addition, spectrum in the 800MHz and 2.6GHz bands were allocated for the deployment of the ultra-high-speed 4G mobile network: in that respect, licences for the 2.6GHz frequency were awarded to Bouygues Telecom, Free Mobile, Orange France and SFR in September 2011,⁴⁷ and in December 2011, licences for the 800MHz were awarded to the same operators except Free Mobile,⁴⁸ which has instead been granted roaming rights in priority roll-out areas. The next step towards greater deployment of the 4G mobile network is the transfer of spectrum in the 700MHz band from TNT services to mobile services. According to the calendar set by the Prime Minister, the allocation of the 700MHz band should be carried out in December 2015, but the transfer will only be made effective from October 2017 to June 2019.

With 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 in particular the conditions under which network sharing between mobile phone operators may be permitted without harming competition.⁴⁹ 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.⁵⁰ 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 terms of 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. On 25 September 2014, the FCA rejected Orange's complaint about and request for provisional measures to suspend the agreement, concluding that the agreement in question did not constitute an immediate and serious threat to the economy. ARCEP announced that it will work closely with the FCA to perform 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.

47 ARCEP, Decision No. 2011-1080 of 22 December 2011.

48 Ibid.

49 FCA, Opinion No. 13-A-08 of 11 March 2013 on conditions for sharing and roaming on mobile networks.

50 See ARCEP press release of 31 January 2014.

iv Spectrum auctions and fees

Spectrum auctions in the 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 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.⁵¹ 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 certain content requirements and restrictions.

Content requirements

At least 60 per cent of the audiovisual 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.⁵²

Private radio broadcasters must – in principle – dedicate at least 40 per cent of their musical programmes to French music.⁵³

In addition, pursuant to Law No. 2014-873 of 4 August 2014 for true equality between women and men, audiovisual programmes have the duty to ensure fair representation of both women and men. Furthermore, audiovisual programmes and radio broadcasters must combat sexism by broadcasting specific programmes in this respect.⁵⁴

Advertising

Advertising is particularly regulated in television broadcasting.⁵⁵ 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.

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

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

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

54 Article 56 of the Law of 4 August 2014.

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

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 fruit, dairy products, etc.) or sponsorships, which may continue to be broadcast.

In addition, some product are prohibited from being advertised, such as alcoholic beverages above a certain level of alcohol or tobacco products. A circular was issued on 25 September 2014 related to the newly marketed electronic cigarettes, prohibiting any form of advertisement of such device or associated refills.

ii 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*).

iii 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, a French company that provides radio and television transmission services, services for telecoms operators and other multimedia services, and Virgin Mobile signed an agreement under which TDF committed to developing the new network with up to 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 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 2010.⁵⁶

56 CSA, Decision No. 2012-275 of 14 February 2012.

VI THE YEAR IN REVIEW

i Deployment of super-fast broadband in France

The ‘Super-fast broadband France plan’ was launched in 2013, and aims to cover the entire territory with fixed super-fast broadband by 2022. 2014 was marked by great improvements in terms of infrastructures development, and in December 2014, 13.3 million households and premises were eligible for super-fast broadband.⁵⁷ The Digital Agency was created in January 2015, and is entrusted with the implementation and monitoring of the deployment of super-fast broadband in France.⁵⁸ In addition, the government created an observatory for super-fast broadband, allowing any person to monitor network developments in France.⁵⁹

In large urban areas, the deployment of super-fast broadband is carried out by private operators, and covers about 57 per cent of the population. In order to enable this, ARCEP expanded the access perimeter to Orange’s infrastructures to private operators. For rural and less populated areas, public initiative networks have been implemented by local authorities with state financial aid of about €3 billion. In July 2014, the government announced the implementation of seven new public initiative networks aimed at providing super-fast broadband coverage to 4 million households by 2020.

Super-fast broadband is also expanding in the mobile sector through 4G deployment in France, and 2014 was marked by a 47 per cent increase in the number of 4G sites in use. The allocation of the 700MHz band to mobile operators announced in October 2014 was a great step forward in this respect. In addition, ARCEP set out 4G deployment obligations for mobile operators that it monitors on a continuous basis and evaluates annually.

ii Concentration in the telecommunication sector

Altice’s acquisition of SFR

In April 2014, after a bidding war that lasted weeks, the cable operator Numericable – a subsidiary of the Altice group – succeeded in purchasing Vivendi’s French telecom subsidiary, SFR. Following a rather favourable opinion from ARCEP,⁶⁰ the FCA authorised the merger after an in-depth Phase II review on 30 October 2014.⁶¹ Numericable had to offer several significant remedies to obtain the approval of the FCA (this is the first time that such remedies have had to be made), including opening up its cable network to its competitors and disposing of its mobile activities in La Réunion and Mayotte (French overseas territories) due to the organisation’s dominance in the Indian Ocean island market. In January 2015, the FCA decided on its own initiative to examine Numericable’s compliance with the remedies related to the disposal of its mobile activities, and on 29 July 2015 announced that Numericable had complied with its undertaking

57 ARCEP Annual Report, 2015.

58 Decree No. 2015-113 of 3 February 2015.

59 <http://francethd.fr/l-observatoire/l-observatoire-france-tres-haut-debit.html>.

60 ARCEP, Opinion No. 2014-0815 of 22 July 2014.

61 FCA, Decision No. 14-DCC-160 of 30 October 2014.

related to access to its cable network.⁶² In addition, on 2 April 2015 the FCA conducted unannounced dawn raids at SFR-Numericable offices following suspicions that the two telecom operators had commenced their merger before the FCA gave the green light to the transaction ('gun-jumping'). Both companies could face potentially sizeable fines if they are found to have implemented the merger prior to the authorisation.

Altice's acquisition of Virgin Mobile

On 27 November 2014, the FCA authorised Numericable-SFR's acquisition of Omer Telecom Limited, which is active in the mobile sector under the Virgin Mobile brand.⁶³ The main competition issue raised by this merger would be the risk of market pre-emption by the new entity, which could now provide innovative multiplay offers combining access to super-fast internet and mobile services. However, the FCA found that the remedies undertaken by Numericable during its prior merger with SFR were sufficient to prevent such a risk.

Bouygues Telecom and SFR

On 31 January 2014, SFR and Bouygues Telecom signed a network sharing agreement covering 57 per cent of the French population (excluding the dense population areas). In addition to network sharing, the agreement includes 4G roaming services provided by Bouygues Telecom to SFR for a period of two-and-a-half years. Orange's request to suspend the agreement was rejected by the FCA in Decision No. 14-D-10 dated 25 September 2014, and was later confirmed by the Paris Court of Appeals in a decision dated 5 February 2015.⁶⁴

In addition, in June 2015, Bouygues rejected Altice's €10 billion offer for its telecom business. The deal would have combined two of France's largest mobile providers – Numericable-SFR and Bouygues Telecom – and overtaken Orange as France's largest cellphone company. The transaction would also have changed the telecommunications landscape in France, reducing the number of main mobile providers from four to three. Bouygues held that there were significant risks in terms of competition law for a transaction that would be examined closely by the FCA, and that it thought Bouygues Telecom was well positioned to take advantage of the growth in the telecommunications sector being driven by consumers' increasing use of digital devices.⁶⁵

iii Data protection and security

2014 saw the adoption of new legal provisions on data protection and security. Law No. 2014-1353 of 13 November 2014 reinforcing the dispositions related to the fight against terrorism provides new offences with regard to security on the internet. In particular, being a terrorism apologist on an online communication service is

62 FCA, Decision No. 15-DAG-02 of 29 July 2015.

63 FCA, Decision No.14-DCC-179 of 27 November 2014.

64 Court of Appeals of Paris, 5 February 2015, No. 2014/21492.

65 www.bouygues.com/wp-content/uploads/2015/06/cp_bouygues_23062015_va.pdf.

now recognised as a *délit*⁶⁶ and is punishable with seven years of imprisonment and a €100,000 fine.⁶⁷ In addition, websites considered to be apologising for terrorism can now be subject to administrative blocking.⁶⁸ Furthermore, the recently promulgated Law No. 2015-912 of 24 July 2015 on Intelligence substantially expands the administrative prerogatives regarding data processing (see Section III.iv, *supra*).

With regard to internet trackers and cookies in particular, the CNIL announced in July 2014 that controls would be carried out as from October 2014 to ensure compliance with Article 32-II of the French Data Protection Act, which requires clear and complete information to be provided to internet users. Since October 2014, 27 online controls and 24 onsite controls have been carried out by the CNIL.⁶⁹ Finally, in 2014 the CNIL imposed a €150,000 fine on Google for the non-compliance of its confidentiality policy with the French Data Protection Act, and forced Google to publish a link to this decision on its homepage for 48 hours,⁷⁰ while Orange was subject to a public warning for lack of security and data protection.⁷¹

iv Judicial proceedings

In June 2014, SFR and its subsidiary SRR (based in La Réunion and Mayotte) were sentenced to a €45.9 million fine by the FCA for anti-competitive practices after a complaint by Orange in 2009. SRR was accused of maintaining abusive prices for calls made to its competitors' networks.⁷²

Further to complaints by Bouygues Telecom and SFR, the FCA formally charged Orange on 10 March 2015 with discriminatory practices on the fixed wholesale market, loyalty practices in the mobile enterprise market and exclusive discounts in the enterprise data markets. In parallel to this ongoing investigation, Numericable-SFR filed a lawsuit before the Paris Commercial Court on 18 June 2015 seeking €512 million in damages against Orange based on accusations that Orange would have engaged into anti-competitive practices in business-to-business services.

In addition, on 16 March 2015, the Paris Commercial Court⁷³ ordered Orange to pay €8 million as compensation for the damages Outremer Telecom suffered as a result of Orange's anti-competitive practices in the mobile and fixed-to-mobile markets in the French Caribbean and in French Guyana, which were punished by the FCA in 2009.⁷⁴

66 The second most serious offence in the French criminal system.

67 Article 421-2-5 of the Penal Code.

68 Article 706-23 of the Penal Procedure Code.

69 CNIL Annual Report, 2014.

70 CNIL, Decision No. 2013-420 of 3 January 2014.

71 CNIL, Decision No. 2014-298 of 7 August 2014.

72 FCA, Decision No. 14-D-05 of 13 June 2014.

73 Paris Commercial Court, 16 March 2015, RG 2010073867.

74 FCA, Decision No. 09-D-36 of 9 December 2009. On 6 January 2015, the Supreme Court confirmed the decision of the Paris Court of Appeals, reducing the fine from €63 million to €7.5 million.

Chapter 8

GERMANY

*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 2014, the ICT sector is one of the largest economic sectors in Germany. Constantly growing, it already employs more than 900,000 people in Germany.²

ICT has become a driving force in Germany's economy, contributing to 4.7 per cent of the national gross value added in 2013.³ 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 federal government adopted specific programmes and strategies tailored to the needs of the ICT sector. On 20 August 2014, it concluded the Digital Agenda 2014–2017,

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 - 2 www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197728.html; 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.
 - 3 www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197728.html; www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html.

focusing on a strategy for the digital future of Germany,⁴ and also planning to ensure nationwide broadband access with transmission rates of at least 50Mbit/s in rural areas until 2018 with the Netalliance Digital Germany initiative.⁵ The Digital Agenda further includes themes such as digital security and the Strengthening Industry 4.0 initiative. In addition, data protection and liability within networks are issues in both policy and court decisions.

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.

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 supervision – include granting authorisations and assigning transmission capacities.

The state media authorities are responsible for the allocation of the available transfer capacities.⁷ They also have a wide range of powers to supervise broadcasters with, such as warnings, prohibitions, or withdrawals and revocations of licences.⁸

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 focus is on promoting programming diversity and

4 www.bundesregierung.de/Content/DE/_Anlagen/2014/08/2014-08-20-digitale-agenda.pdf?__blob=publicationFile&v=6.

5 The Netalliance platform for innovation and investment is formed by the government and ICT companies. It commenced work in 2014 under the guidance of Alexander Dobrindt, the German Minister for Transport and Digital Infrastructure (www.bmvi.de/SharedDocs/DE/Artikel/DG/startschuss-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html?nn=72886).

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

7 Section 50ff of the Inter-State Broadcasting Treaty (RStV).

8 Section 38(2) of the RStV.

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, the promotion of media literacy among viewers and listeners.

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 several committees.

The main regulator in the area of telecommunications is the federal legislator due to his competence regarding the postal system and telecommunications. Important federal laws in the field of telecommunications are the German Telecommunications Act (TKG) and, for telemedia services, the German Telemedia Act (TMG). The national legislator is strongly influenced by directives of the European Union. Furthermore, EU regulations, as well as decisions of the European Court of Justice (CJEU) and the Federal Court of Justice (BGH), have a strong impact on the law in the ICT sector.

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 the 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.

ii Regulated activities

Private and public television broadcasting in Germany is governed by the Interstate Broadcasting Treaty (RStV), which outlines the side-by-side existence of public and private broadcasting. The provisions of the RStV have been modified 16 times since it came into force in 1987. The 16th amendment to the RStV came into effect on 1 April 2015.⁹ Further legal sources, at federal level, are various other interstate treaties, such as the Interstate Treaty on the Protection of Minors in Broadcasting and in Telemedia (JMStV), and at state level, individual state media laws.

All private broadcasters require a licence for the purpose of providing broadcasting services (Section 20(1) RStV). According to Section 20(2) of the RStV, the provider of an electronic information and communications service – if it is categorised as a 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 or her choice either submit a licence application within three months or change the service in a way that it is no longer qualified as a 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 a broadcast.

9 See www.lfk.de/fileadmin/media/recht/2013/16-RStV-April2015.pdf.

When providing telecommunication or network services, the operators have to adhere to the German Telecommunications Act (TKG). The law has developed in accordance with European regulations and was implemented in 2004. Since then, further changes have been made (e.g., on data retention). The last amendment was made with the Law of 17 July 2015 on the Security of IT Systems.¹⁰

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 BNetzA when they start to provide the services or the network.¹¹ A notification is not necessary for non-public telecommunications networks or services. It is, however, not unequivocal in each case which services are exempt from a notification. Operators of certain WLAN hotspots are arguably not under a duty to notify.¹²

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 (BMWi) may prohibit certain acts that might interfere with 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 (AWG).¹³

Due to the security-related aspects of telecommunications services, the TKG 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; a provider with significant market power is not able to choose its customers freely).¹⁴

The RStV contains special ownership control provisions¹⁵ that are designed to achieve media-plurality objectives. These rules apply in addition to the general merger

10 www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl115s1324.pdf.

11 Section 6 of the TKG.

12 www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Anbieterpflichten/Meldepflicht/Amtsblattmitteilung_Nr149_2015.pdf?__blob=publicationFile&v=1; also see Sassenberg/Mantz, MMR 2015, 428ff.

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

14 See Sections 21 and 28 of the TKG.

15 Section 25ff of the RStV.

control regime under German and European competition law and are administered by the Commission on Concentration in the Media.

iv Transfers of control and assignments

The German merger control provisions are enforced by the Federal Cartel Office (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. In addition, Section 101ff of the Treaty on the Functioning of the EU and the EC Merger Regulation¹⁶ apply.

The filing of merger notifications in Germany is mandatory if the turnover thresholds according to Section 35(1) of the GWB are met and none of the *de minimis* exemptions¹⁷ applies. The minimum content of information regarding the transaction to be given in the notification is listed in Section 39 of the GWB. If the statutory conditions 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.

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.

16 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

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).

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

Submission of an incorrect or incomplete filing, failure to submit a post-merger completion notice, or cases of incomplete, incorrect or late notices constitute administrative offences and can lead to a fine of up to €100,000.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

All IP-based services are regulated under the TMG, adopted on 18 January 2007 and last amended on 17 July 2015. Commercial rules for telemedia are covered in the TMG, while aspects relating to journalistic content are regulated in a specific section of the RStV¹⁹ 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 practice, the distinction is often difficult to make. Moreover, the regulatory structure of telemedia services oscillates somewhere between the unregulated press and the framed supervision the television and radio broadcasters are under. The state media authorities are also regulators of telemedia services.

ii Universal service

Germany has good broadband penetration that compares well against international levels. Based on the currently accepted broadband definition of at least 1Mbit/s, penetration amounts to approximately 99.9 per cent of German households. About 66 per cent of German households currently have broadband access with transmission rates of at least 50Mbit/s. While the development of LTE (3.9G, often referred to as 4G) only began in 2010, 92.1 per cent of German households already had LTE access in 2014.²⁰ In November 2014, the first mobile provider supplied LTE Advanced (4G, up to 300 Mbit/s) in a few areas, followed by another provider in the second quarter of 2015.²¹

The federal government intends to give a further boost to the development of the broadband network by, for example, capitalising on synergies in the construction of infrastructure, using the ‘digital dividend’²² and formulating regulations that foster investments. Various initiatives exist at the federal, state and local level: especially worth mentioning are the Digital Agenda 2014–2017, the National IT Summit,²³ the German

19 Section 54ff of the RStV.

20 TÜV Rheinland, Bericht zum Breitbandatlas Ende 2014 im Auftrag des BMVI, www.zukunft-breitband.de/SharedDocs/DE/Anlage/Digitales/bericht-zum-breitbandatlas-ende-2014-ergebnisse.pdf?blob=publicationFile, p. 4.

21 www.lte-anbieter.info/lte-advanced/verfuegbarkeit.php.

22 That is, digitisation ending up in freeing up spectrum and usually resulting in its reallocation.

23 The next National IT Summit will take place in Berlin in November 2015: see www.bmwi.de/DE/Themen/Digitale-Welt/Digitale-Agenda/nationaler-it-gipfel.html. In 2014, it was announced that the IT Summit will be realigned to discuss the subjects of the Digital Agenda:

Broadband Initiative²⁴ and the Netalliance Digital Germany initiative, whose objective is to ensure nationwide broadband access with transmission rates of at least 50Mbit/s until 2018.²⁵

Moreover, the federal government encourages projects to pursue industry solutions. For example, small and medium-sized telecommunications companies can borrow funds on privileged terms and with adequate risk pricing through the corporate financing programme of Germany's state-owned development bank.²⁶

In any event, the existing 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 government and federal states assume up to 90 per cent of the risk of default for project financing.²⁷

'White areas' (i.e., those rural areas in Germany that still lack high-speed internet connections) 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 those areas, and the nationwide activities of associations such as the German Association of Internet Enterprises (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).

Furthermore, the TKG amendment of 3 May 2012 contained special provisions to foster the extension of broadband networks.²⁸ The use of mobile networks is boosted by digitisation in other areas such as TV and radio. As regards TV, digital satellite reception and cable continue to expand, while analogue transmission is no longer possible. The digitisation of radio is planned, and the digitisation of fixed telephone services is currently being realised.

The government's policy is to actively encourage people to use the internet and to help them acquire skills in the areas of new media by, *inter alia*, providing governmental services such as e-government and e-justice electronically, and implementing the De-Mail

www.bmwi.de/BMWi/Redaktion/PDF/1/infopapier-neuausrichtung-it-gipfel-digitale-agenda,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf

24 www.breitbandinitiative.de.

25 The Netalliance Digital Germany initiative started on 7 March 2014: www.bmvi.de/DE/DigitalesUndRaumentwicklung/DigitaleInfrastrukturen/Netzallianz/netzallianz_node.html; www.bmvi.de/SharedDocs/DE/Artikel/DG/breitbandstrategie.html. The Federal Ministry for Transport and Digital Infrastructure will further develop its broadband portal, www.zukunft-breitband.de. Apart from the annual Broadband Atlas and best-practice examples, this portal also includes checklists for local authorities and information on financial support.

