
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

FIFTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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Fifth Edition

Editor
JOHN P JANKA

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EDITOR'S PREFACE

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

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

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

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do

not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

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

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

John P Janka

Latham & Watkins LLP

Washington, DC

October 2014

LIST OF ABBREVIATIONS

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

List of Abbreviations

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

List of Abbreviations

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 5

EU OVERVIEW

*Maurits J F M Dolmans, Francesco Maria Salerno and Federico Marini-Balestra*¹

I REGULATION

i The regulators

The European Commission (the Commission) is the most important regulatory body at the EU level. The Commission is equipped with a variety of regulatory and enforcement powers in areas related to TMT, including antitrust, privacy,² online transactions, intellectual property³ and consolidation of the internal market for electronic communications.⁴ The adoption of the new regulatory framework for electronic communications has, among other things, increased the Commission's powers to oversee the measures proposed by national regulatory authorities (NRAs) to address problems relating to competition on the various telecommunications markets.

The Body of European Regulators for Electronic Communications (BEREC) was established by Regulation (EC) No. 1211/2009⁵ and commenced its activities in January 2010. Its role is to ensure the consistent application of the EU regulatory framework by, for example, delivering opinions on the NRAs' draft measures concerning market definition, designating undertakings with significant market power and imposing obligations on these undertakings (also called 'remedies'), and, upon request, providing assistance to NRAs in carrying out their duties under EU law. The Commission also consults BEREC before adopting recommendations on relevant product and service markets, which NRAs

1 Maurits J F M Dolmans is a partner, Francesco Maria Salerno is a senior attorney, and Federico Marini-Balestra is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 See Section II.iv, *infra*.

3 See Directive 2001/29/EC of 22 May 2001, OJ 2001 L 111/16.

4 See Directive 2002/21/EC of 24 April 2002, OJ 2002 L 108/33.

5 See Regulation (EC) No. 1211/2009 of 25 November 2009, OJ 2009 L 337/1.

must rely on in defining the relevant national markets. The Commission may also task BEREC with carrying out *ad hoc* market studies (e.g., regarding net neutrality).⁶

BEREC became fully functional in 2011. Its most important initiatives between the second half of 2013 and August 2014 include: (1) the publication of best-practice guidelines on the application of Regulation (EC) No. 531/2012 on roaming services; (2) the launch of a monitoring process for the implementation of broadband best practices across Member States; (3) the publication of an opinion on the Commission's proposed new recommendation on relevant markets; and (4) the publication of several opinions to assist the European Commission in evaluating measures taken by NRAs.⁷

ii Regulated activities

In 2002 the EU adopted a new comprehensive regulatory framework for electronic communications networks and services, with the aim of fostering a consistent regulatory approach across the EU. In 2009, Directive 2009/140/EC,⁸ Directive 2009/136/EC⁹ and Regulation (EC) No. 1211/2009 were adopted to improve and revise the 2002 regulatory framework. The EU also seeks to encourage investment in Next Generation Access (NGA) networks while preserving competition.¹⁰

The provision of electronic communication services is regulated by the Authorisation Directive. Under this Directive, a prospective electronic communications services provider needs an authorisation from the competent NRA. Obtaining this authorisation requires a procedure whereby an applicant notifies the NRA of its intentions, without having to wait for any approval by the NRA.¹¹ The information that may be requested in such a notification must be limited to what is necessary for the identification of the provider. In September 2013, the Commission proposed major changes to this regime (within the 'Connected Continent' proposal), which were aimed at establishing a single EU passport for electronic communications services and providers;¹² but the EU Parliament rejected the Commission proposal (see below).

By contrast, the use of spectrum in telecommunications is subject to a licence granted by the Member States and to fees. However, the Commission may impose certain obligations regarding spectrum allocation or the timing of such process. In the Connected Continent proposal, the Commission has suggested significant changes to the spectrum licensing regime.

6 See Section II.iii, *infra*.

7 See http://berec.europa.eu/eng/document_register/welcome/.

8 See Directive 2009/140/EC of 25 November 2009, OJ 2009 L 337/1.

9 See Directive 2009/136/EC of 25 November 2009, OJ 2009 L 337/1.

10 In April 2012, following a public consultation on its draft report, BEREC released its final report on co-investment and SMP in NGA networks.

11 Article 5 of the Authorisation Directive.

12 See the proposal for a 'Connected Continent' regulation (<http://ec.europa.eu/digital-agenda/en/connected-continent-single-telecom-market-growth-jobs>).

The regulation of audio-visual content is addressed by the Television Without Frontiers Directive. With the last revision in 2007, the Directive was renamed Audiovisual Media Services Directive (AVMSD); it was then codified in 2010.¹³

The Commission also has extensive investigation powers in the area of antitrust. It cooperates with national competition authorities (NCAs) to prohibit concerted practices, agreements restricting competition and unilateral anti-competitive behaviour. The Commission has exclusive jurisdiction over mergers above certain thresholds, including in the area of TMT.¹⁴

iii Digital Agenda

In 2010 the Commission launched its Europe 2020 Strategy to prepare the EU economy for the challenges of the next decade. One of the flagship initiatives of the 2020 Strategy is the Digital Agenda for Europe, which defines the key enabling role that the use of information and communication technologies (ICT) will have to play in Europe's efforts if Europe is to succeed in its ambitions for 2020.¹⁵

The Digital Agenda for Europe outlines 101 specific policy actions across seven domains: (1) creating a single digital market; (2) enhancing greater interoperability for software; (3) boosting internet trust and security; (4) developing much faster internet access; (5) rolling out more investment in research and development; (6) enhancing digital literacy skills and inclusion; and (7) applying information and communications technology to address challenges facing society like climate change and the ageing population.¹⁶ The Digital Agenda for Europe involves extensive use of regulatory powers, with no fewer than 31 new pieces of legislation expected to be adopted.¹⁷

13 See Directive 2010/13/EU of 10 March 2010, OJ 2010 L 95/1.

14 The respective competences of the Commission and NCAs to assess mergers are defined on the basis of the turnover of the undertakings concerned (See Article 1.2 of Council Regulation (EC) No. 139/2004 of 20 January 2004 (the EC Merger Regulation), OJ 2004 L 24/1–22). The only exception to this rule is that, due to the plurality of the media, a Member State may also review a concentration that falls within the competence of the Commission and adopt the measures needed to protect such interest (see Article 21.4 of the Merger Regulation).