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

27 www.zukunft-breitband.de/SharedDocs/DE/Anlage/ZukunftBreitband/moeglichkeiten-der-breitbandfoerderung.pdf?blob=publicationFile.

28 Section 2(3) No. 4 of the TKG.

Act in 2011.²⁹ Developments are also made with respect to transport and health-care telematics and the digitisation of cultural assets.

iii Restrictions on the provision of service

The BNetzA is responsible for ensuring broadband network owners comply with the TKG.³⁰ Whereas, until recently, the subject of net neutrality appeared to be of no major concern to the German and the European legislators – the German legislator in particular trusted that existing competition would ensure neutral data transmission on the internet and other new media – the subject has now gained considerable attention. The amendment of 3 May 2012 of the TKG introduced the concept of net neutrality.³¹ 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 and an unjustified deceleration of data traffic.³² Two draft regulations proposed by the BMWi have not yet been passed. On a European level, the European Commission published its legislative plans for net neutrality on 12 September 2013 (Connected Continent legislative package).³³ Under the Connected Continent legislative package, companies would, however, be allowed to differentiate their offers (e.g., 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’. While the European Parliament has made efforts to establish strict rules guaranteeing net neutrality, the European Council’s position tends to be more open to exempt ‘special services’ (i.e., services that require big data volumes, for example, in the fields of automatic driving and internet TV) from net neutrality. In a trilogue between the European Commission, Council and Parliament, the parties found a compromise on 30 June 2015 that, however, still must be approved by Parliament and Council before it can be transposed into a directive.³⁴ The BMWi and the European Commission both see the need for rules regarding net neutrality.³⁵ The Commission further states that special services claiming big data volume may be provided as long as they do not harm open internet access. Zero rating (i.e., services that do not count towards an agreed data

29 The 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. Furthermore, the German legislator adopted an ‘e-justice statute’ that will enable electronic communication with all courts in Germany from 2020 onwards. As of 2022, it will be mandatory for lawyers to communicate with the court by certain electronic means: see dipbt.bundestag.de/dip21.web/bt.

30 See Section 126ff of the TKG.

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

32 Section 41a(1) of the TKG.

33 <https://ec.europa.eu/digital-agenda/en/connected-continent-legislative-package>.

34 data.consilium.europa.eu/doc/document/ST-10409-2015-REV-1/en/pdf.

35 www.bmw.de/DE/Presse/pressemitteilungen,did=717942.html and www.europa.eu/rapid/press-release_MEMO-15-5275_de.htm.

volume) is not mentioned explicitly, but will be allowed and monitored by national regulatory authorities.

Following the EU Directive concerning Unfair Business-to-Consumer Commercial Practices,³⁶ the legislator enacted extensive provisions regarding unsolicited calls, emails and text messages in the Act against Unfair Competition (UWG). Making first contact with consumers by such measures requires the explicit approval of the consumer. Fines can be as high as €300,000.³⁷

iv Security

On 12 June 2015, the Parliament passed the IT Security Act (BSIG),³⁸ which came into force on 25 July 2015. It is the first legal act to govern cybersecurity in Germany.³⁹ Parts of the Act strengthen the position of the Federal Office for Information Security (BSI) as described below, while other sections impose obligations on private entities maintaining critical infrastructure that are relevant for common welfare.

The BSI is a superior federal authority overseen by the Federal Ministry of the Interior with wide-ranging tasks of threat prevention in IT systems. 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 and components. The BSI investigates security risks associated with the use of IT and develops preventive security measures. Therefore, the BSI is the central reporting office for disruptions and attacks on IT systems in private enterprises, using the information submitted by private entities to evaluate them and summarising them in reports that are then provided to the enterprises. The work further includes IT security testing and assessment of IT systems, including their development, in cooperation with the industry. The BSI now also functions as the central authority on IT issues in relation to foreign institutions.

The BSIG especially imposes obligations on private enterprises to safeguard IT security, such as the duty to report disturbances in IT systems to the BSI. Private enterprises that are subject to these obligations are, in particular, operators of critical infrastructures in the energy, IT, telecommunication, transport, health, water, nutrition, finance and securities sectors. Within two years of the BSIG coming into force, they must upgrade their IT systems to make them state-of-the-art, and from then on must prove their compliance with the above-mentioned obligations once every two years through security audits or certificates.⁴⁰ In the future, they will also have to establish a contact centre to exchange information with the BSI.⁴¹ Operators of telecommunication services now have the duty to inform their customers of any IT security risk, and to provide information on the solution for these problems.⁴² Telemedia services operators must now

36 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market.

37 Section 20(1) and (2) UWG.

38 Law on the Federal Office for Information Security.

39 Schweda, ZD-Aktuell 2015, 04737 and Schütze, ZD-Aktuell 2015, 04755.

40 Section 8a of the BSIG.

41 Section 8b of the BSIG.

42 Section 109a(4) of the TKG.

ensure that their users are protected from attacks on IT security through state-of-the-art technical and organisational means.⁴³

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 EU that is currently in the final stages of negotiations.⁴⁴ Moreover, the EU adopted the eIDAS Regulation in 2014.⁴⁵ It aims to consolidate and expand the already existing directive on online signatures, and supplements the uniform legal framework for electronic security services. The provisions will be valid as of 1 July 2016.

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 (BVerfG) developed the notion of an individual's right to decide how his or her data are to be used.⁴⁶ 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, supplemented by the TMG. The BDSG applies 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, if the data originate from publicly accessible sources, or if the data are necessary for the performance of a contract with the relevant person. If a body responsible for processing data harms a data subject by unlawfully or incorrectly collecting, processing or using such person's 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 personal data and the reason for storing these data. They may also claim the deletion or blocking of data if unlawfully stored or no longer needed.

Data protection is supervised by BFDI, the Federal Data Protection Officer, whose position was strengthened by a Law of 25 February 2015 amending the BDSG.⁴⁷

43 Section 13(7) of the TMG.

44 www.ec.europa.eu/digital-agenda/en/news/network-and-information-security-nis-directive.

45 www.eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014R0910&from=DE.

46 Judgment of the BVerfG of 15 December 1983, 1 BvR 209/83 et al, BVerfG collection, 65,1(41).

47 www.bfdi.bund.de/SharedDocs/Publikationen/GesetzeVerordnungen/Unabhaengigkeitgesetz.pdf?__blob=publicationFile&cv=1. The law will come into effect on 1 January 2016.

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 2012.⁴⁸ The European Council, Commission and Parliament are currently negotiating a final draft of the Regulation and aim to finalise the project by the end of 2015.⁴⁹ The project is supported by the European Network and Information Security Agency.

Data retention for the purpose of inner security

Since the BVerfG rendered data retention as intended under the TKG of 2007 to be unlawful,⁵⁰ the question of whether and to what extent data retention is in line with national and European law has been discussed widely. The CJEU decided similarly that European Directive 2006/24/EC setting the framework for data retention is invalid.⁵¹ After two drafts of a data retention act in 2011 and 2013 were not adopted, the German Federal Ministry of Justice presented a new draft on 27 May 2015 containing less extensive possibilities to save data for criminal investigations.⁵² Contrary to media reports, the European Commission announced that it will not take any actions against Germany enacting such law.⁵³

In this context, the BGH nevertheless held that 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.⁵⁴

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, a reform of which is planned.

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, *inter alia*, videos, books, computer games and websites. The BPjM can act only at the request of other administrative institutions, and 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 a prohibition on publication, blocking the provider and fines up to €500,000.

48 KOM (2012) 11.

49 www.consilium.europa.eu/en/press/press-releases/2015/06/15-jha-data-protection.

50 Judgment of the BVerfG of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, BeckRS 2010, 46771.

51 Judgment of the CJEU of 8 April 2014, C-293/12 and C/594/12, BeckEuRS 2014, 393023.

52 www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE_Hoechstspeicherfrist.pdf;jsessionid=0DF4E719C52053037806B63820C853C0.1_cid297?__blob=publicationFile.

53 Becklink 2001085 of 16 September 2015.

54 Judgment of the BGH of 3 July 2014, III ZR 391/13, BeckRS 2014, 14643.

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 Commission for the Protection of Minors in the Media (KJM). The JMStV distinguishes between illegal content and content that impairs the development of minors: illegal content must not be distributed via broadcasting or 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 depend on the severity of the breach, and can range from a complaint against the content provider to fines; the issue may even be handed over to the State Prosecutor.

As of 27 January 2015, new offences to prevent child pornography were implemented under the German Criminal Code (StGB). ‘Cyber-grooming’ (i.e., exerting influence over children via information or telecommunication technologies to prepare them for acts of sexual abuse) is now a criminal offence (Section 176 (4) StGB).

IV SPECTRUM POLICY

i Development

Originally, frequencies in Germany were used – with a few exceptions – by Germany’s federal mail service (Deutsche Bundespost). Since 1996, however, the markets for network and telephony have been 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 and LTE, demand for more bandwidth will continue to rise in line with increasing mobility. Growing demand and technological innovation both call for the availability of an adequate frequency spectrum. The development does not end here; the next generation of mobile network – 5G – is already being developed. In addition to the University of Technology Dresden working on a 5G project,⁵⁵ the government is also focusing on 5G as being part of the Digital Agenda, and is endeavouring to bring Industry 4.0 and the ‘Internet of Things’ (i.e., networks of physical objects with embedded computer technologies) to the next level.

Because of its type of use and the current state of technology, the frequency spectrum available is still considered a scarce resource. The BNetzA is the regulatory authority for the use of frequencies, the allocation of which requires forward-looking, non-discriminatory and proactive frequency regulation. ‘Digital dividend’ is the term frequently used whenever digitisation results in the freeing up of spectrum.

55 www.5glab.de/wp-content/uploads/Press_Release_TUD_Dresden5GLab_01_2014_opening.pdf.

ii Flexible spectrum use

The use of a spectrum requires its prior allocation.⁵⁶ The TKG states that the allocation of spectra shall be regulated by a Spectrum Regulation, and requires the Federal Council's consent.⁵⁷ Based on the allocation of frequencies and the specifications set out in the Spectrum Regulation under Section 53 of the TKG, the BNetzA shall divide the spectrum ranges into spectrum uses and related terms of use.⁵⁸ Spectra for wireless access to telecommunication networks must be assigned in a technologically and service-neutral manner.⁵⁹

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, co-use or in the form of a joint use via 'spectrum pooling'. It is necessary, however, that the BNetzA releases such forms of use for flexible use and specifies the corresponding conditions.⁶⁰

iii Broadband expansion through spectrum auctions

A few rural areas in Germany still lack high-speed internet connections. The federal government plans to invest €2.7 billion into expanding broadband networks, of which €1.33 billion was earned through the last auction of mobile spectra.⁶¹

If the BNetzA finds that the number of available spectra is not sufficient for their allocation, it can order that the allocation of frequencies be preceded by a procurement procedure.⁶² Often, the procurement is held in the form of a spectrum auction, which is organised by the BNetzA.⁶³

On 19 June 2015, the latest auction of mobile broadband spectrum ended following 181 bidding rounds within 16 days. After the merger of Telefónica and E-Plus in the summer of 2014, only three operators (Telefónica, Telekom and Vodafone) were allowed to bid: no new entrants were admitted. The auction of frequencies in the fields of 700MHz, 900MHz, 1500MHz and 1800MHz aggregated a total amount of about €5 billion. The BNetzA imposed rather strict requirements on the auction. For example, the right to use frequency includes, *inter alia*, an obligation to provide internet access to 98 per cent of the population.⁶⁴

The merger of Telefónica and E-Plus may have an impact on the further development of market shares in this field, as the Commission imposed certain restrictions

56 Section 55(1) of the TKG.

57 Section 53(1) of the TKG.

58 Section 54(1) of the TKG.

59 Section 54(2) of the TKG.

60 Section 62(1) and (2) of the TKG; also see Scherer/Heinickel, NVwZ 2012, 585 (591f).

61 www.faz.net/agenturmeldungen/unternehmensnachrichten/roundup-bund-zahlt-die-haelfte-der-kosten-fuer-breitbandausbau-13771354.html.

62 Section 55(10) of the TKG.

63 Section 61 of the TKG.

64 www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/Projekt2016_Frequenzauktion/projekt2016-node.html.

on the new company, such as releasing frequencies at 900MHz and 1800MHz until the end of 2015.⁶⁵

V THE YEAR IN REVIEW⁶⁶

Regarding the ‘right to be forgotten’ (i.e., the right of individuals to have their data deleted from internet websites and search machines where they are no longer needed for legitimate purposes or where they violate personality rights), the supervision of internet companies such as Google or Facebook and the protection of personal data in online communication are subjects of lively debate among the German public and politicians. Since the CJEU judgment of 2014 in *Google v. Spain*,⁶⁷ individuals are entitled to apply for a deletion of personal search entries against Google if their individual interest in hiding information exceeds the public information interest. However, Google still refuses to delete search entries globally, and confines the deletion to its European websites such as google.de. Therefore, links that were requested to be deleted will remain accessible on google.com. This approach is subject to a proceeding by CNIL, the French Data Protection Authority.⁶⁸ Moreover, the BGH decided that – after being notified of a violation – Google is under an obligation to prevent violations of personality rights caused by the search machine’s auto-complete function.⁶⁹

In the field of host provider liability, the BGH has confirmed its position that a host provider is under no general duty to proactively prevent violations of the intellectual property rights or personality rights of its users, and can only be forced to desist from publishing third-party content after it has been notified of the violation.⁷⁰ In addition, the German courts do not grant damages unless the violation has been provoked or appropriated by the host. The Grand Chamber of the European Court of Human Rights, however, upheld its 2014 decision in *Delfi v. Estonia* that a violation of basic personality rights leads to a liability of the forum operator for damages if it did not arrange for sufficient spot checks of the available content.⁷¹

In a decision involving the file-hosting service Rapidshare,⁷² the BGH 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 through its business model. The liability of such file and share-hosting services could be further enhanced through a new draft bill of

65 www.sueddeutsche.de/wirtschaft/mobilfunkmarkt-eu-erlaubt-o-die-uebernahme-von-e-plus-unter-auffagen-1.2027373.

66 For an overview of the developments in internet and multimedia law in 2014, see Hoeren/Thiesen, MMR-Beilage 2015, 1ff.

67 Judgment of the CJEU of 13 May 2014, C-131/12, BeckEuRS 2014, 395156.

68 Becklink 2000746 of 3 August 2015 and becklink 2000735 of 31 July 2015.

69 Judgment of the BGH of 14 May 2013, VI ZR 269/12, BeckRS 2013, 08626.

70 Judgment of the BGH of 5 February 2015, I ZR 240/12, GRUR 2015, 485ff.

71 Judgment of the CJEU of 16 June 2015, BeckRS 2015, 11533.

72 Judgment of the BGH of 15 August 2013, I ZR 80/12, GRUR 2013, 1030ff.

the federal government, which – since 15 June 2015 – has been involved in the EU notification procedure and intends to change some relevant sections of the TMG.⁷³ The draft contains a special provision concerning internet services that are prone to infringements of intellectual property rights, according to which those services are exempted from the existing liability privileges, and providers will therefore be liable even without actual knowledge that rights are infringed on their platform.

As far as streaming of content by private users is concerned, the CJEU held in its decision in the case of *Newspaper Licensing Agency v. Public Relations Consultants Association* that the caching of copyright content does not violate intellectual property rights (at least if its source is legal).⁷⁴ Thus, streaming of copyright-protected content – which had been a grey area from a legal point of view in Germany – can be assessed as lawful following the CJEU judgment.

Another widely discussed topic is the liability of access providers, particularly providers of WLAN hotspots. Under the existing laws, private and commercial access providers can be liable for infringements through their WLAN if they do not take measures to control their users in cases where there are clear indications of infringements.⁷⁵

The new (revised) draft of the federal government of the TMG intends to strengthen the position of access providers so that they would not be liable if they provide ‘reasonable security measures’ and request that their users agree that they will not use the WLAN access to commit violations. This draft provision of the TMG aims to enhance the dissemination of public WLAN hotspots, which are still not very common in Germany.⁷⁶ However, the draft has been widely criticised by consumer associations, as certain provisions could possibly conflict with EU directives and fundamental freedoms.⁷⁷ Moreover, the liability of access providers is the subject of a highly anticipated proceeding submitted to the CJEU by the District Court of Munich in September 2014.⁷⁸ Moreover, in November 2015, the BGH will decide whether Deutsche Telekom as an internet service provider is obliged to block websites with illegal content.⁷⁹

Over the past few years, IT contract law has been influenced in particular by the contractual framework conditions for cloud computing, especially regarding questions of data protection and copyright law. Although trust in cloud computing services has been shaken by data theft and hacking attacks, experts still predict high annual growth rates for this market. The federal government has recognised this potential and,

73 www.bmwi.de/BMWi/Redaktion/PDF/S-T/telemedienaenderungsgesetz-aenderung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf; MMR-Aktuell 2015, 369968.

74 Judgment of the CJEU of 5 June 2014, C-360/13, MMR 2014, 544f.

75 Judgment of the BGH of 8 January 2014 *Bearshare*, I ZR 169/12, NJW 2014, 2360ff.

76 www.eco.de/wp-content/blogs.dir/eco-microresearch_verbreitung-und-nutzung-von-wlan.pdf.

77 MMR-Aktuell 2015, 370686.

78 Order of District Court of Munich of 18 September 2014, 7 O 14719/12, MMR 2014, 772ff.

79 www.bundesgerichtshof.de/SharedDocs/Termine/DE/Termine/IZR3142.html;jsessionid=C61A306DCDC54B0B17CB405390AD94EA.2_cid319?nn=6128288.

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.⁸⁰ The trusted clouds programme will conclude in 2015. Recently, the federal government has also outlined a pilot project on data privacy certification concerning contract data processing in clouds.⁸¹ As in previous years, the contractual framework for IT outsourcing has also been an important subject.⁸²

As previously mentioned in Sections I, III.ii and IV.i, *supra*, on 20 August 2014, the federal government adopted the Digital Agenda 2014–2017. The programme is conducted by three ministries, and intends to formulate guidelines for Germany’s digital policy, and to promote economic, legal, scientific and social aspects to ensure the future sustainability of Germany’s digital policy.⁸³ The National IT Summit has been realigned to pursue the issues of the Digital Agenda.⁸⁴ Eight platforms and two forums, each staffed with officials from the political and economic sectors, have been established to work on Digital Agenda topics, such as digital networks and mobility, digital administration, public IT and Industry 4.0 (which is especially strongly promoted by the government as a future project). To better coordinate Industry 4.0 developments, a special platform, called Platform Industry 4.0, was created.⁸⁵

The acquisition of HERE, the Nokia map service, by the automobile manufacturers BMW, Audi and Mercedes in the summer of 2015 with the aim of using the HERE data for car assistance systems, show that the Internet of Things and machine-to-machine communications (i.e., technologies that allow systems to communicate with other devices) play an ever-increasing role in the German industry.⁸⁶

A further boost for the economy is the availability of data on subjects such as geography, climate, environment, registries or law. Therefore, on 17 July 2015 a law changing the Federal Act on the Re-Use of Public Sector Information entered into force. This Act, which implements an EU directive, will oblige public authorities to grant use of their data as ‘open data’ to the public.⁸⁷

80 www.bmw.de/DE/Themen/Digitale-Welt/Digitale-Technologien/cloud-computing.html.

81 ZD-Aktuell 2015, 04629.

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

83 www.bundesregierung.de/Content/DE/_Anlagen/2014/08/2014-08-20-digitale-agenda.pdf?__blob=publicationFile&v=6.

84 www.bmw.de/DE/Themen/Digitale-Welt/Digitale-Agenda/nationaler-it-gipfel.html.

85 www.plattform-i40.de/hintergrund/visionen.

86 www.audi-mediacyber.com/de/pressemitteilungen/audi-ag-bmw-group-und-daimler-ag-einigen-sich-mit-nokia-corporation-ueber-gemeinsamen-kauf-des-digitalen-kartengeschaefts-here-4600.

87 www.bmw.de/BMWi/Redaktion/PDF/II/informationsweiterverwendungsgesetz-iwg-entwurf,property=pdf,bereich=bmw2012,sprache=de,rwb=true.pdf.

On 12 August 2015, the federal government provided a legislative draft outlining changes to the TKG that will allow consumers to retain their routers when changing internet service providers.⁸⁸

Parts of the German Civil Code (BGB) were revised in 2014 by the law implementing the EU Consumer Rights Directive⁸⁹ that especially impacts operators of online shops. The comprehensive changes include, *inter alia*, an interdiction to preset checkmarks for additional fee-based services, and a prohibition on claiming lump-sum fees that do not actually arise from the use of credit cards. Further, the charging of additional costs for service hotlines is prohibited. The former possibility of revoking a contract several years after its conclusion on the ground that the buyer had not been correctly instructed on the right of withdrawal – which, broadly speaking, is the right to revoke an online contract within 14 days after conclusion or delivery of the purchased good without cause – is not provided for in German law anymore. In contrast to the previous legal situation, the seller no longer has to bear the costs for the return of the purchased goods in cases of withdrawal; rather, these costs can be imposed on the consumer. In addition to several other modifications regarding the duty to instruct the consumer, these obligations have been facilitated regarding mobile commerce. In 2012, the ‘button law’ was implemented in the BGB to protect consumers from cost traps in electronic commerce. The consumer must be clearly informed by a separate button stating ‘fee-based order’ and confirm that he or she would like to place the order (Section 312j(3) BGB).

In a lawsuit against the state, the BGH issued an order that the highly disputed question of whether dynamic IP addresses can be qualified as ‘personal data’ within the meaning of the applicable data protection laws be referred to the CJEU.⁹⁰

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 as well as consumer, copyright and youth protection in the context of new media.

88 www.bmwi.de/DE/Themen/Digitale-Welt/Netzpolitik/freie-routerwahl.html.

89 Tonner, VuR 2013, 443ff.

90 Order of the District Court of Munich of 28 October 2014, VI ZR 135/13, MMR 2015, 131ff.

Chapter 10

HONG KONG

*Simon Powell and Chi Ho Kwan*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 24 local fixed network operators³ and 273 external fixed telecommunications service providers⁴ serving Hong Kong's population of slightly over 7.30 million in a land area of approximately 1,000 square kilometres.⁵ The residential fixed line penetration rate is 99.29 per cent⁶ and the mobile subscriber penetration rate is 228.8 per cent.⁷ The competition for internet services is intense, with a total of 210 ISPs.⁸ The number of

1 Simon Powell is a partner and Chi Ho Kwan is an associate at Latham & Watkins.

2 As of July 2015, provided by the Office of the Communications Authority (OFCA).

3 i.e., licensees authorised to provide facility-based local fixed telecommunications services under an FTNS licence, an FCL or a UCL using wireline or wireless technology (as of August 2015, provided by OFCA).

4 i.e., licensees authorised to provide facility-based external telecommunications services (ETS) under an FTNS licence, an FCL or a UCL, and those authorised to provide service-based ETS under SBO licences (as of August 2015, provided by OFCA).

5 As of mid-2015, provided by the Census and Statistics Department (CSD).

6 The residential fixed line penetration rate is calculated by dividing the number of residential fixed lines by the number of households in Hong Kong (as of June 2015, provided by OFCA).

7 As of June 2015, provided by OFCA.

8 i.e., licensees authorised to provide internet access services under an FTNS licence, an FCL, a UCL or an SBO licence (as of August 2015, provided by OFCA).

registered customer accounts with broadband access exceeds those with dial-up access by approximately 2.08 million, and the household broadband penetration rate is 83.2 per cent.⁹ According to OFCA, there are approximately 2.39 million subscribers to licensed domestic pay television services in Hong Kong,¹⁰ and there are, according to Nielsen Hong Kong, around 2.46 million households in Hong Kong.¹¹ There are more than 38,000 Wi-Fi access points in the city,¹² and the numbers continue to grow. As these figures demonstrate, the use of telecommunications services is advanced and widespread in Hong Kong.

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 be granted, there have only been two domestic free-to-air television programme service providers in the past 30 years. On 1 April 2015, the Chief Executive in Council granted a third domestic free-to-air television programme service licence to HK Television Entertainment Company (HKTVE), enabling HKTVE to provide free television services in Hong Kong using fixed network as its transmission mode. It has not yet commenced its service. Further, as from 1 April 2016, one of the two original domestic free-to-air television service providers, Asia Television Limited will cease to be a domestic free television programme service licensee following the expiry of its licence, reducing the number of licensees back to two. There are currently three domestic pay television service licensees (Hong Kong Cable Television Limited, PCCW Media Limited and TVB Network Vision Limited).

In addition to domestic free-to-air and domestic pay television service providers, there are two other main categories of television broadcasting licences: non-domestic television programme service licences (mainly satellite television services) and other licensable television programme service licences (mainly hotel room television services). Domestic television licences (both free-to-air and pay) are granted and renewed by the Chief Executive in Council (with recommendations from the Communications Authority (CA)), while the CA issues and renews licences in the other two categories. Post-licensing, the responsibility for regulating compliance with the relevant rules and regulations and monitoring compliance and non-compliance rests mainly on the CA.

There are three providers of analogue sound broadcasting services operating 13 radio channels.¹³ Of the three providers, one is funded by the government (and does not hold a sound broadcasting licence). Although there are only 13 local radio channels, given the proximity of Hong Kong to mainland China, it is not uncommon for radio signals from radio stations on mainland China to be picked up in Hong Kong. In March 2011, the government granted 12-year sound broadcasting licences to three providers for the provision of DAB services in Hong Kong. They are required under their 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 November 2013,

9 As of June 2015, provided by OFCA.

10 Ibid.

11 According to statistics from April 2015 to June 2015, provided by the CSD.

12 As of August 2015, provided by OFCA.

13 As of September 2013, provided by OFCA.

there were 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 issuing sound broadcasting licences.

II REGULATION

i The regulators

The Telecommunications Authority (TA) and the Office of the Telecommunications Authority (OFTA)

Prior to 1 April 2012, the Hong Kong telecommunications industry was regulated by the 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 supervised the 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 responsible for supervising and overseeing the implementation and enforcement of measures against unsolicited electronic messages. OFTA also represented Hong Kong in the International Telecommunication Union and other international forums.

The Broadcasting Authority (BA) and the Television and Entertainment Licensing Authority (TELA)

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 Ordinance¹⁴ 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 TELA to discharge its 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 and complaints regarding anti-competitive behaviour, and for processing applications (new and renewals) for television programme service licences.

Further, as 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 the registration of newspapers.

14 Chapter 391 of the Laws of Hong Kong.

The CA and OFCA

In light of the continued blurring of the roles of the BA and the TA, on 1 April 2012, the Communications Authority Ordinance¹⁵ came into operation, and the CA was created as a unified regulator to service the broadcasting and telecommunications industries. The functions of the BA and the TA were transferred to the CA. Like the TA before it, the CA operates through an executive arm, OFCA. OFCA is a combination of the broadcasting arm of TELA (other TELA functions were transferred to other government departments) and OFTA. The Office for Film, Newspaper and Article Administration under OFCA took over TELA's previous functions in relation to film classification, control of obscene and indecent articles and newspaper registration, but the issuance of entertainment licences was transferred to the Home Affairs Department. The CA took 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 Competition Ordinance;¹⁹
- f* the Broadcasting (Miscellaneous Provisions) Ordinance;²⁰ and
- g* the Trade Descriptions Ordinance (TDO).²¹

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 Telecommunications Ordinance contains provisions regulating, *inter alia*, licensing, preventing some anti-competitive practices and imposing some restrictions on ownership.

The Legislative Council enacted the Competition Ordinance in June 2012, giving the CA concurrent jurisdiction with the newly established Competition Commission with regard to the investigation and bringing of enforcement proceedings in respect of competition cases in the communications sector before the Competition Tribunal (the tribunal established within the judiciary to hear and adjudicate competition cases). The Competition Ordinance is being implemented in phases. When the competition rules in the Competition Ordinance come into force, the competition provisions in the Broadcasting and Telecommunications Ordinances will be repealed simultaneously.

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

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 619 of the Laws of Hong Kong.

20 Chapter 391 of the Laws of Hong Kong.

21 Chapter 362 of the Laws of Hong Kong.

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 now have an option to register on facsimile, short message and pre-recorded message do-not-call registers. As of August 2015,²² more than 2.8 million numbers have been registered. However, the effectiveness of this legislation is sometimes queried, as service providers in various industries still appear able to circumvent the regulations and restrictions, and continue to make or send unsolicited 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’²³ by prohibiting false trade descriptions of services, misleading omissions, aggressive commercial practices, bait advertising, bait-and-switch and wrongly accepted payments. The CA has concurrent jurisdiction with the Customs and Excise Department to enforce these provisions in the broadcasting service sector. The CA does not preview or pre-censor any material before it is broadcast. Editorial responsibility lies with the licensees themselves. The CA has promulgated a set of codes of practice for television and sound broadcasting services to provide guidance on these issues to the service providers.

The Office of the Privacy Commissioner for Personal Data (Privacy Commissioner)

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),²⁴ 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, the fourth of which 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,

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

23 Press release of the OFCA dated 15 July 2013.

24 Chapter 486 of the Laws of Hong Kong.

erasure or other use. There have been several incidents in Hong Kong regarding the 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. The Hong Kong police force's 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 the 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).²⁵ The leak of the personal data of Octopus users was so significant that the Privacy Commissioner issued its first-ever 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 increasing concerns over the alleged misuse of personal data, the PDPO was amended in 2012 to:

- a* address the unauthorised disclosure of personal data by a person who obtained such personal data from a data user;
- b* extend the enforcement power of the Privacy Commissioner;
- c* clarify the requirements when using personal data for direct marketing and when providing personal data to another for use in direct marketing; and
- d* 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 their personal data.

The Privacy Commissioner has published codes and guidelines on personal data privacy protection regarding the internet for information technology practitioners, biometric data users, CCTV and drone operators as well as mobile service operators.

Sources of law

Hong Kong's laws governing broadcasting, communications, media and the publication of books and newspapers are scattered across multiple pieces of legislation, including:

- a* the Communications Authority Ordinance;
- b* the Broadcasting Ordinance;
- c* the Competition Ordinance;
- d* the Film Censorship Ordinance;²⁶
- e* the Interception of Communications and Surveillance Ordinance;²⁷
- f* the Telecommunications Ordinance;

25 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 are provided to Octopus. In the summer of 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. In July 2010, Octopus disclosed that it had made HK\$44 million since early 2006 by selling personal data.

26 Chapter 392 of the Laws of Hong Kong.

27 Chapter 589 of the Laws of Hong Kong.

- g* the UEMO;
- h* the Books Registration Ordinance;²⁸
- i* the Registration of Local Newspapers Ordinance;²⁹
- j* the TDO;
- k* the PDPO; and
- l* the Competition Ordinance.

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

ii Ownership restrictions

The Telecommunications Ordinance

The CA has power to impose conditions, including the period of validity, in respect of the licences issued under the Telecommunications Ordinance. In addition, the CA has authority to require a licensee to comply with the terms of its licence and any applicable legislation, regulations and codes of practice, and to suspend or revoke licences in accordance with the Telecommunications Ordinance or other rules or regulations to protect the public interest.

The Telecommunications Ordinance disqualifies two categories of person from controlling an entity with a sound broadcasting licence: 'disqualified persons' and 'unqualified persons'. Subject to exemptions, disqualified persons are restricted from exercising control (or increasing control) over a sound broadcasting licence holder.³⁰ 'Disqualified persons' include advertising agents, suppliers of broadcasting materials to licensees, a sound broadcasting licence holder, any person who (as its business) transmits sound or television material, whether in Hong Kong or outside Hong Kong, a domestic free-to-air or a domestic pay-TV licensee, or an associate of any of such persons.³¹ 'Unqualified persons' refers to persons who are not for the time being ordinarily resident in Hong Kong³² 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

28 Chapter 142 of the Laws of Hong Kong.

29 Chapter 268 of the Laws of Hong Kong.

30 Section 13G of the Telecommunications Ordinance.

31 Section 13A of the Telecommunications Ordinance.

32 '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 total in any two consecutive calendar years; and

ordinarily resident in Hong Kong.³³ The aggregate of the voting shares 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.³⁴ 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.

Where there is a change in relation to a carrier licensee, the CA may conduct investigations to ascertain whether that change has, or is likely to have, the effect of substantially lessening competition in a telecommunications market and, if so, to direct the licensee to take such steps as might be necessary to eliminate or avoid such effect. These provisions are triggered when there is a ‘change’ in relation to a carrier licence, which is deemed to be the case where a person (either alone or with an associated person)³⁵ becomes the beneficial owner or voting controller of more than 15 per cent of the voting shares in the licensee (save where a person does not acquire more than 30 per

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

- (iii) that is formed and registered in Hong Kong under the Companies Ordinance (Cap 622);
- (iv) in which case: 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 at 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 have at any time been resident for a continuous period of not less than seven years; and
- (v) the control and management of which is *bona fide* exercised in Hong Kong.

33 Section 13I of the Telecommunications Ordinance.

34 Section 13J of the Telecommunications Ordinance.

35 ‘Associated person’ includes:

a where the licensee is a natural person:

- (i) a relative of the licensee;
- (ii) a partner of the licensee and a relative of that partner;
- (iii) a partnership in which the licensee is a partner;
- (iv) a corporation controlled by the licensee, by a partner of the licensee or by a partnership in which the licensee is a partner; or
- (v) a director or principal officer of a corporation referred to in (iv);

b where the licensee is a corporation:

- (i) an associated corporation (being a corporation over which the licensee has control or, where the licensee is a corporation, a corporation that has control over the licensee or that is under the same control as is the licensee);
- (ii) a person who controls the corporation and, where the person is a natural person, a relative of the person;

cent of the voting shares in the carrier licensee and (1) is not or does 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 or (2) acquires the power to influence the affairs of such other carrier licence holder as he or she wishes); a person becomes the beneficial owner or voting controller of more than 30 per cent of the voting shares in the licensee; or a person becomes the beneficial owner or voting controller of more than 50 per cent of the voting shares in the licensee, 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.³⁶

The Broadcasting Ordinance

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. The restrictions in relation to domestic free-to-air and domestic pay-TV programme service licences are:

a the exercise of the control and management of the licence holder must be *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 a residency requirement.³⁸ The residency requirement is equally applicable to those directors who actively participate in management and operations, and to the principal officers (being those in charge of the selection, production or scheduling of television programmes) of the licence holder; and

-
- (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; and

- c* where the licensee is a partnership;
 - (i) a partner of the partnership and, where the partner is a natural person, a relative of the partner;
 - (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 (iii).

36 Sections 7P(16) and (17) 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 for a total of 300 days in any two consecutive years and, further, such individuals must have ordinarily resided in Hong Kong for a period of not less than seven years.

- b* no disqualified person or their controlling entities or persons or associates (unless otherwise disclosed in the licence application) can exercise control over (or remain in control of) 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 satisfying the residency requirement.

Broadcasting licences ownership and voting restrictions

The Broadcasting Ordinance sets out detailed restrictions regarding the holding, acquisition or exercise of voting control of licence holders (except for domestic pay-to-air television programme licence holders) who are not qualified voting controllers. A qualified voting controller is someone 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 ‘unqualified voting controller’ is anyone who is not a qualified voting controller. Unqualified voting controllers cannot exercise voting control in excess of 49 per cent of the total voting control at any 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 to 6 per cent or 6 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.

Further, a domestic free-to-air television programme service licence will not be granted to a company that is a subsidiary of a corporation.³⁹

iii Competition measures

Sector-specific competition provisions governing the broadcasting and telecommunications industry are, at present, set out in the Broadcasting Ordinance and the Telecommunications Ordinance, respectively. The CA is vested with the power 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 across all industry sectors. Under the Competition Ordinance, the CA will have concurrent jurisdiction 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. A government notice under the Competition Ordinance has specified that the Ordinance will come into full force from 14 December 2015.⁴⁰ 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.

39 Section 8(3) of the Broadcasting Ordinance.

40 Competition Ordinance (Commencement) (No. 2) Notice 2015.

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, a licensee shall not engage in conduct that has the purpose or effect of preventing or substantially restricting competition in a telecommunications market. When assessing whether conduct is anti-competitive, the CA will have regard to whether there is a price-fixing element; whether the action would prevent or restrict the supply of goods or services to competitors; and agreements regarding the sharing of markets on agreed geographical or customer lines. Certain actions prescribed under Section 7K(3) are deemed anti-competitive, including entering into an agreement, arrangement or understanding that has an anti-competitive purpose or effect; 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 without the prior written authorisation of the CA; or 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 prohibits licensees in a dominant position from abusing their position. A licensee is in a dominant position when it is able to act without significant competitive restraint from its competitors and customers. In considering whether a licensee is dominant, the CA is obliged to take into account:

- a* the market share of the licensee;
- b* the licensee's power to make pricing and other decisions;
- c* any barriers to entry to competitors in the relevant market;
- d* the degree of product differentiation and sales promotion; and
- e* the other matters stipulated in the guidelines issued in this regard pursuant to the Telecommunications Ordinance.

Section 7N prohibits a licensee who is in a dominant position in a market from discriminating between persons who acquire the services in the market on charges or on terms of supply.

The Broadcasting Ordinance has similar competition provisions prohibiting anti-competitive behaviour and abuse of dominance. Section 13 (prohibition on anti-competitive conduct) prohibits a licensee 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 a licensee's conduct is anti-competitive, the CA will have regard to whether there is a price-fixing element; whether the action would prevent or restrict the supply of goods or services to competitors; and agreements regarding the sharing of markets on agreed geographical or customer lines. Any provision in an agreement permitting anti-competitive behaviour is void.

Section 14 (prohibition on abuse of dominance) is similar to Section 7L of Telecommunications Ordinance, as it prohibits a licensee in a dominant position in a television programme service market from abusing its position. A licensee is in a dominant position when it is able to act without significant competitive restraint from

its competitors and customers. In considering whether a licensee is dominant, the CA is obliged to take into account:

- a* the market share of the licensee;
- b* the licensee's power to make pricing and other decisions;
- c* any barriers to entry to competitors into the relevant market; and
- d* the other matters stipulated in the guidelines issued in this regard pursuant to the Broadcasting Ordinance.