15 See Commission Communication, COM(2010)245 final (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0245:EN:NOT>).

16 See press release of 17 May 2010: 'Digital Agenda: investment in digital economy holds key to Europe's future prosperity, says Commission report', available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/571&format=HTML&aged=0&language=EN&guiLanguage=en>.

17 See press release: 'Digital Agenda: Commission outlines action plan to boost Europe's prosperity and well-being', 19 May 2010 (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/581&format=HTML&aged=0&language=EN&guiLanguage=en>).

In 2014, the Commission published a scoreboard showing the performance of the EU and Member States in achieving the targets of the Digital Agenda after its first four years of existence.¹⁸

In general, the results are positive: Internet usage is increasing rapidly: it now stands at 72 per cent, up from 60 per cent in the previous year. The objective of ensuring basic broadband for all citizens by 2013 has been met, as satellite broadband is available to raise coverage to 100 per cent in every Member State.

However, the Commission noted the following areas of concern, where progress is insufficient: e-Government take-up by citizens only increased by four points over four years, is increasing more slowly than other online applications and is indeed stagnating in a number of countries; a mere 14 per cent of SMEs use the internet as a sales channel, an increase of only two points in four years; public support for R&D in ICT is well below the annual growth needed to achieve a targeted doubling by 2020; and cross-border shopping is growing only at a slow pace.

On 18 December 2012, the Commission adopted a digital to-do list for the period 2013–2014, noting that the digital economy is growing at seven times the rate of the rest of the economy, but that ‘this potential is currently held back by a patchy pan-European policy framework’.¹⁹ Thus, in order to reignite growth the Commission has planned the launch of a new legislative initiative, the ‘Connected Continent’ proposal. Other legislative initiatives include the review of the Directive on the enforcement of intellectual property rights (the IPR Enforcement Directive) and the revision of the Data Protection Directive.

II TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

The provision of internet access and, more generally, IP-based services has traditionally been regulated as part of the telecommunications regulatory framework. More specifically, these services are considered ‘electronic communication services’ (within the meaning of the Framework Directive) and are subject to an authorisation procedure (consisting mainly of a notification) to facilitate entry into the market.

As to internet governance, in February 2014 the Commission supported a multi-stakeholder governance model based on the full involvement of all relevant actors and organisations.²⁰

As Commissioner Vice-President Kroes stated, ‘Some are calling for the International Telecommunications Union to take control of key internet functions. I

18 The Digital Agenda scoreboard reports are available at <http://ec.europa.eu/digital-agenda/en/download-scoreboard-reports>.

19 See press release, ‘Digital ‘to-do’ list: new digital priorities for 2013-2014’, 18 December 2012 (available at http://europa.eu/rapid/press-release_IP-12-1389_en.htm).

20 See Commission’s press release of 12 February 2014. See also the Commission’s Communication, ‘Internet Policy and Governance Europe’s role in shaping the future of Internet Governance’, COM/2014/072 final.

agree that governments have a crucial role to play, but top-down approaches are not the right answer. We must strengthen the multi-stakeholder model to preserve the internet as a fast engine for innovation.’ In this vein, the Commissioner strongly welcomed the announcement of the United States government’s decision to transition key internet domain name functions to the global multi-stakeholder community.²¹

In international fora, the Commission advocates an approach summarised by the acronym COMPACT: the internet as a space of civic responsibilities, one unfragmented resource governed via a multistakeholder approach to promote democracy and human rights, based on a sound technological architecture that engenders confidence and facilitates a transparent governance both of the underlying internet infrastructure and of the services which run on top of it.

ii Universal service

Under EU law, telecom operators should provide to all citizens a basic set of electronic communications services irrespective of the end-users’ location and profitability. Universal service is thus an inclusive tool aimed at ensuring a telephone connection for everybody.

Access to broadband internet is currently outside the scope of universal service at the EU level.²² However, several EU measures encourage the take-up of broadband. Indeed, broadband internet is one of the cornerstones of the Digital Agenda. In its Communication on this subject the Commission outlined its commitment to achieving two goals: (1) universal broadband coverage (combining fixed and wireless) with internet speeds gradually increasing up to 30Mb/s; and (2) fostering the deployment and take-up of NGA networks in a large part of EU territory, which would allow ultra-fast internet connections above 100Mb/s.

The Commission’s major contribution to the achievement of the goal of ‘broadband for all’ is the adoption of:

- a* a Broadband Communication outlining a common framework within which EU and national policies should be developed to lower the costs of broadband deployment throughout the entire EU territory;
- b* a Recommendation on NGA Networks on 20 September 2010 (the NGA Recommendation); and

21 See Commission’s press release of 15 March 2014.

22 See Commission Communication of 23 November 2011, COM(2011) 795 final, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0795:FIN:EN:PDF>. In March 2014 the Commission started the fourth review of the scope of universal service. In July 2014 BEREC provided a Report, including the views of the NRAs. See http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/4479-ec-questionnaire-on-the-implementation-and-application-of-the-universal-service-provisions-8211-a-synthesis-of-the-results. The Commission is expected to issue its determination in 2015.

- c a Recommendation on non-discrimination obligations and costing methodologies for access services on 11 September 2013 (the Access Recommendation).²³

The Commission also adopted guidelines for the application of state aid rules relating to the rapid deployment of broadband networks.²⁴

Together with the NGA Recommendation, the Access Recommendation, and the Broadband Communication, the Broadband Guidelines on State Aid are part of the Digital Agenda's plan to achieve ambitious goals for high-speed broadband development in the European Union. These measures are discussed below (the Spectrum Policy Programme is discussed in Section III, *infra*).

Broadband Communication

On 20 September 2010, the Commission adopted a Broadband Communication calling on Member States to adopt operational broadband plans regarding ultra-high-speed networks with concrete implementing measures for realising their targets, notably with respect to funding such plans.²⁵ To this end, it provides guidance on how public authorities might promote and support investment in broadband infrastructure and reduce investment costs (for example, through coordination by national and local authorities using town planning rules and mandating access to passive infrastructures). As a follow-up, in 2012 the Commission consulted on how to reduce the cost of rolling out high-speed internet.²⁶ The results of the consultation will feed into the Commission's impact assessment of potential measures at EU level on reducing the costs of broadband roll-out.