Where the CA is of the view that there is anti-competitive behaviour or an abuse of position, it can issue a cease-and-desist notice requiring the licensee to cease the anti-competitive behaviour or abuse⁴¹ 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 2012, and is now monitored and regulated by the CA. Since 2007, the government has adopted a market-based approach to spectrum management,⁴² 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 a spectrum release plan governing a three-year period going forward was released pursuant to the Radio Spectrum Policy Framework that was announced in April 2007. 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 spectrum release plan is updated annually on a rolling basis or as required taking into account the latest developments. Spectrum availability determines the number of market players in the industry. Currently, spectrum is auctioned and allocated by the CA through the latest spectrum release plan. Where spectrum has been previously allocated under an earlier release plan, it will be clearly stated in the current release plan.

The CA announced the spectrum release plan for 2015 to 2017 on 6 March 2015. According to the plan, no spectrum will be available for release during this period.⁴³ Nonetheless, 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.

As part of the spectrum management policy, Hong Kong is also considering spectrum trading to create a market for secondary trading of spectrum use. The

41 Section 16 of the Broadcasting Ordinance.

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

43 Spectrum Release Plan for 2015–2017 dated 6 March 2015 published by the OFCA.

government is understood to have commissioned feasibility studies, but it has yet to make the consultant's report publicly available.⁴⁴ However, the consultant's conclusions can be inferred from the reports of the Subcommittee on Telecommunications. These suggest that, in jurisdictions where it is permitted, spectrum trading does not occur frequently. Further, while demand for spectrum remains incessant, few holders of spectrum rights are willing to transfer their rights to other operators. The administration does not therefore consider spectrum trading a matter of priority, even though it is viewed as desirable under the Radio Spectrum Policy Framework.⁴⁵

Until the government makes the findings of the feasibility report publicly available, the telecommunications industry in Hong Kong cannot be sure 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; there may be allocation of spectrum bands that are permitted for secondary trading; and a new licence category for spectrum use may be created. The CA takes the view that this subject should be dealt with in the long term:⁴⁶ in November 2013, two Hong Kong TV stations were fined by the OFCA for renting transmission capacity without the prior consent of the CA, per the licence requirement, constituting illegal spectrum trading under the current legislation.

ii Spectrum auction and fees

Since it is a limited resource, and demand is high, the government imposes a fee on the use of spectrum. This fee (the spectrum utilisation fee (SUF)) is applicable to all use of spectrum save those reserved for government use. As an example, in March 2013, a total of 50MHz of radio spectrum in the 2.5–2.6GHz band was sold for HK\$1.54 billion to four bidders.⁴⁷

The results of the latest auction of spectrum in the 1.9–2.2GHz band were announced by the OFCA on 10 March 2015. A total of 49.2MHz of spectrum was reassigned after the incumbent spectrum assignees exercised their right of first refusal. Following the decision of the CA on the arrangements for reassignment of the spectrum and its decision to give conditional consent to the acquisition by HKT Limited of CSL New World Mobility Limited, the other three incumbent spectrum assignees accepted the right of first refusal for the reassignment of 68.2MHz of the 118.4MHz of paired spectrum that were assigned in 2001. The remaining 49.2MHz was reassigned through auction, where a non-incumbent spectrum assignee was assigned a total of 19.6MHz of spectrum, with the rest being assigned to the incumbent spectrum assignees. Together,

44 OFTA's 2008/2009 Trading Fund Report.

45 Report of the Subcommittee on Telecommunications, LC Paper No. CB (4) 170/12-13; LC Paper No. CB (4) 364/12-13(05).

46 '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.

47 Press release of the OFCA dated 19 March 2013.

the winners of the auction paid SUFs of HK\$2.42 billion for their 15-year licences, which are to commence on 22 October 2016.⁴⁸

IV MEDIA

i Mobile services

To facilitate the development of broadcast-type mobile TV services, the government announced the Framework for Development of Broadcast-type Mobile TV Services in Hong Kong in February 2010. It was announced that the radio spectrum of 678–686MHz would be released for the introduction of broadcast-type mobile TV services in Hong Kong with at least 75 per cent of the transmission capacity to be used to provide mobile TV services, with the operator entitled to harness the remaining capacity of the UHF allocated for delivery of other services such as datacasting.⁴⁹

Pursuant to the Telecommunications Ordinance, an operator of the network used to transmit mobile TV services via the assigned spectrum is required to obtain a UCL. The government has also indicated that the content of mobile TV, either local broadcast-type or streaming-type, should be subject to regulation by general laws rather than under the Broadcasting Ordinance. To enable self-regulation, the industry will be required to develop codes of practice on the provision of mobile TV services prior to service commencement. The codes should include, *inter alia*, the requirement of conditional access with a view to protecting public morals and children.⁵⁰

The radio spectrum of 678–686MHz was auctioned off in June 2010, with China Mobile Hong Kong Corporation Limited successfully bidding for the spectrum at an SUF of HK\$175 million. OFTA announced that, after payment of the SUF and submission of the performance bond, China Mobile Hong Kong Corporation Limited will be assigned the spectrum under a 15-year UCL. The licensee would be obliged to provide service coverage to at least 50 per cent of Hong Kong's population within 18 months from licence grant.⁵¹

V THE YEAR IN REVIEW

i The Competition Ordinance⁵²

The Competition Ordinance was passed by the Hong Kong Legislative Council on 14 June 2012. Its operation is not restricted to broadcasting or telecommunications, but applies to all sectors and industries in Hong Kong. The Competition Ordinance has not

48 Press release of the OFCA dated 8 December 2014 and the Successful Bidder Notice published by the CA dated 10 March 2015.

49 Framework for Development of Broadcast-type Mobile TV Services in Hong Kong (February 2010) published by the Communications and Technology Branch of the CEDB.

50 Ibid.

51 Press release of the OFTA dated 29 June 2010.

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

yet come into full operation, with the government implementing the legislation in phases so that the public and business sectors can familiarise themselves with the new legal requirements during the transition period. The Competition Ordinance is now due to come into full force on 14 December 2015. At this time, relevant competition provisions that are currently embedded in the Telecommunications Ordinance and the Broadcasting Ordinance (and subsidiary legislation) will be amended or repealed (as applicable). The amendments and changes that will be made to the Telecommunications Ordinance and the Broadcasting Ordinance are set out in full in Schedule 8, Parts 4 and 9 of the Competition Ordinance. Some of the more important changes are described below.

In April 2013, the Competition Commission was established under the Competition Ordinance as an independent statutory body responsible for the general competition regulations. The Competition Commission has developed regulatory guidelines to provide clear guidance on the Competition Commission's interpretation and implementation of the competition rules, and to explain the procedures for handling complaints, conducting investigations and considering applications relating to exclusions and exemptions. Six draft guidelines under the Competition Ordinance were released for public consultation in October 2014 and, following the consultation exercise, final form guidelines were issued jointly by the Competition Commission and the CA on 27 July 2015. The six separate guidelines pertain to complaints, investigations, applications for exclusions and exemptions, the First Conduct Rule, the Second Conduct Rule and the Merger Rule.

Pursuant to Part 11 of the Competition Ordinance,⁵³ 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 entities licensed under the Telecommunications Ordinance or the Broadcasting Ordinance; unlicensed entities whose activities require them to be licensed under the Telecommunications Ordinance or the Broadcasting Ordinance; and entities exempted pursuant to Section 39 of the Telecommunications Ordinance. The 'merger rule', set out in Schedule 7 of the Competition Ordinance, will apply only to the telecommunications sector. Unless exempted, undertakings that are subject to the merger rule will be 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 is a substantial lessening of competition are set out in Schedule 7 of the Competition Ordinance.

The Competition Ordinance also contains provisions enabling competition-related matters to be transferred between regulators with concurrent jurisdiction.

Sections 7K (anti-competitive practices), 7L (abuse of position), 7N (non-discrimination) and 7P (authority may regulate changes in relation to carrier licensees) of the Telecommunications Ordinance, and Section 13 to 16 of the Broadcasting Ordinance, will be repealed when the Competition Ordinance comes into full operation and 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.

On 23 September 2015, the Competition Commission published its draft leniency policy for undertakings engaged in cartel conduct. Pursuant to Section 80 of the

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

Competition Ordinance, the Competition Commission may make a leniency agreement with a person that it will not bring or continue proceedings in the Competition Tribunal for a pecuniary penalty in exchange for the person's cooperation in an investigation or proceedings under the Competition Ordinance. Under the draft cartel leniency policy, the Competition Commission will agree not to bring proceedings in the Competition Tribunal for a pecuniary penalty against the first cartel member who reports the cartel conduct to the Competition Commission and meets all the requirements for receiving leniency under the policy. At this stage, the CA has yet to decide whether it should adopt (whether on its own or jointly with the Competition Commission) a leniency policy and, if so, when that should take place. The CA has indicated that it would welcome submissions from broadcasting and telecommunications licensees in this regard.⁵⁴

ii Charging scheme in respect of administratively assigned spectrum

In contrast to those assigned by auction, bands of radio spectrum without congestion that are assigned administratively (not by auction) are not subject to any form of SUF. In November 2010, the government issued a public consultation paper relating to the proposed implementation of a charging scheme in respect of the SUF for such spectrum, including relevant guiding principles, the proposed SUF and its calculation methodology, and the implementation details. The charging scheme is intended 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, was proposed. This grant is also available where users migrate to other means of providing their services.

It is proposed that the 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 a SUF. The 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. It is also proposed that the SUF bands will be reviewed every five years.

Having considered the views of 10 market participants on the consultation paper, 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 government will make the necessary amendment to the Telecommunications (Designation of SUF) Order⁵⁵ and make regulations to specify the level of SUF under Section 32I(2) of the Telecommunications Ordinance.

54 Guide to the Draft Leniency Policy for Undertakings Engaged in Cartel Conduct published by the Competition Commission on 23 September 2015.

55 Chapter 106Y of the Laws of Hong Kong.

Chapter 13

JAPAN

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I OVERVIEW

The media and telecommunications environment in Japan has undergone significant development in 2014 and early 2015. The country has completed implementation of its broadband infrastructure, with a broadband penetration rate of 100 per cent facilitating a readily accessible high-speed data communication usage environment nationwide. Further, in preparation for hosting the 2020 Olympic Games in Tokyo, the government has sought to develop its telecommunications networks and regulations to better accommodate foreign visitors to Japan. Pursuit of this goal has led to the expansion of free Wi-Fi accessibility, as well as the streamlining of telecommunications regulations to better accommodate foreign visitors' mobile devices. We expect Japan to continue to develop its telecommunications networks, services and technologies in the coming years in anticipation of the upcoming 2020 Olympic Games.

The government is also increasingly prioritising expanding market access and competition within the Japanese telecommunications industry, with the ultimate goal of reducing mobile device charges for Japanese consumers. Major Japanese companies, such as Rakuten, have increasingly begun to enter the MVNO sector, and this activity has served to both increase pressure on Japanese regulators to facilitate fair competition within the telecommunications industry, as well as incentivise the major telecommunications companies to reduce prices. Increased regulatory activity by Japan's Ministry of Internal Affairs and Communication (MIC) and other government authorities has led to pressure on the major Japanese telecommunications companies to reduce or eliminate practices perceived as anti-competitive, such as automatically renewing two-year contracts and

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refusing to unlock SIM cards. Such reforms look to reduce costs for consumers in making full use of Japan's extensive, high-quality telecommunications networks in future years.

II REGULATION

i The regulators

MIC's broad authority to regulate telecommunications and broadcasting derives from statutes, which are the ultimate source of law in the telecommunications and media sectors in Japan. The core statutes are:

- a* the Wire Telecommunications Act, which governs facilities for wired signal transmission, such as wired telephony, wired broadband networks and cable television;
- b* the Radio Act, which governs facilities for wireless signal transmission, such as mobile phones, terrestrial and satellite television broadcast infrastructure and high-powered Wi-Fi networks;
- c* the Telecommunications Business Act, which regulates telecommunications and media businesses; and
- d* the Broadcast Act, which regulates the content that telecommunications and media businesses carry or provide.

The Broadcast Act and the Radio Act were amended in November 2010 to provide for a streamlined broadcast licence regime, including the separation of broadcasting licences from transmission licences.

Prior to the amendment, general broadcasting licences, cable radio broadcasting licences, CATV broadcasting licences and licences to broadcast through third-party facilities were granted by MIC under different statutes using different procedures. Under the amended Acts, the statutory licensing provisions for these activities are consolidated into the Broadcast Act and the Radio Act, and broadcasting is divided into two major licensing categories: 'main broadcasting', consisting of terrestrial broadcasting, and broadcasting through broadcasting and communication satellites located over 110 east longitude; and 'regular broadcasting', consisting of broadcasting through other satellites, CATV and IPTV.

Prior to the amendment, terrestrial broadcasting licences were granted only to broadcasters that provided their own broadcast content and operated the wireless transmission facilities used to distribute it. Under the amended Acts, broadcasters are now able to distribute their programming through third-party terrestrial wireless transmission facilities, just as they already were permitted to distribute their programming through third-party satellites and third-party cable television providers.

These reforms are expected to help lessen the regulatory burdens on telecommunications and broadcasting companies, to provide flexibility to the management of those companies and to open up competition by decoupling the ownership of broadcasting facilities from the production of broadcasting content.

ii Regulated activities

MIC exercises its regulatory power in numerous ways. MIC has the authority to grant broadcasting licences (for facilities such as television and radio stations that produce or broadcast media content), wireless transmission licences (for mobile phones and facilities such as mobile phone base stations and satellites) and telecommunication business licences (for traditional wired communications as well as mobile phone providers and ISPs), and monitors the businesses conducted with such licences.

MIC also allocates radio spectrum and has adopted detailed regulations to monitor and establish technical standards applicable to spectrum users and their licensed facilities and businesses. MIC's decision-making process in exercising this authority has often been criticised as opaque and arbitrary. For example, the allocation of radio spectrum to private sector users is based on the 'overall judgement' of MIC, not on any clear set of factors, leaving applicants unsure of what is required and opening MIC to accusations of favouritism or political manipulation. Spectrum policy in Japan is further discussed in Section IV, *infra*.

Currently under the Radio Act, use of mobile devices that do not fulfil the requirements of Japanese technology standards with respect to radio waves in Japan, and for which the manufacturer has not obtained authentication in Japan, is prohibited by law. Therefore, many foreign visitors' use of their own mobile devices in Japan is substantively illegal, although there are no known cases of any foreign visitor being accused of Radio Act violations. However, the Radio Act was amended in the legislative session of 2015, and once this amendment becomes effective, foreign visitors to Japan will become allowed to use their own mobile devices not authenticated in Japan for up to 90 days so long as such devices meet equivalent standards to Japanese technology standards. The amendment was implemented as a measure to encourage foreign tourists to visit Japan in anticipation of the Olympic Games in Tokyo in 2020. There used to be concerns that devices not authenticated in Japan may adversely affect the radio use environment. However, MIC concluded that the possibility of non-authenticated foreign devices adversely affecting the radio use environment would be minimal.

iii Ownership and market access restrictions

Foreign ownership and management of broadcasting licence holders, wireless transmission licence holders and Nippon Telecommunication and Telegraph Corporation (NTT), the semi-privatised national telecommunications service provider, is restricted by statute.

As discussed in Section II.i, *supra*, the Broadcast Act and the Radio Act, each amended in 2010, now divide broadcasting into two categories: main broadcasting and regular broadcasting. Under the Acts, no foreign national, foreign entity or Japanese entity that has either a non-Japanese director or 20 per cent or more of its voting shares directly owned by foreign nationals or entities may hold or receive a licence for main broadcasting. Further, indirect foreign ownership of 20 per cent or more through a subsidiary or affiliate is not permitted for terrestrial (non-satellite) main broadcasting licences. If foreign nationals or entities acquire 20 per cent or more of the voting shares of a main broadcasting licence holder, the licence will be cancelled. To avoid cancellation, any main broadcasting licence holder whose shares are traded on a stock exchange is permitted by statute to refuse to recognise the transfer of its shares if the transfer would

cause it to violate foreign ownership restrictions. In contrast, foreign investment in regular broadcasting licence holders is not restricted. As a result, several foreign-owned broadcasters now broadcast into Japan through cable television and third-party satellites.

Ownership of multiple broadcast outlets is also restricted by the Broadcast Act and related regulations. This restriction on the concentration of ownership is intended to support press freedom and diversity of speech in broadcasting. The restriction includes limits on ownership of shares in, and board seats of, multiple main broadcasting licence holders, as well as upper limits on the use of satellite transponder capacity. However, in response to worsening business conditions for radio broadcasters, MIC amended regulations in 2011 to relax cross-ownership restrictions on radio broadcasting licence holders, allowing entities to control up to four licence holders. Cross-ownership of newspapers and broadcasters has not been restricted in Japan. Newspaper companies often hold large ownership stakes in broadcast companies – in fact, each major private Japanese television broadcast network is affiliated with a major newspaper.

iv Transfers of control and assignments

In addition to foreign ownership and management, and cross-ownership limits, MIC approval is required for mergers and acquisitions that result in a new entity holding main broadcasting or wire transmission licences. Therefore, a statutory merger involving a licence holder or the divestiture of a business conducted under such licence generally requires MIC approval. The MIC review is primarily to determine whether the transferee of a licence would be eligible to independently qualify as a new licensee.

Further, the Telecommunications Business Act was amended in May 2015 to require the major telecommunications companies to renew their telecommunications business registration when such companies engage in mergers or share acquisitions. The telecommunication industry in Japan is monopolised by three major private telecommunication companies – NTT DOCOMO,² KDDI and SoftBank – and this amendment allows MIC to review any proposed merger or share acquisition's potential anti-competitive effects on business operations and fair trade. The amendment will come into effect in the spring of 2016.

In addition, pursuant to Japan's Foreign Exchange and Foreign Trade Act, certain acquisitions of shares in broadcasting licence, wireless transmission licence and telecommunication business licence holders by non-Japanese parties are subject to prior filing and waiting periods.³ Ordinarily, this is a *pro forma* requirement where no national security concerns are present.

2 NTT DOCOMO is publicly traded, but NTT Corporation holds approximately 60 per cent of shares in the company. NTT Corporation is 32.47 per cent owned by the Japanese Ministry of Finance as of 30 June 2015.

3 Regulated transactions include an acquisition of 10 per cent or more shares in such licence holder whose shares are traded on a stock exchange or over-the-counter market; and an acquisition from a Japanese party of any shares in such licence holder whose shares are not traded on a stock exchange or over-the-counter market.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

In Japan, MIC regulates internet and IP-based services (such as high-speed internet and VoIP), along with wired telephony and mobile phones, under the Telecommunications Business Act. The Act and the regulations thereunder emphasise protection of the secrecy of communications and the reliable and non-discriminatory provision of telecommunication services.

The Act not only regulates service providers that operate their own network facilities, but also regulates service providers that provide services to facilitate telecommunication between users but do not operate their own network facilities, such as dedicated hosting services on which clients can operate an e-mail server. Internet-based services that are not designed to facilitate telecommunication, such as internet banking and internet-based newsletter and media subscriptions, are not considered to be a 'telecommunication' and therefore are not regulated under the Act.

ii Universal service

Under the Telecommunications Business Act and the NTT Act, the NTT group must provide wired telephony services (analogue or IP over optical fibre), pay phone services and emergency call services to all areas in Japan. NTT East and NTT West provide services to depopulated areas, and a telecommunications trade association comprising the major telecommunications companies in Japan reimburses NTT East and NTT West for any cost deficits incurred by NTT's provision of such service. National law requires every landline and mobile phone user (customer) to pay a small fee (approximately ¥2 to ¥8, varying from year to year) as part of their monthly telephone service bill to cover these costs.