NGA Recommendation

The Commission adopted the NGA Recommendation on 20 September 2010, the same day on which it adopted the Broadband Communication.²⁷ The NGA Recommendation seeks to provide NRAs with guidance so that they may have a common approach when deciding whether to impose obligations on incumbents in connection with NGA networks. The NGA Recommendation also tries to strike a balance between investment in such a highly capital-intensive infrastructure and regulating the 'migration' (or transition) from old copper networks to NGAs.

23 See 'Broadband Communication', 'Recommendation on NGA Networks' and 'Access Recommendation', *infra*.

24 See 'Revision of the Broadband Guidelines on State Aid', *infra*.

25 See Commission Communication, COM(2010) 472 (available at http://ec.europa.eu/information_society/activities/broadband/docs/bb_communication.pdf).

26 See press release 'Digital Agenda: Commission opens public consultation on how to reduce the cost of rolling out high speed internet', available at http://europa.eu/rapid/press-release_IP-12-434_en.htm.

27 Commission Recommendation of 20 September 2010, O.J. 2010 L251/35.

The scope of the Recommendation primarily covers remedies to be imposed upon operators deemed to have significant market power (SMP).²⁸ However, where it is justified on the grounds that duplication of infrastructure is economically inefficient or physically impracticable, NRAs may also impose obligations of reciprocal sharing of facilities on non-dominant undertakings, which would be appropriate to overcome bottlenecks in the civil engineering infrastructure and terminating segments.

In 2013 and 2014, the Commission has extensively relied on the NGA Recommendation to criticise national regulatory proposals which, for example, do not provide for fibre-based unbundling of the local loop.

Access Recommendation

After a long debate with BEREC and NRAs, the Commission published a recommendation on access remedies on 11 September 2013, the same day on which it adopted the ‘Connected Continent’ proposal (See *infra*).²⁹

The Access Recommendation is part of the Commission’s envisaged antidote to the current ‘regulatory mess [which is] hurting broadband investment [with] consumers and businesses stuck in slow lane’.³⁰ According to the Commission, improved guidance to NRAs in this field would further reduce a current problem (i.e., companies and users facing different outcomes depending on where they live and operate).

The Access Recommendation relies on two pillars: ensuring equivalence of access; and setting out a harmonised costing methodology.

As to the first pillar, the Commission suggests that equivalence of inputs (EoI) (i.e., the supply to competitors of the same access services enjoyed by the vertically integrated company’s downstream units) is in principle ‘the surest way’ to avoid non-price-related discrimination.³¹ Since EoI may be disproportionate in certain instances, NRA are tasked to determine at which level the imposition of EoI is appropriate and mandate access based on an equivalence of output model in all other instances.³² The Recommendation also proposes some measures intended to monitor compliance with

28 For more details on the applicable remedies, See the 4th edition of this Chapter.

29 The measure follows Commissioner Kroes’ policy statement issued on 12 July 2012 (available at http://europa.eu/rapid/press-release_MEMO-12-554_en.htm?locale=en).

30 See Commission’s press release of 30 August 2013.

31 The EoI model ensures that the incumbent’s and the competitor’s downstream access product use exactly the same physical upstream inputs, e.g. same tie-cables, same electronic equipment, same exchange space, etc.. Conversely, the Equivalence of Outputs (‘EoO’) ensures that the access products offered by the incumbent operator to alternative operators are comparable to the products it provides to its retail division in terms of functionality and price, but they may be provided by different systems and processes. The EoI model is currently implemented only in the UK, based on a commitment entered into by BT in 2005, whilst in 2008 the Italian incumbent committed to a EoO model.

32 See Commission, Recommendation of 11.9.2013, C(2013) 5761 final, recitals 13 to 17, available at http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf.

non-discrimination obligations (such as the establishment of a technical replicability test, and the setting of key performance indicators (KPI) to evaluate and compare the quality of services rendered to competitors).

As to the second pillar, in Commissioner Kroes' words 'we need to lift price regulation of high-speed networks where it is not warranted, and make regulation of copper prices stable and consistent across the EU'³³ to guarantee market stability and regulatory consistency, thus favouring broadband investments.

Therefore, the Commission suggests the adoption of a common costing methodology (bottom up – long-run incremental cost +) which, for copper-based local loop unbundling services, should lead to monthly tariffs within the price band of €8/€10 per line (2012 prices).³⁴ This price band is expected to incentivise operators to climb up the ladder of investment by providing them with the right information to inform their 'make or buy' decisions. In order to enhance regulatory stability and market consistency, the Commission suggests that, once they have set tariffs within the mentioned price band, NRAs should not modify the costing methodology (and hence the tariffs) without a market-analysis procedure, and should avoid undue price fluctuations by ensuring stable access prices over at least two review periods (i.e., about six years).

The Access Recommendation is likely to reduce NRAs' discretion in relation to the regulation of access services. Since its adoption, the Commission has extensively relied on the Access Recommendation's principles to challenge NR's proposals that it found inconsistent with its principles.³⁵

The new state-aid Broadband Guidelines

On 19 April 2011, the Commission launched a public consultation on the revision of the 2009 Broadband Guidelines, which provide a comprehensive framework for the application of EU state aid rules to this sector. After two rounds of public consultation, in January 2013 the Commission adopted new guidelines, which are aimed at taking into account technological advances, and acknowledging that super-fast (next generation access) networks can be based on different technological platforms. The Guidelines are

33 Idem.

34 To this extent, in September 2013, BEREC issued its Report on the Regulatory Accounting in Practice 2013, according to which data from NRAs generally confirms the ongoing trend toward an increasingly consistent approach to regulatory accounting obligations among NRAs.

35 For instance, on 11 December 2013 the Commission adopted an Article 7a Recommendation challenging some regulatory measures proposed by the Italian NRA on the ground that these measures were hampering market stability and regulatory predictability (See: Commission's press release of 11 December 2013); in a similar vein, on 26 November 2013 the Commission adopted an Article 7a Recommendation addressed to the Austrian NRA claiming that 'any new measure [on access] should also take account of the Commission's Recommendation on non-discrimination and costing methodologies to promote competition and enhance the broadband investment environment' (See: Commission's press release of 26 November 2013).

based on the distinction between competitive areas ('black' areas), where no state aid is necessary – typically urban areas – and unprofitable or underserved areas ('white' and 'grey' areas), where state aid may be justified if certain conditions are met.

To help achieve the Digital Agenda objective of delivering very fast connections (of more than 100Mb/s) to half of all European households by 2020, the new guidelines allow for public funding in urban areas, albeit subject to very strict conditions to ensure a pro-competitive outcome. To protect private investors, the guidelines require that any public investment must fulfil a 'step change' requirement: public finance of infrastructure can be allowed only if it provides a substantial improvement over existing networks and not simply a marginal improvement in citizens' connectivity. Moreover, there are new provisions regarding the publication of financing documents, a centralised database for existing infrastructure and *ex post* reporting obligations to the Commission.

On 8 May 2014, the Commission issued a handbook on EU broadband state aid to support government investment in broadband. It serves as a guidance for any public authority investing in broadband or considering cofunding projects with EU structural and investment funds. The handbook clarifies how to design a project from inception and who to contact at the regional and EU level to obtain funding and advice. In particular, the handbook emphasises that state aid may be permissible if it delivers a 'step change', defined in terms of broadband service availability and capacity, speed and competition.

iii Restrictions on the provision of service

EU Roaming Regulation

In 2007, the EU Roaming Regulation³⁶ introduced wholesale and retail price caps for roaming charges associated with voice, text messages and data services. In 2009, the EU amended the Roaming Regulation to lower those price caps until 30 June 2012, on which date it expired. On 13 June 2012, the Commission adopted a new regulation setting price caps on mobile telecommunication services.³⁷ This new regulation further reduces the caps put in place by the previous regulation but also introduces price caps on mobile data usage. Furthermore, from 1 July 2014, customers also have the option of using a separate mobile roaming provider when roaming (either through a contract or by choosing a provider at their destination) without having to change numbers.

EU institutions are currently evaluating changes to the roaming regime within the Connected Continent proposal.³⁸ In Commissioner Kroes' words, 'the level of roaming charges is still an important obstacle to the single market, and continues to be an important cost to citizens and businesses and as such constitutes a significant

36 Regulation (EC) No. 717/2007, 27 June 2007 (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:171:0032:0032:EN:PDF>).

37 Regulation (EU) No. 531/2012 of 13 June 2012, OJ 2012 L172/10, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:172:0010:01:EN:HTML>.

38 See answer given on 22 July 2013 by Ms Kroes on behalf of the Commission to the Parliamentary question No. E-006805/2013 (available at www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-006805&language=EN).

impediment to mobility' in the common market.³⁹ Thus, the proposal aims to equalise the cost of calls so that the price does not differ depending on whether the customer is at home or roaming.

Net neutrality

The debate about net neutrality is still at an earlier stage in Europe than it is in the United States.

However, some rules enshrined in the current EU telecoms regulatory framework already cover net neutrality issues:

- a* Under the current regulatory framework, NRAs are required to promote 'the ability of end-users to access and distribute information or run applications and services of their choice'.⁴⁰ They are also entitled to set minimum quality of service requirements.⁴¹ This sets a very important principle for net neutrality, as it recognises and safeguards the basic freedoms of internet users.
- b* Moreover, the telecoms framework foresees the possibility of NRAs, after consulting the Commission, setting minimum quality of service requirements. This should ensure that traffic management and possible prioritisation do not lead to a degradation of content and services provided by non-commercial actors or by new entrants.
- c* The telecoms framework provides for strong transparency measures to ensure that consumers understand the level of service their providers are supposed to guarantee⁴² and are offered the ability to subscribe to a contract of no more than 12 months.⁴³

On 30 June 2010, the Commission launched a public consultation on traffic management, transparency, quality of service and the need for regulation. The consultation closed on 30 September 2010 with 318 responses from a wide range of stakeholders (including BEREC, operators, ICPs, Member States' authorities, consumer and civil society organisations and a number of individuals). On 9 November 2010, the Commission released a report summarising those responses.⁴⁴ The report showed that respondents generally agreed that traffic management is necessary to preserve a secure and efficient network and that traffic management currently does not have any negative impact on the consumer. However, BEREC voiced concerns that traffic management could be – and in some instances was – used to favour one service over another or to block certain services altogether (e.g., IPTV and VoIP, especially over mobile networks), and that the packet inspection associated with traffic management could affect privacy.

39 *Idem.*

40 Article 8 Section 4(g) of the Framework Directive.

41 Article 22(3) of the Universal Service Directive.

42 Article 21 of the Universal Service Directive.

43 Article 30(6) of the Universal Service Directive.

44 See http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/net_neutrality/index_en.htm.

In addition to this consultation process on 11 April 2011, the Commission adopted a Communication on net neutrality summarising the issues raised in the public consultation. It announced that new regulation was currently not necessary and that BEREC would continue exploring a number of issues for which data was incomplete or imprecise (*inter alia*: barriers to switching; blocking and throttling practices; transparency and quality of service; possible competition issues).⁴⁵ The Commission made clear that under Articles 101 and 102 TFEU it reserved its right to assess any behaviour related to traffic management that might restrict or distort competition.

On 6 October 2011, BEREC published for consultation its draft Guidelines on Net Neutrality and Transparency, which identified best practices and recommended approaches for NRAs, and reported on the outcome of the December 2011 public consultation.⁴⁶ The next day, the European Data Protection Supervisor adopted an opinion on the European Commission Communication on open internet and net neutrality in Europe, highlighting the serious implications of traffic management practices on users' fundamental right to privacy and data protection.⁴⁷

On 29 May 2012, BEREC published the results of its investigation into traffic management practices. It found that among the wide array of traffic management practices, the most frequently employed were the blocking or throttling of peer-to-peer traffic (on both fixed and mobile networks) and the blocking of VoIP traffic (mostly on mobile networks). In some cases, operators were instead giving preferential treatment to certain traffic, such as streaming or other real-time applications (which include VoIP and instant messaging). The most common method used for traffic management is deep packet inspection, through which an operator examines the content of packets that pass through its network.

On the same day, BEREC released three documents for public consultation: the guidelines for quality of service in the area of net neutrality;⁴⁸ a report on differentiation practices and related competition issues;⁴⁹ and an assessment of IP interconnection in the context of net neutrality.⁵⁰ In light of that information and the implementation of the revised telecoms framework, the Commission announced that it might issue additional guidance or take more stringent measures to achieve competition and consumer choice.