There is no similar law requiring universal broadband service. However, as of 2014, the penetration rate of broadband infrastructure (3.5G, satellite internet, 3.9G, DSL, optics fibre/FTTH, etc.) in Japan has already reached 100 per cent, and super-broadband (data transmission speed over 30Mb per second, including 3.9G, DSL, optics fibre/FTTH, etc.) infrastructure has reached 99.9 per cent penetration in Japan.

Meanwhile, MIC has been planning and implementing improvements to public Wi-Fi services so as to increase foreign visitors to Japan. In particular, MIC has been managing the implementation of the 'SAQ2⁴ JAPAN Project' (SAQ is an acronym for 'selectable', 'accessible' and 'quality') since June 2014. The goals of the SAQ2 JAPAN Project include improving preparation of free Wi-Fi and facilitating the use of such Wi-Fi; facilitating the acquisition and setting up of Japanese SIM cards by foreign mobile phone users in Japan; reducing international roaming fees for foreign mobile phone users in Japan; and implementing multi-language interpretation systems (i.e., translation applications). In November 2013, an NTT group affiliate started to provide a smartphone application, 'Japan Connected-free Wi-Fi', which allows users to connect

4 This application was prepared primarily for foreign visitors' use, but Japanese residents are also able to use the application.

to approximately 130,000 public Wi-Fi access points,⁵ including access points at airports, train stations, convenience stores and tourist spots in Japan, with one-time user registration. This NTT affiliate also continues to install more Wi-Fi access points.

Separately from the above free Wi-Fi service improvements, major Japanese mobile phone service providers are currently cooperating to establish an emergency disaster service set identifier (SSID), '0000JAPAN'. This SSID will enable every Wi-Fi user to use all Japanese mobile service providers' Wi-Fi networks during natural disasters regardless of the provider to which a user is currently subscribed.⁶

iii Restrictions on the provision of service

The telecommunications business in Japan is dominated by NTT East and NTT West and by the three major private telecommunication companies: NTT DOCOMO, KDDI and SoftBank. Telecommunication regulations, in combination with antitrust law, facilitate competition among telecommunication service providers. Because providers can become dominant to the exclusion of new entrants once their network or technology standard has been adopted by a critical mass of users, MIC and the Japan Fair Trade Commission have jointly adopted guidelines to regulate anti-competitive practices by providers that have high market shares. For example, such guidelines state that it would raise antitrust issues if a telecommunications service provider, such as a mobile phone carrier, with a high market share contractually restricts its customers from switching to another service provider or charges an excessive cancellation fee.

Under the Telecommunications Business Act, prices charged to end users by NTT for wired telephony services and payphone services are subject to a cap determined by MIC. This is to prevent these companies from abusing their near monopoly over these fundamental services and encourage them to improve efficiency. Prices charged by NTT for certain services, including optic data services, are subject to prior notification obligations to MIC. If MIC finds the pricing scheme inappropriate because it is anti-competitive or otherwise significantly unreasonable, MIC may require the carrier to change the pricing scheme. Otherwise, prices charged to end users of telecommunications services and other terms of service are not regulated. However, Prime Minister Shinzo Abe and other governmental officials have recently begun putting pressure on the major telecommunications companies to reduce prices for mobile phone services.

As a general rule, all telecommunication business licence holders must provide access to any other carrier that seeks to interconnect with their network. However, prices for, and methods of, interconnection have been areas of public controversy and regulatory scrutiny. Telecommunications companies have pressed for greater access to NTT's infrastructure, including its optical fibre network. Previously, NTT only provided access to its fibre-optic network on a bulk basis; however, on 1 February 2015, NTT East and NTT West respectively launched single-line fibre-optic wholesale to other carriers, including to non-traditional telecommunication companies such as

5 As of November 2014.

6 Normally, users can only use the Wi-Fi network of the service provider to which they are currently subscribed.

Sohgo Security Services (ALSOK) and Tsutaya, a rental video company. This fibre-optic wholesale is designed to improve fibre-optic use by reducing fees for fibre-optic use at the end user level. As of September 2015, 271 operators have commenced utilising such fibre-optic wholesale services. Before the commencement of this fibre-optic wholesale, there were competition concerns regarding NTT group companies' fibre-optic service, because NTT East and NTT West and the counter service provider execute contracts for the provision of fibre-optic wholesale service and do not disclose the contracts to the public. Therefore, other major telecom service providers such as KDDI and Softbank expressed concern that NTT East and NTT West provide their fibre-optic wholesale service with lower prices to NTT group companies than to other unrelated companies, so that those NTT group companies can in turn provide fibre-optic services to end users at lower prices. In response to these concerns, MIC prepared guidelines with regard to the provision of fibre-optic wholesale that prohibit unfair treatment of specific service providers and provide for potential enforcement by MIC. However, MIC is not currently examining any fibre-optic wholesale agreements, although KDDI, Softbank and other service providers have requested that MIC or a third party perform such examinations.

To date, the introduction of fibre-optic wholesale has not yet resulted in significant price reductions due to increased competition or new entrants from other industries; however, it is likely that more time is required for such effects to occur. MIC announced in March 2015 that increased competition and resulting price reductions had not yet occurred as a result of the fibre-optic wholesale service. A survey by MIC shows NTT DOCOMO obtained 46.6 per cent of the fibre-optic service share and NTT Communications (a data communication company of NTT group) obtained 18.1 per cent (the total of these two companies' share is approximately 65 per cent). This share concentration within NTT group is prominent, although NTT group companies do not provide fibre-optic services at lower prices than their competitors. To address concerns with respect to its high market share, NTT announced on 7 July 2015 that they will reduce the price of their fibre-optic connection fee from approximately ¥2,900 per line to ¥2,000 in stages until 2019, and target expansion of fibre-optic service to new customers.

Along with the introduction of a fibre-optic wholesale service, in recent years mobile line wholesale services, MVNO, have been expanding in Japan. MVNO has existed since 2001, but until recently service providers and subscribers have been very few in number. In 2007, MIC's guidelines regarding MVNO were amended to clarify the rights and obligations between MVNO and MNOs, and a dispute settlement procedure was established. After this amendment, the number of MVNO service providers using MNOs' mobile lines or WiMAX lines increased. In 2013, there was another amendment in the MVNO guidelines that clarified the extent to which MNOs could solicit information regarding MVNO business plans in connection with granting such MVNOs access to their networks, and established an opinion submission procedure to MIC. Further, in 2014, the guidelines for operation of Type II designated telecommunication facilities were amended, which included a change in the calculations for mobile line wholesale pricing. These changes in calculations are expected to lead to reductions in mobile line wholesale prices, to the benefit of MVNOs. These changes have spawned a recent increase in MVNO activity. In FY2013, 15 MVNOs provided only data communication service, and seven MVNOs provided both data communication

services and voice communication services. However, in FY2014, the number of MVNOs providing both services increased to 14, while the number of MVNOs providing only data communication services decreased to 12. The number of MVNO subscribers was 7.17 million in December 2013, increasing to 10.87 million subscribers by December 2014. However, MVNO service subscribers still only constituted 5.8 per cent of all mobile service subscribers in December 2014 despite this recent increase.

In connection with the recent expansion in MVNOs, controversy has emerged among mobile phone providers regarding the issues of SIM unlock and two-year contracts with automatic contract renewal.

MIC has been requesting mobile service providers to provide an option for SIM unlock to mobile phone customers, as they believe SIM lock prevents consumers from freely choosing mobile phone carriers and causes competition stagnation, and MIC prepared guidelines for the implementation of SIM unlock in June 2010. However, the guidelines did not include a direct or indirect obligation of mobile service providers to implement SIM unlock. Therefore, NTT DOCOMO was the only operator that implemented SIM unlock at that time.⁷

MIC, as part of its regulatory enforcement powers, has the authority to issue a business improvement order to telecommunications companies that significantly disrupt the sound development of telecommunications services. Taking advantage of this authority, MIC amended the guidelines regarding SIM unlock in December 2014. This amendment indicated that MIC shall consider telecommunications companies that fail to address requests for SIM unlock without any reasonable grounds for doing so as having engaged in action sufficiently disruptive to the sound development of telecommunications services to constitute grounds for issuance of a business improvement order against them. Therefore, mobile service operators are now substantially obligated to provide SIM unlock. These amended guidelines apply to devices that are released after May 2015.⁸ It is expected that customers' choice of mobile carriers and competition among major mobile service operators as well as MVNO service operators will be facilitated by this SIM unlock policy.

Abolishment of two-year contracts, however, has not shown significant progress. Two-year contracts, in which customers receive certain discounts subject to two years' continued use of the same service provider, enable customers to purchase expensive smartphones effectively for free or discounted prices. However, the two-year contract system has been identified as reducing customers' freedom of choice in mobile service carriers since customers are required to pay approximately ¥10,000 for early termination of such two-year contracts. In July 2015, a council of advisers to MIC stated that binding customers over two years raised concerns, but they did not raise any specific issues with

7 However, NTT DOCOMO required customers to pay a fee of ¥3,000 for SIM unlock, and the SIM unlock provided was incomplete.

8 However, each operator provides SIM unlock service with no charge only after six months from users' purchase of devices, and each provider generally requires a charge of ¥3,000 for SIM unlock within six months after users' purchase of devices. MIC has not invoked a business improvement order against any operator's policy at this stage.

respect to binding customers for two years and simply mentioned that ‘contract period binding agreements could be regarded as an anti-competitive market structure or action and we need to consider it further’. In addition to the discussion regarding two-year contracts, the advisers mentioned automatic contract renewal as a concern and raised the issue, stating that ‘automatic contract renewal has the effect of making two-year contracts four-year contracts or six-year contracts by the extension of contracts’ and ‘in that sense, we cannot deny that the current automatic contract renewal system deprives customers of freedom of choice of services’. The automatic contract renewal system has been regarded as a problem, since customers can terminate their two-year contracts only in the 25th month from the beginning of their contracts with no charge, and customers are once again required to pay a termination fee due to early termination of a renewed two-year contract after the 26th month from the beginning of their original contract, so that mobile service operators force their customers to use the same operator for another two years.

The council of advisers to MIC concluded ‘it is appropriate to establish a plan where two-year contracts are not renewed after the initial binding period so that customers can terminate their contracts with no charge’. However, this conclusion does not substantially affect current operators, because failure to comply with this recommendation would not result in issuance of a business improvement order by MIC. Therefore, the abolishment of two-year contracts with automatic contract renewal remains unlikely in the near future.

Separate regulations exist in Japan restricting unsolicited texts and e-mails and unsolicited phone calls. With respect to unsolicited texts and e-mails, the Act on Regulation of Transmission of Specified Electronic Mail prohibits:

- a* the transmission of e-mails using false sender information as a means of advertisement for the sender’s own or another person’s sales activities;
- b* the transmission of e-mails using fictitious e-mail addresses for the purpose of sending multiple e-mails to promote the sender’s own or another person’s sales activities; and
- c* the transmission of e-mails to persons who refuse to receive such specified e-mails.

Violators may face penalties of up to one year’s imprisonment or a fine of up to ¥1 million. With respect to unsolicited phone calls, each local prefectural government has established a local ordinance prohibiting unsolicited phone calls. For example, the Metropolitan Government of Tokyo has an anti-nuisance ordinance prohibiting continued unsolicited phone calls and facsimiles, and offenders may be penalised with up to six months’ imprisonment or a fine of up to ¥500,000.

iv Security

In keeping with Japan’s constitutional protection of freedom of speech and secrecy of communication, the Telecommunication Business Act prohibits ISPs from censoring or infringing on the privacy of communications passing through their networks.

As a general matter, the Law Concerning the Protection of Personal Information (Privacy Act) protects personal information or data that can be used to identify specific living persons, and generally applies to any entity that gathers the personal information of

5,000 or more individuals. Under the Privacy Act, such entities are required to publish a 'purpose of utilisation' regarding their use of personal information. Personal information incorporated into a database must be kept accurately, and necessary and proper measures to maintain its security must be instituted. Any person about whom personal data is kept in a database for more than six months has a right to request access to the data, and add to, modify or delete it. In August 2015, the Privacy Act was amended to strengthen protection of personal information, including expanded protection of sensitive personal information and restrictions on transfer of personal information outside Japan; and to establish protocols for use of anonymised data to facilitate 'big data' analysis.

Further, MIC has issued Privacy Act guidelines that are specific to telecommunications businesses. Since MIC guidelines also take into account the obligations of telecommunication business licence holders to preserve the secrecy of communications, they provide for a more stringent data protection regime than would apply under the Privacy Act alone. MIC guidelines generally prohibit telecommunication businesses from collecting information related to race, religion, disability or other attributes that may form a basis for discrimination. The guidelines also require such licence holders to specify what length of time they intend to retain personal information and to delete any personal information after the expiry of such period. Under MIC's Privacy Act guidelines, information related to persons making or receiving communications, such as usage history, identity and user location, may only be disclosed to third parties in very limited circumstances, such as pursuant to a search warrant. In addition, MIC's Privacy Act guidelines were amended on 2 November 2011, allowing telecommunications business providers to provide users' locational information to third parties only if they have the user's consent, a search warrant or other valid justification; and obtain a user's locational information pursuant to law enforcement agencies' requests only if a warrant is issued. MIC's Privacy Act guidelines also require telecommunication businesses to specify what length of time they intend to retain communication log information and to delete such information after the expiry of such period. In June 2015, MIC announced an indicative permissible length of time to retain communication log information (six months to a year, depending on the business reasons for retaining such information).

ISPs are not currently required to proactively delete content that infringes upon the intellectual property rights or privacy of others. However, the Internet Provider Liability Limitation Act, enacted in 2001, provides a safe harbour for ISPs that delete such content. Under the Act, no ISP may be held liable for the deletion of content on its network if the ISP reasonably believes that such content infringes the intellectual property rights or privacy of others, or a third party alleges such infringement and the sender of the content does not respond to the ISP's inquiry within seven days. ISPs are further protected by the Internet Provider Liability Limitation Act, which shields ISPs from tortious liability for failing to delete infringing content. In reliance on this statutory defence to liability, ISPs generally do not take steps to monitor the content passing through their networks. The Act does, however, authorise persons whose rights are infringed by content delivered over the internet to demand information regarding the sender of the content from ISPs, so that legal action may be taken against the sender. However, as a practical matter, it is often not possible to identify the original sender of such infringing content where content passes through multiple networks.

A statute for the protection of children from harmful internet content, known as the Youth Internet Environment Act, became effective in April 2009. The statute directs governmental bodies to improve internet safety for juveniles (under the age of 18) by encouraging ISPs to use technologies that limit juvenile access to harmful content. The statute targets content glorifying crime or suicide, obscene sexual content, and other depictions of extreme violence or cruelty. The statute further exhorts parents to monitor their children's internet use, and to limit access to inappropriate content by using filtering software and other measures. The statute requires mobile network service providers to filter internet content for customers that are juveniles, except where a parent has expressly requested that filtering not be used. Under the Act, from April 2010, manufacturers of devices with internet connectivity (other than mobile phones) are also required to pre-install filtering software or otherwise facilitate the use of third-party filtering software or services. In Japan, cybercrime has long been an area of public concern. In recent years, law enforcement has focused efforts to combat cybercrime on computer hacking through the unauthorised use of IDs and passwords, and other attacks on security holes; the distribution of computer viruses, and the input of data and unauthorised commands that can cause damage to computers and data; and other types of crimes facilitated through the internet, such as drug trafficking, prostitution, fraudulent internet auctions and child pornography.

Combating the distribution of child pornography has been an area of particular scrutiny and public interest. The Act on Punishment of Activities Relating to Child Prostitution and Child Pornography and the Protection of Children, originally passed in 1999, prohibits the distribution of child pornography. This Act was amended in 2004 to outlaw the uploading and distribution of child pornography over the internet, and was further amended in 2014 to criminalise the simple possession of child pornography images and to require ISPs to block child pornography.

In order to combat increasing threats against cybersecurity, the Basic Act on Cybersecurity was enacted in November 2014. The Act prescribes the concept of cybersecurity and defines the roles and responsibilities of the government. In January 2015, the Cybersecurity Strategic Headquarters (Headquarters) and National Center of Incident Readiness and Strategy for Cybersecurity (NISC) were established to facilitate programme planning, policy formulation and overall coordination for cross-cutting cybersecurity measures. The Headquarters will define the uniform standard of cybersecurity protection applicable to government agencies and, based on such standard, each agency will establish and manage security policies customised for such agency, and will also streamline its structure and organisation to enforce newly implemented security measures.

Amid mounting concerns regarding cybersecurity, in May 2015, over 1.25 million sets of personal pension records were leaked after a cyberattack on the management system of Japan Pension Services, a special public corporation entrusted by the Minister of Health, Labour and Welfare with public pension system operations. Based on its authority set forth in the Basic Act on Cybersecurity, NISC announced in August 2015 its evaluation of the measures and policies to combat material breaches of cybersecurity within government agencies. The government will be implementing the My Number system under which every resident in Japan will receive his or her own 12-digit individual number (nicknamed 'My Number') that will be used for administrative procedures

related to social security, taxation and disaster response beginning in January 2016. The Japan Pension Services incident has raised concerns regarding information security, and the coupling of pension information with My Number will be delayed until proper cybersecurity preventive measures have been implemented.

With respect to government authorities' ability to monitor the content of telecommunications, law enforcement authorities are currently allowed to utilise wiretapping during criminal investigations of organised crime for murder, drug-related crimes, arms possession or stowaway smuggling by obtaining a wiretap warrant pursuant to the Act for Wiretapping for Criminal Investigation (Wiretapping Law). A proposed amendment to the Wiretapping Law has been introduced in the legislature that would allow wiretapping to be used in any criminal investigation of organised crime regardless of the suspected offence. Legislators hope this amendment will allow authorities to better address organised criminal fraud, which has particularly affected the elderly and cost victims billions of yen each year over the past five years. As of September 2015, this proposed amendment is still under discussion.

IV SPECTRUM POLICY

i Development

The need for access to the radio spectrum has steadily increased with the proliferation of new technologies utilising wireless data transmission. The number of licensed wireless stations and devices increased from 3.8 million in 1985 (a majority of which were for amateur radio stations and handheld two-way radios), to 146 million in March 2013 (over 98 per cent for mobile devices).

MIC holds broad discretion to determine how the radio spectrum is allocated in Japan, and describes its decision-making process as open and collaborative – including consultations with the public, scholars and industry experts. However, MIC decision-making has been criticised by some as arbitrary and opaque. This has led to some calls for spectrum auctions as a fairer method of allocation. Despite such criticism, MIC has yet to establish a system that provides transparency over spectrum policy and spectrum allocation decisions. While there was some movement toward implementing a spectrum auction system and a bill that would have implemented such system was submitted to the legislature in March 2012, the bill lost momentum after a change in the controlling political party in Japan took place in December 2012, and the bill has since been rejected.