However, in 2013 the Commission seemed to embrace a different stance. Commissioner Kroes stressed that failure to take coordinated action on this issue would shatter the fragile construction of the telecoms single market (which is already far from being completed), since future innovative services might have to stop at national

45 See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0222:FIN:EN:PDF>.

46 Available at http://erg.eu.int/doc/berec/consultation_draft_guidelines.pdf and http://berec.europa.eu/doc/bor11_66_transparencyinput.pdf, respectively.

47 Press release available at www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2011/EDPS-2011-10-Net-neutrality_EN.pdf.

48 Available at http://berec.europa.eu/doc/consult/bor_12_32_guidelines.pdf.

49 Available at http://berec.europa.eu/doc/consult/bor_12_31_comp_issues.pdf.

50 Available at http://berec.europa.eu/doc/consult/bor_12_33.pdf.

borders because of restrictive national laws.⁵¹ The proposal for the regulation Connected Continent includes a limitation on the use of traffic management.

On the antitrust side, on 9 July 2013, the Commission conducted dawn raids on several European telecoms operators to investigate whether the operators were blocking or throttling services that use up large amounts of data. According to the Commission, such conduct would not only violate net neutrality, but would also breach Article 102 TFEU and, as such, represent an abuse of dominant position.⁵²

On 3 April 2014, the European Parliament approved in first reading the Connected Continent proposal.⁵³ As regards net neutrality, the Parliament amended the proposed text by shortening the list of 'exceptional' cases in which internet access providers could block or slow down the internet. In addition, the amended text states that these practices can be permitted only to enforce a court order, preserve network security or prevent temporary network congestion. Moreover, such 'traffic management measures' need to be 'transparent, non-discriminatory and proportionate' and 'not be maintained longer than necessary'.

Monitoring and control of content

Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the internal market (the electronic commerce directive), explicitly sets out that no 'intermediary' should be obliged to engage in monitoring activities of a general nature (the 'mere conduit' rule).⁵⁴ This was confirmed in the 2009 reform of the regulatory framework. In particular, Recital 30 of Directive 2009/136 stated that 'Directive 2002/22/EC (the Universal Service Directive) does not require providers to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information.'

In the ensuing 2011 communication, the Commission noted that although the electronic commerce directive removed a number of obstacles to cross-border online services, clarification was required, *inter alia*, regarding the liability of intermediary internet providers.

The interpretation of the mere conduit rule was also probed in two cases put before the European Court of Justice, which involved Scarlet (an ISP) and Netlog (a

51 See: 'The EU, safeguarding the open internet for all', SPEECH/13/498 of 4 June 2013 (available at http://europa.eu/rapid/press-release_SPEECH-13-498_en.htm).

52 See: 'Antitrust: Commission confirms unannounced inspections in internet connectivity services', MEMO/13/681 of 11 July 2013 (available at http://europa.eu/rapid/press-release_MEMO-13-681_en.htm).

53 European Parliament legislative resolution of 3 April 2014 (COM(2013)0627 – C7-0267/2013 – 2013/0309(COD)).

54 See Section 4, Articles 12 to 15.

social networking website) and each company's responsibility for exchanges of allegedly unlawful content by its users.⁵⁵

In the opinion released on 14 April 2011 in *Scarlet*, Advocate General Cruz Villalón argued that Directives 2001/29/EC, 2004/48/EC, 95/46/EC, 2002/58/EC and 2000/31/EC, interpreted in the light of Articles 7, 8, 11 and 52, Paragraph 1 of the Charter of Fundamental Rights of the European Union, do not allow national courts to order an ISP to filter all traffic transmitted through its network for an indefinite period of time, at the ISP's own cost. The EU court followed the AG's opinion and held that these directives preclude a national court from issuing an injunction against a hosting service provider that requires it to install a system for filtering information that is stored on its servers by its service users if the injunction applies indiscriminately to all those users as a preventative measure, at the exclusive expense of the hosting service provider, and for an unlimited period of time.⁵⁶ However, in *Scarlet* the Court left open the question on the admissibility of injunctions against specifically determined copyright-infringing practices. On 27 March 2014 the EU Court of Justice held that an internet service provider may be ordered to block its customers' access to a copyright-infringing website (UPC Telekabel⁵⁷). Such an injunction and its enforcement must, however, ensure a fair balance among the fundamental rights concerned. The Court of Justice, in this case, provided guidance on the correct interpretation of Article 5, paragraphs 1 and 2, letter b) and 8, paragraph 3 of the EU Copyright Directive,⁵⁸ as well as some of the fundamental rights enshrined in EU law.

Specifically, the Court held that an ISP that allows its customers to access protected material made available to the public on the internet by a third party is an intermediary whose services are used to infringe a copyright. According to the Court, the EU Copyright Directive does not require a specific relationship between the infringer and the intermediary against whom an injunction may be issued. Nor is it necessary to prove that the customers of the ISP actually accessed the protected material made accessible on the third party's website, because the Directive requires that the measures which the Member States take in order to conform to that Directive are aimed not only at ending infringements, but also at preventing them.

The Court held that Member States must ensure a fair balance among the fundamental rights at stake. Therefore the fundamental rights concerned do not preclude an injunction, on two conditions: that the measures taken by the ISP do not unnecessarily deprive users of the possibility of lawfully accessing the information available; and that those measures have the effect of preventing unauthorised access to the protected

55 Cases C-70/10, *Scarlet Extended v. SABAM*, dated 24 November 2011; and Case C-360/10, *Sabam v. Netlog NY*, dated 16 February 2012, (information available on the website of the European courts http://curia.europa.eu/jcms/jcms/Jo1_6308/).

56 The Court upheld the same arguments in the *Netlog* case.

57 Case C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*.

58 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, OJ 2001 L 167, p. 10.

material or, at least, of making it difficult to achieve and of seriously discouraging users from accessing the material that has been made available to them through breach of the intellectual property right.

Another crucial aspect concerning the role of ISPs relates to the so-called ‘right to be forgotten’. On 13 May 2014, the EU Court of Justice held that, by searching systematically for information published on the internet, indexing websites, recording and making them available, the operator of a search engine is ‘processing’ personal data within the meaning of Article 2(b) of Directive 95/46/EC⁵⁹ (*Google Spain*⁶⁰). Following its earlier decision (*Satakunnan Markkinapörssi and Satamedia*), the Court confirmed that, even when the information collected by the operator of a search engine had already been published elsewhere by others, the search engine’s related activities must still be classified as processing under the Directive.