As an example of MIC's ability to exercise discretion in allocating spectrum, in December 2014, MIC issued 3.5GHz 120MHz bandwidth spectrum licences to each of NTT DOCOMO, KDDI and SoftBank. This was the first spectrum allocation since MIC amended its policy restricting submissions of multiple licence applications from companies that operate their spectrum as a 'group'. Prior to the amendment, companies that held more than one-third of the voting rights of another company were restricted from submitting licence applications together with such affiliate companies. However, MIC expanded this restriction on multiple licence applications by group companies to take into consideration additional factors in determining what companies constitute a group, including non-voting capital structure, decision-making authority and the

business relationship between the companies, in order to reduce multiple applications by *de facto* group companies and facilitate greater entry into the spectrum market. Due to this amended restriction, YMobile, which was not previously considered a group company of SoftBank but was now considered a member of SoftBank's group under the new policy, was unable to submit an application, and applications were accepted from NTT DOCOMO, KDDI and SoftBank only.

As MIC planned to allocate 40MHz of the 120MHz available to each of the three applicants, it was always clear that each of the three applicants would receive an equal allocation. However, there was some competition in this allocation scheme in which MIC exercised discretion. The 120MHz bank is divided into 'high' 'medium' and 'low' components, and NTT DOCOMO's first choice was the 'low' component, while both KDDI and SoftBank preferred the 'high' component. MIC determined that it would grant Softbank the 'high' component because KDDI failed to specify in its application when they would be able to start operation of speeds of more than 1Gbit/per second.

ii Broadband and next-generation mobile spectrum use

In most areas of Japan, the 3.9G (up to 300Mb per second) service has been standardised, and the 3G (up to 7.2Mb per second) service now functions as a backup spectrum. In addition, mobile phone companies are in the process of expanding 4G services (LTE-Advanced or WiMAX2), which will enable data transmission speeds of up to 1Gb per second. In March 2015, NTT DOCOMO, the first among the major Japanese mobile phone companies, launched its LET-Advanced next-generation mobile communication service called PREMIUM 4G, which uses carrier aggregation technology. PREMIUM 4G's initial maximum transmission speed remains at 225Mb per second, but NTT DOCOMO plans to continuously improve the transmission speed, aiming to accelerate to a maximum 300Mb per second towards March 2016. KDDI (au) and Softbank, which are the other major mobile phone companies, have also begun implementing the same service.

NTT DOCOMO plans to launch the next generation mobile communication service 5G, which will enable data transmission speeds of up to 10Gb per second sometime in 2020, the year in which the Tokyo Olympic Games will be held.

iii Spectrum auctions and fees

MIC imposes spectrum usage fees on broadcasters, mobile phone carriers and other businesses that use radio spectrum, as provided for in the Radio Act. The formulae used to establish the usage fees have been criticised as unfairly favouring broadcasters at the expense of mobile service providers. Until 2005, the fees were determined, in the case of broadcasters, per broadcaster, and in the case of mobile phone carriers, by the number of base stations and subscriber handsets. Even after changes were made in 2005, 2011 and 2014, the formulae still favour broadcasters, satellite operators and other 'vested' rights holders. The total amount of spectrum fees MIC imposed for the fiscal year ending March 2015 was approximately ¥74 billion (up from ¥68 billion in 2010), 74 per cent of which was paid by mobile phone carriers and only 8.9 per cent of which was paid by broadcasters, even though the bandwidth of spectrum occupied by mobile phone carriers is narrower than that occupied by broadcasters.

While spectrum fees are purportedly charged to cover spectrum administration costs, such as monitoring illegal spectrum use, MIC has been criticised for using the fees to pay for ‘miscellaneous’ expenses that appear to have little connection to spectrum administration. In August 2010, MIC’s committee to explore reform of spectrum usage fees announced a policy to strengthen links between the amount of spectrum usage fees and the bandwidth of spectrum occupied by fee payers, and to use the spectrum usage fees more efficiently. In May 2011, a bill to amend the Radio Act to implement the revised spectrum usage fee scheme was passed.

An action plan published in November 2010 by MIC’s study group on spectrum allocation recommended that MIC consider the introduction of spectrum auctions as a way to allocate spectrum licences more efficiently and transparently. However, the plan also warned that the transition would raise questions of fairness such as those between existing licensees who did not pay for their licences at auction and future licensees who would bear this additional cost, and a related concern for consumers that the cost of auction fees would be ultimately passed on to the public in increased fees for services. MIC has held a series of meetings led by scholars since March 2011 to consider the implementation of spectrum auctions, and in March 2012 submitted a bill to amend the Radio Act to include spectrum auctions. The amended Act would have established a mechanism in which MIC would conduct an auction to grant the licence to the applicant with the highest bid price. The spectrum auction was envisaged to be first used for the licensing of the 3.4GHz to 3.6GHz band, which was planned to be used for 4G mobile phones from 2014. However, the discussion on the bill was put on hold in anticipation of the change of government from the Democratic Party of Japan (DPJ) to the Liberal Democratic Party (LDP), which took place in December 2012. In January 2013, the Minister of Internal Affairs and Communications under LDP Prime Minister Abe announced that the LDP government would not resubmit the bill for spectrum auctions. DPJ resubmitted the bill, but it was voted down. DPJ was able to obtain LDP’s consent to adopt a non-binding resolution by a committee of the legislature acknowledging that spectrum auctions have benefits and detriments and should be reviewed through public hearings. Efforts to implement spectrum auctions as a method to provide greater transparency of MIC’s spectrum allocation process have effectively returned to square one.

V MEDIA

i Restrictions on the provision of service

While freedom of broadcasting is an underlying premise of the Broadcast Act, the Act includes certain content requirements, such as an obligation to be politically impartial; a prohibition on reporting ‘manipulated facts’; an obligation to present diverse opinions on controversial issues; and an obligation to provide closed captioning, audio commentary or other aids for the impaired where possible. Main broadcasting licence holders are also required to provide a balance of entertainment, news and educational programming.

ii Internet-delivered video content

The internet and dedicated networks are widely used to deliver video content. Internet television services available in Japan vary widely, from simultaneous transmission of terrestrial and satellite television broadcasts, to exclusive IPTV channels with programming provided by domestic and foreign third-party programme providers, to VOD services. The methods of video delivery vary from free video-sharing sites (such as YouTube), to membership-based video-sharing sites (such as Nikoniko Douga), to partially fee-based video delivery sites (such as Gya!) and to full fee-based video delivery sites (such as Hulu and Netflix). Traditional television stations (i.e., NHK and commercial television broadcasters) also have VOD service, and are streaming broadcast programmes through personal computers and smartphones. The Supreme Court ruled that services that record and forward Japanese television programmes and those that provide real-time streaming of Japanese TV programmes via the internet breach the originating television station's copyright, and therefore the third-party recording or streaming of Japanese television programmes without a licence constitutes a breach of Japanese copyright law.

For regulatory purposes, MIC has taken the view that video delivery over the internet is not a 'broadcast' under the Broadcast Act, and consequently the content restrictions under the Act discussed in Section V.i, *supra*, do not apply. While 'broadcast' is defined in the Broadcast Act as 'transmission of telecommunication for the purpose of being directly received by the public', MIC's position is that video delivery over the internet does not fall within this definition because it requires a request to send that results in receipt by a specific recipient, and not the public. This interpretation allows internet content providers to distribute multimedia offerings without being regulated as traditional broadcasters. However, such technical distinction has been criticised as resting on shaky ground, and calls have been made for clearer legislation clarifying that content restrictions will not apply to internet broadcasts.

iii Mobile services

Video broadcasting services for mobile devices in Japan began in 2006. The first service, still popular today, is known as 'One-Seg' because it uses one out of the 13 segments that constitute the spectrum bandwidth allocated to each terrestrial digital television broadcasting channel. The other 12 segments are used for traditional television broadcasts. In 2013, mobile devices that can receive 'Full-Seg' broadcasting were introduced. 'Full-Seg' is named in contrast to 'One-Seg' as it uses the traditional 12 segments for television broadcasting. Mobile devices with 'Full-Seg' receiving functions allow their users to enjoy high-definition television broadcasts through mobile devices at the same level of quality as traditional terrestrial television. Currently, One-Seg and Full-Seg services are generally limited to the simultaneous delivery of DTTV broadcasts to mobile devices. VOD services provided by mobile networks to subscribers are also widely available. Major mobile carriers offer VOD services free of charge or at a low price, mainly to attract subscribers to their network and not as a significant revenue source.

The next-generation multimedia broadcasting service 'Moba-Cas' provides viewers with high-definition broadcasts mostly equivalent to the Full-Seg service, and allows users to store content delivered through the dedicated spectrum band to their mobile devices.

VI THE YEAR IN REVIEW AND OUTLOOK

2015 is an important year for Japan's ICT industry, as it is the 30th anniversary of the privatisation of Nippon Telegraph and Telephone Public Corporation (known as NTT post privatisation). Since NTT's privatisation, and through active competition among the ICT companies, the ICT industry has become one of Japan's fastest growing sectors. Increased entry into the telecommunications market by MVNOs, as well as increased regulation of anti-competitive practices within the industry, will allow the ICT industry to continue to expand and provide increasingly effective service at reduced prices for consumers.

Japan also continues to develop new telecommunications and media technologies to be implemented in future years. MIC announced its vision for the Tokyo Olympic Games in 2020 to be broadcast in 4K and 8K ultra-high-definition formats. To achieve such a goal, in September 2014 MIC announced a roadmap for encouraging use of 4K and 8K broadcasting. The roadmap aims for actual broadcasting of 4K broadcasting through CS, cable television and IPTV to start in 2015, test broadcasting of 4K and 8K broadcasting through BS to start in 2016, and actual broadcasting of 4K and 8K through BS to start in 2018. In line with this roadmap, actual broadcasting of 4K started in March 2015.

In addition to seeking to expand access to free public Wi-Fi, MIC has also announced its vision to have 5G mobile technology in place ahead of all other countries in anticipation of the 2020 Tokyo Olympic Games. The public and private telecommunications sectors in Japan are combining strength as an 'All Japan' platform to achieve this goal. Development of media and telecommunications policy and technology in Japan has seen a resurgence over the past year, and further significant progress is likely in the near future.

Chapter 28

UNITED KINGDOM

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I OVERVIEW

The establishment of the Office of Communications (Ofcom) and the entry into force of the Communications Act 2003 (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 2015–16 Annual Plan.² They include promoting effective competition and informed choices for consumers through the Strategic Review of Digital Communications and introducing greater consumer protections through clearer pricing structures.

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, Julia Samso, Calum Docherty, David Zhou and Jagveen Tyndall in the preparation of this chapter.

2 www.ofcom.org.uk/content/about/annual-reports-plans/ann-plans/Annual_Plan_Statement.pdf.

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 performed 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). On 1 November 2014, Ofcom renewed its 10-year contract with the ASA until 2024,³ with only minor changes from the previous contract. The changes were mainly intended to recognise established practices agreed between Ofcom and the ASA since the initial implementation of the co-regulatory system.

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 were renewed for 2015/2016 in Ofcom's annual plan. These strategic purposes are as follows:

- 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 and, where appropriate, by devolved administrations (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* undertake the Strategic Review of Digital Communications;
- b* ensure effective competition in the provision of communications services for businesses, and particularly small and medium-sized enterprises (SMEs);
- c* improve the process of switching providers for consumers;
- d* introduce clearer pricing for numbers starting 08, 09 and 118, and make '080' and '116' calls free from mobiles;
- e* monitor and ensure improved quality of service and customer service performance;
- f* protect consumers from harm in a range of priority areas, including nuisance calls;

3 See Ofcom statement, Renewal of the co-regulatory arrangements for broadcast advertising, 4 November 2014, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/asa-re-authorisation/statement/Statement.pdf>.

- g* review the factors that potentially affect the sustainability of the universal postal service;
- h* promote better coverage of fixed and mobile services for residential and business consumers;
- i* work towards the timely release and effective award of spectrum, including the 2.3GHz, 3.4GHz and 700MHz bands;
- j* represent the UK's position in international negotiations to agree how best to use spectrum effectively; and
- k* promote audience safety and assurance in traditional and online environments.

Ofcom's specific statutory 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.

On 12 March 2015, Ofcom announced that it would be conducting an overarching review of the UK's digital communications.⁴ This will be Ofcom's second major assessment of the telecommunications sector: the first began in December 2003 and concluded in September 2005. In the terms of reference for this review, Ofcom stated that the assessment will focus on three questions:

- a* Efficient investment: how can incentives for efficient private sector investment and innovation be maintained and strengthened to ensure widespread availability and high quality of service?
- b* Competition: what should be the focus of competition policy in future networks (the 'enduring economic bottlenecks')?
- c* Deregulation: what is the scope for deregulating networks and services downstream of any 'enduring bottlenecks'?

Ofcom expects that the review will span two phases, phase one of which will focus on evidence gathering and understanding digital communications experiences. The second phase will draw initial conclusions and set out next steps. Ofcom started the first phase in July 2015, publishing a discussion paper.⁵ The consultation will close in October 2015.

4 Available at: <http://media.ofcom.org.uk/news/2015/digital-comms-review>.

5 Available at http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/summary/digital-comms-review.pdf.

The discussion paper considers future policy challenges across fixed, mobile and content sectors, including:

- a* investment and innovation, delivering widespread availability of services;
- b* sustainable competition, delivering choice, quality and affordable prices;
- c* empowered consumers able to take advantage of competitive markets; and
- d* targeted regulation where necessary, deregulation elsewhere.

In addition, the Body of European Regulations in Electronic Communications (BEREC), formed after the adoption of Regulation (EC) 1211/2009,⁶ 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 (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:

- a* the Wireless Telegraphy Act 2006;
- b* the Digital Economy Act 2010;
- c* the Data Protection Act 1998;
- d* the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011);
- e* the Freedom of Information Act 2000;
- f* the Regulation of Investigatory Powers Act 2000;
- g* the Data Retention and Investigatory Powers Act 2014 (DRIPA);
- h* the Enterprise Act 2002; and
- i* the Competition Act 1998.

Following the review of the European Framework for Electronic Communications Regulation (Revised Framework),⁷ 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

6 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.

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

legislation, and implemented most aspects of the EU Better Regulation Directive (2009/140/EC)⁸ and the Citizens' Rights Directive (2009/136/EC).⁹

The wholesale review of the European data protection regime continues following the release in 2012 of a draft general data protection regulation¹⁰ (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 in October 2014, some agreement was reached regarding the 'risk-based approach' that the Regulation would adopt. This approach would allow data controllers increased flexibility in addressing their approach to compliance within the context of various businesses. The draft is expected to be finalised at meetings scheduled for December 2015.

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' (Strategy Paper).¹¹ In line with the government's view that a large-scale overhaul of the existing legislation is

8 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.

9 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.

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

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

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

- a* a consumer rights bill introducing 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 (ECC) 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.

Following on from the above, the Consumer Rights Act 2015 introduced rights in respect of the quality of digital content and digital services. The Act received royal assent on 26 March 2015, and the entirety of its provisions are expected to come into force by 1 October 2015.

The 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 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;
- 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 and 5G.

The 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 PSBs, such that the duty would arise only upon the demand of the Secretary of State, was withdrawn in February 2014. Ofcom published the findings of its third review of PSBs on 2 July 2015. It found that overall, despite declining spending levels, PSBs continue to provide programmes that are highly valued by audiences.

In August 2014, The DCMS issued a consultation paper,¹² seeking input on the goals and policies set out in the July 2013 report entitled 'Connectivity, content and consumers – Britain's digital platform for growth' and explored further in a framework published in February 2014. The results of this consultation were used to develop the government's digital communications infrastructure strategy, which was published on

12 Available at www.gov.uk/government/consultations/digital-communications-infrastructure-strategy-consultation.

18 March 2015.¹³ Overlapping with the government's 2015 budget, the government has made commitments in relation to broadband infrastructure, in particular superfast broadband, connectivity in rural areas and the delivery of mobile broadband connectivity. As part of its focus on ensuring that the UK becomes a 'leading digital nation', the government has set up a Ministerial Digital Taskforce to develop networks, including infrastructure.

The DCMS published a consultation on 26 March 2015¹⁴ on three areas of broadcasting regulation: the defence against copyright infringement in Section 73 of the Copyright, Designs and Patents Act 1988; the must offer/must carry provisions applicable to PSBs and electronic communications networks (ECNs) respectively in the Communications Act 2003; and the rule on electronic programme guide prominence. The consultation closed on 30 June 2015.

With regard to the ECC, in December 2014 the government proposed to introduce a new code. This proposal was subsequently withdrawn in January 2015 following representations from stakeholders on the practical application of the proposed revised code. The government agreed to consult further. The DCMS launched a consultation on 26 February 2015¹⁵ (which closed on 30 April 2015) on reforming the ECC, welcoming submissions in particular on:

- a* the definition of land and ownership;
- b* how consideration is to be determined;
- c* upgrading and sharing apparatus;
- d* contracting out the revised code;
- e* the role of land registration; and
- f* transitional arrangements, savings and retrospectivity.

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 electronic communications service providers (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

13 Available at www.gov.uk/government/publications/the-digital-communications-infrastructure-strategy/the-digital-communications-infrastructure-strategy.

14 Available at www.gov.uk/government/consultations/the-balance-of-payments-between-television-platforms-and-public-service-broadcasters-consultation-paper.

15 Available at www.gov.uk/government/consultations/consultation-on-reforming-the-electronic-communications-code.

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 2014,¹⁶ radio transmission equipment and earth stations mounted on mobile platforms (ESOMPs) on aircraft have been exempt from licensing requirements when operating within the 1800MHz or 2100MHz bands, provided they comply with European Telecommunications Standards Institute requirements.¹⁷ From 27 June 2014, pursuant to the Wireless Telegraphy (Exemption and Amendment) Regulations 2014,¹⁸ land-based transmission equipment and ESOMPs are exempt from licensing requirements across all frequencies, provided they comply with certain technical specifications.¹⁹

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 (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 2012, Ofcom 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.²⁰ 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

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

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

18 SI 2014/1484.

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

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

a framework to assess media plurality and commissioning Ofcom to develop a suitable set of indicators.²¹ Following on from this, Ofcom published a consultation proposing a framework for media plurality on 11 March 2015.²² The proposed framework builds on the advice Ofcom gave to the Secretary of State in 2012. The consultation in particular makes the following points, which Ofcom has either developed or affirmed since 2012:

- a* online news and digital intermediaries should be measured by the framework;
- b* cross-media consumption metrics should form the foundation of plurality assessment;
- c* impact metrics should feature in the assessment of plurality;
- d* qualitative factors should be considered alongside quantitative metrics (such as the above) in the assessment of plurality;
- e* the measurement framework must be capable of capturing the differences in the level of media plurality and sources of news across the UK and within the UK nations; and
- f* media ownership can be taken into account by using a framework with metrics that can be considered at both the retail and wholesale level.

This consultation closed on 20 May 2015. Ofcom has stated it intends to publish a statement in summer 2016.

iv Transfers of control and assignments

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, although the Competition and Markets Authority (CMA) takes a proactive approach in monitoring transactions it may wish to review and has powers to impose comprehensive ‘hold separates’ if such a review is launched).²³

The administrative body currently responsible for UK merger control is the CMA, which was established on 1 April 2014 by merging the function of the former Office of Fair Trading and the former Competition Commission 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.²⁴

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’.

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

22 http://stakeholders.ofcom.gov.uk/binaries/consultations/media-plurality-framework/summary/Media_plurality_measurement_framework.pdf

23 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.

24 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.

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.

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.²⁵

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 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

25 '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.