The Court did not describe such a processing as unlawful but clarified that even initially lawful processing of accurate data may become incompatible with the Directive ‘where those data are no longer necessary in the light of the purposes for which they were collected or processed [...] in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed’.⁶¹ In addition, the Court held that Google may be considered a ‘controller’ of the personal data circulated by third parties on the internet, given that its search engine would determine the means and purposes of the data processing.⁶²

In assessing whether the data subject would be entitled to require the search engine to remove information relating to him ‘on the ground that that information may be prejudicial to him or that he wishes it to be “forgotten” after a certain time’, the Court did not provide the data subject with an absolute right to be forgotten. On the contrary, the Court confirmed that the right to have personal data erased has clear limits. The request for erasure has to be assessed on a case-by-case basis by the operator of a search engine, which will have to apply the criteria mentioned in EU law and the European Court’s judgment. These criteria relate to the accuracy, adequacy, relevance – including time passed – and proportionality of the links, in relation to the purposes of the data processing but do not require that the inclusion of the information in question cause prejudice to the data subject.⁶³ Accordingly, a fair balance should be sought among: the legitimate interest of internet users in having access to that information; the economic

59 Paragraphs 28 and 41, *Google Spain*.

60 Case C-131/12, *Google Spain SL, Google Inc./Agencia Española de Protección de Datos, Mario Costeja González*.

61 The Directive grants individuals the right to obtain from the controller ‘rectification, erasure or blocking’ of personal data (Article 12(b)) and to object to processing on ‘compelling legitimate grounds’ (Article 14). The Court affirmed that these rights can also be invoked against search engines since ‘it is the search engine operator which determines the purposes and means of that activity and ... must, consequently, be regarded as the ‘controller’ in respect of that processing pursuant to Article 2(d)’ (Paragraph 33).

62 Paragraphs 32, 33 and 41, *Google Spain*.

63 Paragraphs 89, 93 and 96, *Google Spain*.

interest of the search engine; and the data subject right to request that the information in question no longer be made available to the general public through its inclusion in a list of search results. Finding a fair balance between the right to be forgotten and other fundamental rights, such as the freedom of expression and of the media, is the purpose of the proposal for a data protection Regulation – introduced in 2012 – that strengthens the general principle established by the Court of Justice and improves legal certainty.⁶⁴

iv Security

*Privacy and data retention*⁶⁵

General EU rules on privacy are set out under Directive 95/46/EC.⁶⁶ Special legislation translates the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector. In particular, under Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communication sector (as amended by Directive 2006/24/EC and Directive 2009/136/EC), service providers must take strong security measures to protect their customers' personal data. The rules also require that service providers inform, without undue delay, data protection authorities as well as their customers in the event of a security breach.⁶⁷ To ensure consistent implementation of these rules across Member States, the Commission adopted 'technical implementation measures' specifying what telecoms operators and ISPs should do if their customers' personal data is lost, stolen or otherwise compromised. Under these new rules, telecoms operators must inform the competent national authority (and, in some circumstances, their customers as well) within 24 hours after detection of the incident.⁶⁸ These rules also provide that the user's consent must be obtained in order

64 See article 17 of the proposed Regulation. Following the ruling, Google announced that it was continuing to work with data protection authorities in order to refine processes and standards for distinguishing between information that should be removed and information that should remain in the best interest of the public. Google has created a special advisory committee to strike the right balance between freedom of expression and an individual's right to be forgotten.

65 On the protection for children, see the fourth edition of this Chapter.

66 Directive 95/46/EC of 23 November 1995, OJ 1995 L 281/31.

67 The current version of the draft Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), released by the Commission on 25 January 2012 anticipates a similar requirement to notify all personal data breaches to the supervisory authority (See COM(2012) 11 final). This requirement was approved by the Council of the European Union in April 2013 (See press release '3234th Council meeting Agriculture and Fisheries', Luxembourg, 22 April 2013, available at: http://europa.eu/rapid/press-release_PRES-13-145_en.htm).

68 See Commission Regulation (EU) No. 611/2013 of 24 June 2013, OJ L 173/2. The new regulation is not associated with the draft regulation on data protection, which in its current version also provides for a 24-hour notification obligation. This requirement was heavily discussed, and the European Parliament rapporteur Jan Philipp Albrecht proposed to extend

to store data on the user's computer that is not related to the service accessed by the user (e.g., cookies for targeted behavioural advertising).

The Commission will also incentivise companies to encrypt personal data. To this end, in conjunction with the European Network and Information Security Agency (ENISA), the Commission will publish an indicative list of encryption techniques to render personal data unintelligible to any person not authorised to see it. If a company applies such techniques but suffers a data breach, it is not required to notify the customer of the breach because the breach would not have actually revealed the customer's personal data.⁶⁹

Pursuant to Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (as amended by Directive 2006/24/EC and Directive 2009/136/EC), ISPs do store certain basic information (time, duration or volume of communication, etc.) about their customers' communications, which they use for various purposes (e.g., billing, charging other companies for interconnection and marketing). The ban does not affect the storage of information that is necessary for the conveyance of a communication. Apart from the ISPs' storage and use of this traffic data, such data can only be used by certain national authorities (typically, the police) in accordance with the laws in each EU country and only in exceptional circumstances (e.g., for detecting and investigating serious crimes).

Under the EU rules, service providers must keep traffic data and geolocation data (e.g., data that indicates the location of computer or mobile phone) generated or processed by them and the data necessary to identify the subscriber or registered user associated with that data, for a period of between six months and two years, depending on national legislation.

Activities like listening, tapping, storing or otherwise intercepting or monitoring communication without the user's consent are banned. However, Member States may restrict confidentiality of online communication for reasons relating to state security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences.

A significant review of the current European data protection framework was initiated in 2009 in order to further harmonise data protection legislation throughout Europe, whose fragmentation is considered to be overly burdensome to businesses with cross-border activity.

On 12 March 2014, the Parliament passed the compromise texts of the general data protection regulation⁷⁰ together with the police and criminal justice data protection

this period to 72 hours. MEP Albrecht's report is available at: www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf.

69 See Commission Press Release 'Digital Agenda: New specific rules for consumers when telecoms personal data is lost or stolen in EU,' 24 June 2013 (available at http://europa.eu/rapid/press-release_IP-13-591_en.htm).