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, although it stressed the importance of maintaining an open internet in which all users could access any legal content, ensuring that ISPs’ traffic management 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. There have been no formal statements by the government in relation to regulation of traffic management since 2010.

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 ISPs’ traffic management practices. Subsequently, in July 2012, major ISPs published the Open Internet Code of Practice, which 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 Code was updated in May 2013 to clarify that signatories would not be infringing the Code if they deployed content filtering. In January 2015, the BSG announced that all of the UK’s leading ISPs had now signed up to the Code. In August 2015, the BSG announced that it has commissioned a review into, *inter alia*, the Open Internet Code of Practice.

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 regulates how ISPs are permitted to offer access at various speeds to different customers was introduced to the European Parliament in September 2013.²⁶ A final version of the proposal passed a second reading in the European

26 Proposal [2013] COD 0309.

Parliament in July 2015.²⁷ MEPs are due to vote on the matter in October 2015. If approved by both the European Parliament and the European Council, the regulation is predicted to enter into force on 30 April 2016.

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 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 included 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 target had been met, although high-speed broadband coverage remains low.²⁸ To support the Digital Agenda for Europe, the EU Parliament and the Council passed a Directive²⁹ in May 2014 aiming to cut the costs of the high speed rollout. 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 coalition government supported 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 the 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 stated that it expected the private sector to lead the necessary investment, but it confirmed in the spending review of October 2010 that it was committed to investing £530 million until 2015 to help deliver superfast broadband to more rural and hard-to-reach areas. The coalition government received EU state aid clearance in November 2012 for its National Broadband Scheme.³⁰ Subsequently, 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 November 2014, the DCMS published guidance on its plans to improve the UK's

27 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 and 2002/22/EC and Regulations (EC) No. 1211/2009 and (EU) No. 531/2012 – Analysis of the final compromise text with a view to agreement. Available at <http://data.consilium.europa.eu/doc/document/ST-10409-2015-REV-1/en/pdf>.

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

29 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.

30 State aid SA.33671 (2012/N) – United Kingdom, C(2012) 8223 final.

broadband network, in particular making high-speed broadband available in rural communities.³¹

In September 2012, as part of a scheme to create ‘super-connected cities’, 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. However, following legal challenges by two of the UK’s biggest networks, the government withdrew the state-aid application relating to the super-connected cities. 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 allowed SMEs to apply for vouchers to install faster internet connections in August 2013.³² As part of the government’s 2014 autumn statement, this scheme was extended by 12 months to March 2016 with a further £40 million of funding. The plan to install wireless access points across the super-connected cities, however, was re-emphasised in July 2013. In January 2014, the 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 the DCMS confirmed that the rollout 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 rollout to the final 5 per cent. This progress was confirmed in the government’s digital communications infrastructure strategy, published in March 2015. As part of the Commission’s state aid clearance decision, the UK committed to undertake an *ex post facto* evaluation of the National Broadband Scheme. This was published by Oxera in March 2015.³³ The Commission’s state aid clearance decision expired on 30 June 2015. The government has sought an extension from the Commission to the current National Broadband Scheme on materially the same terms.

The development of superfast broadband will require the rollout 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. In June 2015, Ofcom published a report setting out its assessment and recommendations on the provision and availability of

31 Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/376430/Broadband_Delivery_Framework_Summary.pdf.

32 See the DCMS’s consultation on the Connection Vouchers Scheme, 25 June 2013. Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/239182/BDUK_vouchers.pdf

33 Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/428381/The_UK_s_National_Broadband_Scheme_-_an_independent_evaluation.pdf.

communications services for SMEs in the UK.³⁴ Ofcom found that the availability of superfast broadband to SMEs is significantly lower than to residential premises.

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. Although 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.

In connection with this, Ofcom imposed 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.³⁵ 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 included 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. Furthermore, in June 2015, Ofcom proposed a charge control on the wholesale prices BT charges for products using leased telecoms lines, which provide vital high-speed links for businesses and providers of superfast broadband and mobile services.³⁶

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

34 Available at <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/sme/bb-for-smes.pdf>.

35 Review of the wholesale broadband access markets, Ofcom, 3 December 2010. Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/wba/statement/wbastatement.pdf>.

36 Business Connectivity Market Review: Leased lines charge controls and dark fibre pricing. Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/lbcc-dark-fibre/summary/lbcc-dark-fibre.pdf>.

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, the 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 this educational function, the scheme also introduced the Voluntary Copyright Alert Programme (VCAP), under which educational warning letters will be sent to those suspected of online piracy. 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 2014,³⁷ 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.³⁸

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 (Data Protection Directive),³⁹ and by the Privacy and Electronic Communications (EC Directive) Regulations 2003 as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (e-Privacy Regulations), which implement the EU Directive on Privacy and Electronic Communication,⁴⁰ as amended by EU Directive 2009/136/EC (e-Privacy Directive).

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

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

39 Directive 95/46/EC.

40 Directive 2002/58/EC.

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 Harbor Framework, whereby personal data can be transferred to US entities that have undertaken a process of self-assessment to determine that it meets an 'adequate' standard of privacy protection; and
- 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 controls on unsolicited direct marketing, restrictions on the use of cookies, and rules on the use of traffic and location data.

The Draft Data Protection Regulation (Draft Regulation) would significantly change the current UK – and broader European – data protection framework. The Council of the European Union, the European Parliament and the Commission (Trilogue) are currently negotiating the text of the Draft Regulation with the aim of agreeing upon the final text in early 2016. The Regulation is expected to come into effect in 2017 or 2018.

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;
 - 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 (although 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;
 - h* maximum fines of 5 per cent of an organisation's annual global turnover for breaches; and
 - i* a new definition, termed 'genetic data', which includes data relating to characteristics obtained during foetal development, now categorised as 'sensitive personal data'.

Various interested parties have published recommendations with the aim to shape the discussions in the Trilogue. In June 2015, the Article 29 Working Party published letters⁴¹ addressed to the members of the Trilogue that included recommendations to extend the territorial scope of the Draft Regulation to non-EU data processors, and to redefine 'personal data' to include IP addresses and other online identifiers. Later that same month, the European Data Protection Supervisor, Giovanni Buttarelli, published an opinion⁴² featuring various additional recommendations and a corresponding mobile app whereby participants may view the proposals from each member of the Trilogue side by side to assist with the negotiations.

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.⁴³

41 Available at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2015/20150617_appendix_core_issues_plenary.pdf.

42 Available at https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Reform_package.

43 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)).

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. The *Schrems v. Data Protection Commissioner*⁴⁴ case brought before the CJEU highlighted the inadequacies of the Safe Harbor Framework; see Section VI, *infra*, for more details.

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 at any one time) in particular. According to the ICO's Annual Report of 2014/15,⁴⁵ civil penalties relating to marketing calls and texts have totalled £386,000. Similar fines issued for instances of data loss total £692,500, while 12 organisations and their directors have accrued penalties of over £12,000 for failing to register with the ICO or to respond to its information notices. Finally, the first fixed penalty of £1,000 was presented to Vodafone for failing to report a security breach within 24 hours. 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 Tetras Telecoms, following a spam text message scam whereby Tetras 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. The ICO takes a serious view of the loss of unencrypted data. In February 2015, Staysure.co.uk Limited, an online holiday insurance company, was fined £175,000 after its customer records were hacked. The Serious Fraud Office and The Money Shop have each been fined £180,000 for the accidental distribution of case evidence and the loss of computer equipment containing customer details, respectively. 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

44 *Schrems v. Data Protection Commissioner* (C-362/14).

45 Available at <https://ico.org.uk/media/about-the-ico/documents/1431982/annual-report-2014-15.pdf>.

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 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 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, boxes 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.⁴⁶ Between January and March 2015, the ICO received 39 reports regarding breach of cookies rules via their website, down from 65 that were received in the same period in 2014. The total number of reports received from 2014 to 2015 was 164, down from 278 received between 2013 and 2014.⁴⁷ The ICO's 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.⁴⁸

A variety of different approaches can be seen across those countries that have implemented the consent rules, although 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

46 See 'Concerns reported about cookies via the ICO website (csv format)' available at <https://ico.org.uk/action-weve-taken/cookies>.

47 See Information Commissioner's Annual Report and Financial Statements 2013/14 available at <https://ico.org.uk/media/about-the-ico/documents/1042191/annual-report-2013-14.pdf>.

48 See ICO website – Enforcement Actions – Cookies.

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 warrant). Interception warrants can be requested by a limited number of individuals heading various security and law enforcement bodies, by 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 wellbeing 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).⁴⁹ 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 DRIPA; however, as set out in more detail in Section VI, *infra*, in July 2015, the English High Court ruled that DRIPA is incompatible with the EU Charter of Fundamental Rights, and its provisions are scheduled for repeal by the end of December 2016.

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 right to privacy.⁵⁰ Under the DPA, 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 ICO⁵¹ 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

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

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

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

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 with 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 (e.g., where a child is asked to provide information about his or her family members or friends).

In May 2015, the ICO announced that it would review 50 websites and applications to comprehend exactly what information was routinely taken from children, how this was communicated to them and what parental permission was requested. This approach was mirrored by several other global bodies in an attempt to publish a combined report on the matter.⁵² The results of this combined effort, reported in September 2015, raised concerns regarding 41 per cent of the material considered. Indeed, only 31 per cent of websites and applications had effective controls to limit the collection of data from children.⁵³

The Draft Data Protection Regulation includes specific provisions on processing the personal data of children that require parental consent for children aged under 13 years and grant the Commission the 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).⁵⁴ CEOP also offers training, education and public awareness in relation to child safety online.

52 ICO website – News and Events.

53 Ibid.

54 Crime and Courts Act 2013.

Website and software operators may 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. The 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).

Cybersecurity

Cyberattacks are becoming increasingly problematic in the global financial and regulatory landscape. The Government Communication Headquarters stated that more than 80 per cent of UK companies reported a security breach in 2014. More worryingly, PricewaterhouseCoopers reported that the total amount of global incidents escalated to 42.8 million in 2015, a 48 per cent increase from 2013.⁵⁵

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 codes, criminal offences. Further offences exist where an individual supplies 'tools' to commit the above-mentioned activities.

The government has consolidated its focus on cybersecurity through the establishment of the National Cyber Security Programme with a dedicated pool of funds stretching to £860 million over five years until 2016.⁵⁶ 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). A recent policy paper⁵⁷ reported that 81 per cent of large corporations and 60 per cent of small businesses reported a cyber breach in 2014. To address this, the government has begun offering cybersecurity advice directly to businesses through publications such as the '10 Steps to Cyber Security', and by establishing an information-sharing partnership whereby the government and industry can exchange information about cybersecurity threats. To reduce the risk of cyberattacks, the government established the Computer Emergency Response Team in March 2014⁵⁸ to take a lead in administrating the UK's response to national cybersecurity incidents.

At a European level, the European Parliament has been in negotiations to agree the proposed Network and Information Security Directive (NISD), which introduces, *inter*

55 Cybersecurity Regulation and Best Practices in the US and UK – Section 1.

56 The UK Cyber Security Strategy – Report on Progress and Forward Plans – December 2014.

57 2010 to 2015 Government Policy: Cyber Security – available at www.gov.uk/government/publications/2010-to-2015-government-policy-cyber-security/2010-to-2015-government-policy-cyber-security.

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

alia, mandatory breach notification requirements and minimum security requirements.⁵⁹ According to the latest draft, NISD will impose obligations on companies deemed to have a critical impact upon national infrastructure (including financial services organisations) to report breaches of cybersecurity to the national competent authorities (NCAs) without undue delay where the relevant incident would have a significant impact on the core services provided by that company. NISD has been stuck in negotiations between EU lawmakers and Member States over which sectors the Directive should cover; after months of negotiations, it was decided that digital platforms such as search engines, social networks and cloud computing service providers will be subject to the Directive's remit, albeit with 'lighter touch' requirements. The Directive aims to ensure a uniform level of cybersecurity across the EU as part of the Commission's wider Digital Agenda for Europe.

IV SPECTRUM POLICY

i Development

The Framework Directive and the Authorisation Directive, part of the Telecoms Reform Package, require the neutral allocation of spectrum in relation to the technology and services proposed by the user (e.g., 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 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

⁵⁹ 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.

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 tradable 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 were 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 December 2014, the government signed a statement of commitment with the UK MNOs (EE, H3G, Telefónica and Vodafone) in which each MNO agreed to implement 90 per cent geographic voice coverage throughout the UK by no later than 31 December 2017. That commitment has been given legal effect through the variation of each of the MNOs' 900MHz and 1800MHz licences. Further to this, in April 2015 Ofcom published a provisional decision on the level of the annual fees for current 3G licences while simultaneously launching a further consultation on the impact of the geographic coverage obligation on the annual fee.⁶⁰ 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. In November 2014, Ofcom issued a consultation on the auction of this spectrum.⁶¹ In May 2015, Ofcom published its decision and a further consultation.⁶² The statement element of the document sets out Ofcom's decisions on a number of issues, including the auction design and process, the coexistence of new uses

60 Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/annual-licence-fees-further-consultation/summary/alf-further-consultation.pdf>.

61 Available at http://stakeholders.ofcom.org.uk/binaries/consultations/2.3-3.4-ghz-auction-design/summary/2_3_and_3_4_GHz_award.pdf.

62 Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/2.3-3.4-ghz-auction-design/statement/statement.pdf>.

of these frequencies alongside existing uses in neighbouring bands, and the technical and non-technical licence conditions. The consultation element invites responses from stakeholders on options for proceeding with the award in the light of potential changes in the mobile market.

In April 2014, Ofcom published its spectrum management strategy setting out the approach to and priorities for spectrum management over the next 10 years.⁶³ 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, in May 2014 Ofcom published a consultation on the future use of the 700MHz band, considering particularly whether the band should be made available for mobile broadband use. In a statement published in November 2014, Ofcom decided to make the 700MHz band available for mobile data use.⁶⁴ Ofcom has stated that it plans to hold an auction for the 700MHz band up to two years before the spectrum starts to become available.

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 also benefited 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. Ofcom is currently working to identify potential spectrum for future mobile services, including 5G mobile networks. Ofcom issued a call for information on spectrum above 6GHz in January 2015, which ended in February 2015.⁶⁵

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

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

64 Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/700MHz/statement/700-mhz-statement.pdf>.

65 Laying the foundations for next generation mobile services, update on bands above 6GHz, Ofcom, 20 April 2015. Available at http://stakeholders.ofcom.org.uk/binaries/consultations/above-6ghz/5G_CFI_Update_and_Next_Steps.pdf.

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.

iv White space

Following an earlier consultation, 2011 saw 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. 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.

Ofcom has released a statement that certain white space devices that operate automatically and without manual configuration are licence-exempt, on the condition that they do not interfere with existing users.⁶⁶ In February 2015, Ofcom published a consultation on proposals for authorising other types of white space devices on a licensed basis.⁶⁷ This followed a pilot for innovative white space equipment that began in December 2013; none of the white space devices tested during the pilot demonstrated that they were capable of operating without some degree of manual configuration. The consultation closed in April 2015, and a statement is expected to be published in late 2015. The final version of the ETSI Harmonised European Standard for white space devices⁶⁸ has been published and delivered to the European Commission. In February 2015, Ofcom published a statement allowing the commercial use and deployment of white space broadband technology, harnessing the unused parts of the radio spectrum in the 470MHz to 790MHz frequency band.⁶⁹

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

66 Implementing TV White Spaces, Ofcom, 12 February 2015. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/white-space-coexistence/statement/tvws-statement.pdf>.

67 Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/manually-configurable-wsds/summary/manually-configurable-wsds.pdf>.

68 ETSI EN 301598 V1.0.0(2014-02).

69 Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/white-space-coexistence/statement/tvws-statement.pdf>.

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 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 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. In a January 2015 report entitled 'Citizens and communications services', Ofcom stated that it was monitoring the effectiveness of steps by the industry to improve emergency caller location information on mobile calls.⁷⁰

In 2013, the Home Office announced the Emergency Services Mobile Communications Programme, which plans to provide a dedicated emergency services network (ESN) that would provide the next generation communication system for emergency services. The contracts for the operation of the ESN are currently the subject of a public tender process. At inception, the government split the contracts for the operation of the ESN into four lots. However, one of the lots, relating to a contracted agreement for an MNO to extend guaranteed signal coverage to ensure mobile coverage, was withdrawn in January 2015.

⁷⁰ Available at http://stakeholders.ofcom.org.uk/binaries/research/cross-media/Citizens_Report.pdf.

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, *supra*, 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 rollout of superfast broadband has reached more than 1 million homes and businesses across the UK. The £1.7 billion nationwide rollout 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 rollout 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.⁷¹ As of February 2015, nearly one in three broadband connections is now superfast.⁷²

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

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

72 Ofcom Press Release, 26 February 2015.

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 (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 and 2012. Following the Treasury’s announcement, the DCMS stated in May 2013 that technical changes to the draft Sharing of Costs Order were required. There has been no update at the time of writing.

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 expected to be delayed, as it requires notification to the Commission.⁷³ The government has welcomed work by the industry to develop a voluntary-led process.

In 2015, as part of the DCMS’s ‘Creative Content UK’, the 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.

73 Select Committee Report – Supporting the Creative Economy.

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 report, UK adults spend on average four hours and 17 minutes per day viewing audiovisual 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).⁷⁴ 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.

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.⁷⁵ Four operators (EE, Hutchinson 3G, Telefónica O2 and Vodafone) are now offering 4G mobile services, and more than 5 million consumers are enjoying the benefits offered by superfast broadband. Services are currently available across over 80 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

74 Ofcom – The Communications Market 2014.

75 Ofcom Annual Report and Accounts 2013/2014.

found that the proposals were not fair and reasonable. This decision was overturned by a decision of the Competition Appeals Tribunal (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

i Sky – wholesale broadcasting rights

The Court of Appeal in February 2014 referred back to the 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. In February 2014, 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, in the February 2014 judgment, the Court of Appeal remitted the decision back to the CAT for reconsideration. In the interim, Ofcom has decided to review the WMO; Ofcom issued consultations in December 2014⁷⁶ and subsequently in July 2015⁷⁷ on this matter. 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. In October 2014, the Supreme Court refused an application by Sky for permission to appeal against the Court of Appeal's judgment in February 2014. In May 2015, the CAT handed down a ruling on the constitution of the panel to hear the matters remitted by the CAT. This was followed by an order in June 2015 issued by the CAT denying BT permission to appeal against the May 2015 ruling.

On 9 June 2015, the CMA referred the anticipated acquisition by BT of EE for a Phase 2 investigation under the Enterprise Act 2002. In its Phase 1 investigation, the CMA found that the proposed merger gave rise to a realistic prospect of a substantial lessening of competition, as a result of vertical effects, in relation to the supply of wholesale access and call origination services to MVNOs and fibre mobile backhaul

76 See Review of the pay TV wholesale must-offer obligation, Ofcom, 19 December 2014. Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/wholesale-must-offer/summary/condoc.pdf>.