70 EP legislative resolution (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)), 12 March 2014, available at: www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0212.

directive.⁷¹ Before final adoption, the regulation and the directive have to be submitted to the EU Council of Ministers.⁷² It is generally expected that final agreement will now be reached in 2015.

Harmonising data protection standards in Europe is seen as a ‘necessity’ and a sense of urgency has been raised by the recent US spying scandals.⁷³ Press sources report that in August 2013, the Commission mandated an informal working group composed of CEOs from major IT-sector companies to submit proposals. Some are calling for a ‘Schengen for data’, in reference to the 1995 Schengen Agreement that removed border controls between 10 EU Member States.⁷⁴ Under this proposal, data of EU citizens or companies must be hosted, treated and processed only on European territory even for services offered by non-EU companies.

The Snowden revelations alleging that the United States has conducted mass surveillance of EU citizens prompted a six-month investigation carried out by the Committee for Civil Liberties, Justice and Home Affairs. The Committee published a resolution⁷⁵ approved by the EU Parliament on 12 March 2014. In addition to describing the scope of the surveillance, the Resolution called for withholding the Parliament’s consent to the Transatlantic Trade and Investment Partnership if European data protection principles are not fully respected; suspending the Terrorist Finance Tracking Program until alleged breaches of the underlying data disclosure agreements have been fully clarified; and suspending the Safe Harbor Framework immediately, claiming that it does not effectively protect European citizens. The Parliament also affirmed its support for more Europe-based cloud providers and recommended a ‘European whistle-blower protection programme’.⁷⁶

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- 71 EP legislative resolution (COM(2012)0010 – C7-0024/2012 – 2012/0010(COD)), 12 March 2014, available at: www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0010%28COD%29&cl=en.
- 72 The Commission hopes for the regulation to become law in late 2014. EU Press release, 28 January 2014, available at: http://europa.eu/rapid/press-release_IP-14-70_en.htm.
- 73 See EU Press Release, 12 March 2014, available at: http://europa.eu/rapid/pressreleaseMEM0-14-186_en.htm.
- 74 See press release ‘Atos CEO calls for “Schengen for data”’, available at www.telecompaper.com/news/atos-ceo-calls-for-schengen-for-data--963463. For concerns associated with this proposal, see Section V, *infra*.
- 75 Committee on Civil Liberties, Justice and Home Affairs report (2013/2188(INI)), 21 February 2014, available at: www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2014_0139&language=EN.
- 76 From the perspective of data protection, the suspension of the Safe Harbor Framework would be the most important development since it could disrupt UA–EU data flows. The Safe Harbor Framework essentially provides a method for US businesses to transfer personal data from the EU in accordance with the EU Data Protection Directive (95/46/EC).

*Cybersecurity*⁷⁷

Since 2004, ENISA has worked with the relevant national authorities and with the European institutions to disseminate knowledge, facilitate the sharing of best practices, and coordinate responses to common threats.⁷⁸ The role of ENISA was reaffirmed in the 2009 reform of the regulatory framework.⁷⁹ In the 2010 Digital Agenda for Europe, the Commission promised to present measures aiming at a reinforced and high-level Network and Information Security Policy in 2010, including legislative initiatives such as a modernised ENISA, and measures allowing for faster reactions in the event of cyberattacks, including a common emergency response team for the EU institutions.

On 13 March 2014, the EU Parliament approved the draft Network & Information Security (NIS) Directive, also known as the Cybersecurity Directive, which was developed within the framework of the Commission's 'EU Cyber Security Strategy'.⁸⁰ The Directive aims to ensure a high common level of network and information security across the EU through a set of wide-ranging measures that will generate cooperation and information sharing mechanisms and set minimum requirements for a broad scope of public and private players.⁸¹

According to the proposed NIS Directive, Member States should ensure that 'market operators' take appropriate technical and organisational measures in order to manage the risks relating to the security of networks and information systems that they test and employ as part of their activities, all while safeguarding the continuity of services offered through these networks and systems. It also requires 'market operators' to notify the competent national authority of any 'incidents', defined as any circumstances or events having an adverse effect on safety.⁸²

The most disputed aspect of proposed NIS Directive likely relates to the scope of the obligated operators, given that the Commission had proposed to include the 'enablers of key internet services' (i.e., cloud computing operators, search engines, social networks and app stores). However, the Parliament excluded 'internet enablers' (as well as public administrations). Moreover, the proposed text raises an issue of regulatory coordination as energy, transport, financial services and telecoms companies are already supervised by sector-specific national regulators. The proposed text is subject to discussion in Council and it is likely that it will be significantly amended, thus requiring a second reading by Parliament in 2015.

77 On the international cooperation in this field, see the fourth edition of this Review.

78 See www.enisa.europa.eu/about-enisa.

79 See Articles 13a and 13b of the Framework Directive (consolidated version).

80 The directive's text is not yet available.

81 Paul Waszin, Nauta Dutilh, 'Network and information security NIS: EU Strategy and Directive.' 4 May 2013, available at: www.lexolov.com/librarv/detail.aspx?s=fbOffQ7d-09c8-4add-aa58-7daf780eSd6f.

82 In fact, as the Commission explained in the FAQ related to the Directive, only the incidents that have a significant impact on the security of essential services should be subject to notification.

III SPECTRUM POLICY

i Development

Spectrum management remains within the competence of the Member States.⁸³ However, it is recognised that European law may play a crucial role in strategic planning, coordination and, where appropriate, harmonisation at the EU level, so that spectrum users derive the full benefits of the internal market. More specifically, in 2005 the Commission published a Communication on ‘A market-based approach to spectrum management in the European Union’⁸⁴ and in the 2010 Digital Agenda for Europe, the Commission committed to initiating the legislative process leading to a decision by the European Parliament and Council on a European Spectrum Policy Programme for more efficient management of radio spectrum.⁸⁵

In this context, in January 2014 the Commission set a high-level group in charge of helping the Commission to develop, in cooperation with the Member States, a long-term strategic and regulatory policy on the future use of the entire UHF band for broadcasting and wireless broadband applications (470-790 MHz).⁸⁶ In particular, the group should look at how Europe will access and use audio-visual content and data in the medium to long term and address relevant issues (such as securing the public interest and consumer benefits while facilitating market transformation and assessing the regulatory role of the EU in coordinating developments). According to Commissioner Kroes, in this matter ‘Europe [should] find a way forward that delivers for all: both more and better television and more and better broadband.’