77 See Review of the pay TV wholesale must-offer obligation, supplementary consultation, Ofcom, 27 July 2015. Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/wmo-supplementary/summary/wmo-supplementary.pdf>.

services to MNOs in the UK. The CMA also noted that the merger might also have an impact on other markets, such as the retail mobile market in the UK. On 17 July 2015, the CMA published its issues statement setting out its proposed approach to assessing market definition and the counterfactual. It also identifies 10 theories of harm: four raising horizontal unilateral effects, four raising vertical effects, one raising co-ordinated effects and one raising conglomerate effects. The statutory deadline for the CMA to adopt its decision is 23 November 2015.⁷⁸

On 11 September 2015, Hutchinson Whampoa, the parent company of Three, notified before the European Commission its plan to acquire Telefónica's UK subsidiary, O2 UK. The transaction will be assessed in parallel with EE's acquisition by BT.

ii 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 a report titled 'EU Data Protection law: a 'right to be forgotten'?' in which it criticised the judgment as 'unworkable' and burdensome on ISPs.⁷⁹

In the year following the decision, Google received over 350,000 requests for information to be removed from its European website.⁸⁰ Recent examples include requests for the removal of links regarding an individual jailed in France for running a ring of call girls and mass murderer Anders Breivik. Individuals who attempt to search such content will encounter a message stating, 'Some results may have been removed under Data Protection Law in Europe'.

There are some practical limitations to the 'right to be forgotten'. This right applies only to European websites; individuals who visit the American portal of Google will not be faced with the inability to access certain search results. Even within Europe, only searches that include the blocked individual's name will prompt the message detailed above. Searching for the same link through the use of other keywords will display the search result in question. Finally, and particularly within the UK context, any attempt to remove a particular webpage link will only succeed if it can be argued that it is no longer in the public interest for that link to be available.

78 www.gov.uk/cma-cases/bt-ee-merger-inquiry.

79 www.publications.parliament.uk/pa/ld/201415/ldselect/ideucom/40/4002.htm.

80 Based on information available in September 2015. Google Transparency Report available at <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>.

iii **Schrems v. Data Protection Commissioner (C-362/14)**⁸¹

In March 2015, the CJEU considered a case brought by Max Schrems arguing that the US–EU Safe Harbor agreement did not provide adequate security for EU citizens in light of the revelations exposed by Edward Snowden about the clandestine PRISM and NSA programmes. Schrems challenged the self-certification process involved in Safe Harbor, and claimed that the personal data of EU citizens was no longer adequately protected due to US government surveillance.

Schrems asked the Irish Data Protection Commissioner (DPC) to stop Facebook Ireland Ltd (the European branch of the social media site) from transferring data to Facebook’s US headquarters, but the DPC refused to grant the request. Schrems then appealed to the Irish courts, which referred two questions to the CJEU:

- a Is a national data protection authority bound by an adequacy decision of the Commission for a third country, if it is argued that the laws and practices of that third country do not contain adequate protections?
- b Must the data protection authorities of different Member States conduct their own investigations as to the adequacy of the third country’s laws if new developments occur since that Commission’s adequacy decision was made?

In the hearing, Schrems argued that the data protection authorities and the Commission have a right to protect EU citizens against violations of their privacy. By ignoring legitimate complaints, he believed that the discretion of the DPC had been fettered. Schrems also argued that the Safe Harbor Framework was illegal, particularly in light of the revelations exposed by Snowden. The DPC countered that it was bound by the Commission’s previous decision about the legality of Safe Harbor, and that since Schrems had not suffered any harm, the courtroom was not the appropriate forum for a privacy debate, being better left to international diplomats. Much of the courtroom debate also focused on the adequacy of the self-certification process and the potential economic consequences of the suspension of the Safe Harbor agreement.

The CJEU’s decision in the *Schrems* case is due to be delivered on 6 October 2015. In his Opinion, Advocate General Yves Bot concluded that the current framework is insufficient to comply with European data protection rules. While it is likely that the CJEU will follow the Opinion of the Advocate General, it is not bound to do so.

In September 2015, it was announced that an EU–US ‘umbrella agreement’ had been agreed to provide more comprehensive safeguards for data transfers between law enforcement agencies.⁸² The agreement is intended to complement existing transatlantic data protection agreements, and to assist in the investigation and prosecution of criminals. Notably, the umbrella agreement provides EU citizens with a right to redress in the US courts in the event of a privacy breach.

81 Available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157862&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=244813>.

82 Press release available at http://europa.eu/rapid/press-release_MEMO-15-5612_en.htm?locale=en.

iv DRIPA

DRIPA 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: the obligation to retain communications data by communications providers and the extraterritorial expansion of powers under RIPA.⁸³ DRIPA also clarified that interception capability notices under RIPA may be issued to telecommunications providers outside the UK in relation to conduct outside the UK.

The first part of DRIPA was implemented in response to the declaration of invalidity of Directive 2006/24/EC (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.⁸⁴ 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 DRIPA grants the Secretary of State the power to issue notices to telecommunications operators requiring them to retain communications traffic data (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. The latter part of DRIPA 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.

Following the passage of DRIPA, MPs Tom Watson and David Davis and leading civil rights group Liberty mounted a legal challenge against the Act via the judicial review procedure whereby a judge assesses the legality of a decision taken by a public body (in this instance, Parliament). The legality of DRIPA was questioned on the basis that the data retention provisions in the first part of the Act were introduced following the CJEU's declaration that similar provisions in the Data Retention Directive were declared invalid.

In July 2015, the High Court heard the case and declared the data retention provisions to be incompatible with EU law on the basis that they interfered with Articles 7 and 8 (the public's right to respect for private life and communications and to the protection of personal data) of the EU Charter of Fundamental Rights.⁸⁵ Particular criticism was made regarding the emergency nature of the legislation as well as its fast

83 Data Retention and Investigatory Powers Act 2014.

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

85 *R (Davis & Watson) v. Secretary of State for Home Department* [2015] EWHC 2092.

tracked path through Parliament. The remaining provisions, including those legalising the extraterritorial expansion of RIPA, are scheduled to be repealed on 31 December 2016 in accordance with a sunset clause set out in the Act. The Court has granted the Secretary of State permission to appeal the order in the Court of Appeal.

VII CONCLUSIONS AND OUTLOOK

In 2014 and 2015, privacy debates continued both inside and outside the courtroom, highlighting the ever-evolving regulatory landscape and the ongoing legal controversies about the scope and extent of a citizen's right to privacy. Internet search providers like Google grappled with the implementation of the 'right to be forgotten' ruling as hundreds of thousands of requests for the removal of links flooded in. Following its fast-tracked introduction last year, the DRIPA legislation was declared incompatible with EU law on the basis that its data retention provisions violated the right to respect for private life and to the protection of personal data. The fallout from the Snowden revelations about the PRISM and NSA spying programmes continued to be felt, as highlighted in the *Schrems* case, which questioned the adequacy of the self-certification process in the Safe Harbor Framework governing data transfers. Negotiations between EU and US officials over updates to the Safe Harbor Framework are ongoing, and it remains to be seen if the expected finalisation in 2016 of the Data Protection Regulation will resolve some of these debates.

Ofcom has set its policy priorities for 2015 to 2016 to include promoting effective competition and informed choices for consumers through the Strategic Review of Digital Communications and introducing greater consumer protections through clearer pricing structures.

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 (FCC)

The FCC is an independent US regulatory agency established by the US Congress pursuant to the Communications Act of 1934, as amended (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 (ITU).

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The National Telecommunications and Information Administration (NTIA)

The 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 the case of a conflict between the FCC and state or local regulations, the state or local regulation is typically pre-empted, unless 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 (FTC)

The 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 traditional 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 cognisable 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 or 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 a CFIUS review 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 traditional 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., VoIP services).

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 enforcement of such provision is not necessary to ensure just, reasonable and non-discriminatory rates, terms and conditions of service; enforcement of such provision is not necessary for the protection of consumers; and 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. The FCC also used this authority in early 2015 in connection with its reclassification of broadband internet access service as a ‘telecommunications service’ (discussed in greater detail below).

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 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 cognisable 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 (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 chairperson, 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 sub-organisation 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 licences, 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, the 20 per cent limit effectively increases to 25 per cent, and 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 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. In May 2015, the FCC granted such a waiver to Pandora Radio LLC to allow Pandora to buy a radio station, and sustained that waiver against a legal challenge that was resolved in September 2015.

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 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); the satellite complies with the same FCC technical and service requirements that apply to US satellites; and 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 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 has also 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 has also 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 September 2015, the FCC approved a series of applications through which Frontier Communications Corporation and Verizon Communications Inc sought FCC consent to transfer to Frontier certain authorisations related to long-distance and broadband services provided by Verizon in California and Texas. The FCC found that the transaction was unlikely to result in any public interest harms but was likely to result in public interest benefits, including cost savings and increased infrastructure investment.
- b* In July 2015, the FCC approved a series of related applications through which AT&T Inc (the largest provider of mobile and fixed wireline telephone services in the US) and DirecTV (a leading BSS operator) sought FCC consent to AT&T's acquisition of DirecTV. In granting such consent, the FCC imposed conditions on the combined company (e.g., with respect to fibre deployment) to mitigate certain harms that the FCC believed otherwise might have resulted from the transaction.
- c* In April 2015, Comcast Corp (a broadcasting, CATV and BIAP company) and Time Warner Cable Inc (a CATV and BIAP company) withdrew applications in which they had sought FCC consent to Comcast's acquisition of Time Warner Cable. The parties' decision was made in the face of intense scrutiny of the proposed transaction by the FCC and the DoJ, and likely efforts by one or both of those agencies to try to block the transaction.

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

- a* In May 2015, Charter Communications Inc, Time Warner Cable Inc and Advance/Newhouse Partnership (all CATV and BIAP companies) filed applications seeking FCC consent to the acquisition by Charter of Time Warner Cable and Bright House Networks (a subsidiary of Advance/Newhouse Partnership). The transaction was pursued soon after the termination of Time Warner Cable's transaction with Comcast (discussed above).
- b* In June 2015, Altice SA (a Luxembourg-based provider of telecommunications services with extensive operations in Europe and other foreign markets) and Cequal Corporation d/b/a Suddenlink Communications (a CATV and BIAP company) filed applications seeking FCC consent to the acquisition of Suddenlink by Altice. Subsequently, in September 2015, Altice publicly announced its plans acquire Cablevision (a CATV operator serving metropolitan New York and four

western states). Upon consummation, the two acquisitions would give Altice a significant foothold in the US.

- c In April 2015, LightSquared Subsidiary LLC (which holds satellite and terrestrial authorisations from the FCC) filed applications seeking FCC consent to emerge from bankruptcy with a new ownership and control structure. The FCC's consent will allow the company to successfully reorganise and end a bankruptcy proceeding that persisted for over three years and that commenced soon after an interference dispute with GPS interests left the company unable to move forward with its business plan.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Prior to 2015, 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. Recent activity at the FCC now suggests that it intends to play 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 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'. The contribution factor (essentially, that rate at which interstate and international revenues are assessed for USF contribution purposes) fluctuates during the course of the year, but has been around 17 per cent of covered revenues for most of 2015. Universal service programmes and contribution obligations are administered by the Universal Service Administrative Company, 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, certain wireline incumbents called 'price cap carriers' enjoy significant funding preferences through, among other things, a 'right of first refusal' in connection with available funding. These rules, in their current form, would also 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 is now examining ways to increase participation by competitive providers. Although incumbent price cap carriers have exercised preferential rights to receive approximately US\$1.5 billion of funding, in the aggregate, for each of the next six years, an estimated approximately US\$500 million of additional annual funding remains to be awarded. Currently, the FCC is implementing Phase II of the CAF programmes for price cap carriers, including the process for deciding how the FCC will distribute funding in areas where the incumbents declined preferential funding. In addition, the FCC is beginning to develop CAF rules for 'rate of return' incumbent carriers. 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 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. In reclassifying broadband internet access service as a 'telecommunications service,' the FCC exercised forbearance authority to avoid subjecting BIAPs to any immediate obligation to contribute to the USF. However, over time there may be mounting pressure for the FCC to examine this contribution question more closely.

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'. Traditional 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 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 swung in the opposite direction. In February 2015, the FCC reclassified retail broadband internet access service as a 'telecommunications service' in the latest phase of the FCC's net neutrality proceeding. While this action was taken for the stated purpose of creating a clearer jurisdictional basis for the imposition of net-neutrality rules on BIAPs, and not for the purpose of generally imposing common-carrier requirements on BIAPs, it is not clear that ultimately will be the case. While the FCC used its forbearance authority to free BIAPs from many specific common-carrier regulations that otherwise would apply under Title II, it left BIAPs subject to the broad requirements to charge 'just and reasonable rates' and provide service without undue discrimination. The reclassification of broadband internet access service is under challenge in the courts and, if it remains in effect, is likely to create ripple effects in many other areas of FCC regulation for years to come.

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'. Now that retail broadband internet access service is classified as common carriage, it too is subject to these same general 'just and reasonable' requirements that apply to traditional telecommunications 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:

- a* gain access to the lawful internet content of their choice;
- b* run applications and use services of their choice, subject to the needs of law enforcement;
- c* connect their choice of legal devices that do not harm the network; and
- d* 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’, that:

- 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 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 proceeding 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. In 2015, the FCC opted for the latter approach, reclassifying retail broadband internet access service as a ‘telecommunications service’ subject to Title II. At the same time, the FCC exercised its forbearance authority to free BIAPs from much of the regulation that otherwise would apply under Title II (such as tariffing obligations and mandatory federal universal service contributions). Notably, this reclassification still results in the effective imposition of several other core common carrier regulations, including statutory requirements that ‘charges’ and ‘practices’ be just, reasonable and not unreasonably discriminatory, requirements to maintain the privacy of customer information, and the right of consumers to seek damages, and pursue complaints in courts, for claimed violations by common carriers. Soon after the FCC’s ruling, a broad coalition of BIAPs and trade associations filed an appeal in federal court, which remains pending.

The FCC’s new substantive net-neutrality rules are different in some respects than those adopted in 2010. The rules apply equally to fixed and mobile BIAPs, and broadly prohibit blocking access to legal content, applications, services, or non-harmful devices; and impairing or degrading lawful internet traffic on the basis of content, applications, services, or non-harmful devices (i.e., ‘throttling’). In each of these two cases, the prohibition is subject to the ability of BIAPs to engage in ‘reasonable network management.’ The new rules also broadly prohibit ‘paid prioritisation’ arrangements (e.g., favouring some lawful internet traffic over other lawful traffic in exchange for value provided), notably without regard to any reasonable network management exception. The FCC reaffirmed and enhanced its transparency requirements. Significantly, the FCC also adopted a new ‘catch-all’ standard of conduct to allow it to police, on a case-by-case basis, BIAP practices that ‘unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the internet content, services, and applications of their choosing or of edge providers to access consumers using the internet’. The FCC clarified that these net-neutrality rules do not apply to commercial interconnection and peering arrangements, but it indicated that such arrangements are subject to general Title II oversight.

The scope and application of these new rules likely will become clearer only as the FCC applies them on a case-by-case basis in response to complaints, as the FCC further articulates its policies with respect to many of the specific requirements, and after the pending appeal to the courts is resolved.

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. In addition, earlier this year the FCC adopted rules to require providers of fixed residential voice services (including interconnected VoIP) to offer customer premises equipment along with a backup power source.
- 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, 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 is also 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 will be funded by the proceeds of spectrum auctions.

The Communications Assistance for Law Enforcement Act (CALEA)

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 interconnected VoIP providers (as well as facilities-based BIAPs, consistent with the FCC’s reclassification decision in the net-neutrality context). 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 developing 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, cyberthreats and attacks' in coordination with other US federal agencies such as the Department of Homeland Security and the Federal Bureau of Investigation. The FCC has not yet developed or released a plan of this type. The FCC has also 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 government. However, 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 exposés 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 remain to be seen, it is sure to affect policies and practices for years to come.

The FCC has also tried to ensure that consumers can effectively block calls and text messages that they do not wish to receive, using authority provided by Congress in the Telephone Consumer Protection Act (TCPA). For example, in June 2015 the FCC attempted to strengthen restrictions on the practice of ‘robocalling’ using ‘automatic telephone dialing systems’ (i.e., ‘autodialers’) by issuing a series of declaratory rulings. Among other things, the FCC ruled that a device is an impermissible autodialer if it could be used to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers. Critics claim that the FCC’s action actually obfuscates matters and unreasonably expands the reach of the TCPA, because, for example, a smartphone could be classified as an impermissible autodialer simply because it could use an autodialing application. Further clarifications of the FCC’s policies are likely in the near term.

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, 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 have 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 auctioned non-federal spectrum rights in the 1695–1710MHz, 1755–1780MHz and 2155–2180MHz bands (the AWS-3 bands). The winning bids in this auction totalled nearly \$45 billion – a result that underscores the premium value placed on underutilised spectrum suitable for mobile broadband applications.

The FCC and the NTIA are also 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:

- a* incumbent federal users, which would be entitled to full interference protection from new spectrum users;
- b* 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
- c* 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 has also 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 has also 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, in 2012 Congress 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. The FCC is continuing its efforts to plan the first broadcast ‘incentive auction’, which was not conducted in 2015 as initially expected. Instead, that auction currently is set to occur in 2016 (after auction procedures are finalised). 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.

The FCC also is in the early stages of allocating ‘millimeter-wave’ spectrum (generally above 24GHz) for 5G wireless services that are expected to be deployed over the next decade.

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, Congress authorised a new type of auction, known as the incentive auction. Under this auction model (the first of which is now expected to occur in mid-2016), 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 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 are also 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 was also 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 licence 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 US markets for several weeks. However, 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 ranked among the top four stations in a local market and not commonly owned. The FCC explained that such action was necessary to ensure that broadcasters did not enjoy undue leverage in such negotiations. More recently, the FCC has proposed to re-examine rules and policies that govern more broadly the obligations of broadcasters and MVPDs to negotiate retransmission consent arrangements in good faith.

Legislation on this same topic has been introduced in both houses of Congress over the past year. 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 programming 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 the relevant copyright – as the US Supreme Court confirmed in June 2014 when it released its decision in *American Broadcasting Cos v. Aereo, Inc.*, which involved 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. 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 mechanism. 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. To expedite competitive entry into the IPTV market, and 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 net-neutrality order adopted earlier this year by the FCC reaffirmed its commitment to ‘Open Internet’ principles, but leaves many important details to be filled in through case-by-case adjudication or further FCC policy statements. More controversial is the FCC’s corresponding decision to reclassify retail broadband internet access service as a ‘telecommunication service’ subject to Title II common carrier regulation, and thus subject BIAPs to a number of common carrier requirements to which they previously were not subject, and the full effect of which may only become clear after case-by-case applications of those requirements.

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 winners and 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 on the horizon is the possibility that 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 that the federal courts will clarify the scope of the FCC’s authority.

Appendix 1

ABOUT THE AUTHORS

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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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John P Janka is a partner in the Washington, DC office of Latham & Watkins LLP, where he served as a global leader of the communications law practice group for a decade. For almost three decades, 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 effectuating changes in legal and regulatory frameworks. His clients include satellite operators, broadband providers, wireless and other terrestrial communications companies, video programming suppliers, ISPs, 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 processes, 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 *The Legal 500 Paris 2014*: ‘Great negotiator’ Jean-Luc Juhan, who is ‘very sharp and down-to-earth’ and has ‘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 during 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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Mr Powell is one of only a few solicitor-advocates in Hong Kong, giving him full rights of audience before all the Hong Kong civil courts (including the newly instituted Competition Tribunal, which has been set up as a part of the judiciary). He is also a fellow of the Chartered Institute of Arbitrators, and a CEDR accredited mediator. He sits on the Hong Kong Law Society's competition committee, which focuses on reviewing and commenting upon competition-related issues within Hong Kong.

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