In November 2013, the Commission also adopted new rules that allow the latest wireless communication technology (and hence smartphones and tablets) to be used by passengers on board aircraft flying over the EU.⁸⁷ This means that spectrum for 3G (UMTS) and 4G (LTE) communications may be used above an altitude of 3,000 metres. Until now only 2G (GSM) services have been allowed on-board aircraft flying in the EU, which is impracticable for sending large amounts of data (for example sending large attachments, downloading eBooks, watching video).

As mentioned, the ‘Connected Continent’ proposal purports to consider spectrum as a ‘European input’, and thus sets a number of common rules. In the April 2014 first reading of the Connected Continent Regulation,⁸⁸ the EU Parliament agreed with the Commission’s proposal. In addition, the Parliament introduced a common minimum

83 For more details on the regime applicable to spectrum auctions and fees, see the fourth edition of this Review.

84 See COM(2005) 400, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0400en01.pdf.

85 For more details on the Commission’s initiatives aiming at promoting the supply of advanced services over the spectrum, See the 4th edition of this Chapter.

86 See Commission’s press release of 13 January 2014.

87 See Commission implementing decision 2013/654/EU of 12 November 2013.

88 Available at www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0281.

licence terms of 25 years for spectrum in harmonised bands, which would apply also to current licence holders, and provisions to facilitate spectrum trading.

IV MEDIA

i Restrictions on the provision of service

The AVMSD sets out EU rules, *inter alia*, on advertising, protection of minors, and promotion of European works. Note that, with respect to media ownership, under EU law there are no restrictions on foreign (i.e., non-EU) ownership. Member States are, however, free to impose such restrictions against non-EU Member States. See the corresponding section in the chapters on national jurisdictions.

The AVMSD applies to all audio-visual media services, whether linear (traditional television) or non-linear (VOD), irrespective of the technology used to deliver the content (principle of technological neutrality).⁸⁹

ii Internet-delivered video content

The impact on the move to internet-delivered video content varies from country to country. Note that the Commission has advocated for a principle of technological neutrality, whereby Member States are enjoined from favouring a given distribution means over another (e.g., DTTV over digital satellite) or a given company's product or technology over another's. This principle has been upheld by the judgment of the General Court in *Mediaset*,⁹⁰ where the court dismissed Mediaset's application to annul a Commission decision that prohibited, as incompatible, aid given to a subsidy by the Italian state for the purchase of DTTV decoders in the context of the digital switchover, for breach of the principle of technological neutrality. The Court of Justice confirmed the General Court's decision on 28 July 2011.⁹¹

On 22 April 2013, the Commission published its Green Paper 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values'. The Green Paper invited stakeholders, including viewers and internet users, to share their views on the changing media landscape and borderless internet, particularly with regard to market conditions, interoperability and infrastructure, and implications for EU rules in light of the emerging diffusion of Connected TV (which, from a legal perspective, means convergence between sectors subject to different rules and restrictions). As to the market evolutions, the Commission states that convergence between different media is a reality, and that it is expected that connectable TVs will move from 40.4 million devices at the end of 2012 to become the leading TV equipment in EU households by 2016. By the same year, it is expected that video will be the majority of consumer internet traffic video and that the majority of IP traffic will be channelled mainly through wi-fi and mobile devices.

89 See Article 1(1)(a) and the explanatory note provided by the Commission.

90 Case T-177/07.

91 Case C-403/10.

V THE YEAR IN REVIEW

i Cloud computing

The Digital Agenda calls for an EU strategy for cloud computing as one of the actions related to ICT in light of the significant annual growth rate expected in this area. In order to do so, the EU has to address business user needs while protecting citizens' rights and privacy. The Commission released its much-anticipated Communication on 'Unleashing the Potential of Cloud Computing in Europe' (Cloud Computing Strategy) on 27 September 2012.⁹²

The Cloud Computing Strategy does not envisage the creation of a 'European Super Cloud' (i.e., a dedicated hardware infrastructure to provide generic cloud computing services to public-sector users across Europe), but rather relies on public cloud offers that meet European standards, are competitive, open and secure. The Commission does not, however, exclude the creation of dedicated clouds by public authorities for the storage and treatment of sensitive data. The Cloud Computing Strategy gives no preference to European suppliers through protectionist measures, but instead sets out actions that will lay the foundation for Europe to become a 'world cloud computing powerhouse'.

On 26 June 2014, the Commission released new guidelines to support cloud computing.⁹³ The guidelines have been prepared by a Cloud Select Industry Group as part of the Commission's European Cloud Strategy to raise confidence in these services. These guidelines cover terminology and metrics in service level agreements, in particular the availability and reliability of the cloud service, the quality of support services they will receive from their cloud provider, security levels, and how to better manage the data they keep in the cloud. As a next step, the European Commission will test these guidelines with users, in particular SMEs.

If adopted, the above-mentioned proposed 'Schengen area for data' (including a ban on export of European company and personal data outside the EEA) would have many consequences on the cloud computing business. First of all, a European cloud would undermine Europe's ambitions to become a 'world cloud computing powerhouse'. This proposal may hinder multinational cloud computing services because, for example, other jurisdictions may respond by requiring that their data should also be stored only in their own jurisdictions, which would undermine the competitiveness of European cloud providers. Second, it is unclear if this proposal is compatible with the EU and Member States' obligations under the WTO's General Agreement on Trade in Services. It would also reduce EU consumers' choices, and impose great difficulties on any European-based firms conducting business outside the EEA. Indeed the Parliament seems more

92 Commission Communication, 'Unleashing the Potential of Cloud Computing in Europe', COM(2012) 529/2.

93 On the initiatives carried on by the Commission in 2013 to promote cloud computing services, see the fourth edition of this Review.

supportive of a data protection legal framework that secures fundamental rights in the European market, but without requiring a Schengen area for data.⁹⁴

ii The internet of things and big data

In 2012 the Commission held a consultation on the internet of things (IoT), focusing on the regulatory challenges posed by the inter-connection of everyday objects among themselves and the ecosystem of smart applications and services to which these interactions give rise.⁹⁵ First, there are data protection issues including how users should be informed about the nature and the purpose of data collection, and how they may access and amend personal data. Second, there is a debate as to whether there should be one unified IoT network or a multiplicity of IoT 'silos' without interoperability. The Commission plans to introduce specific new legislation in 2015 for IoT, and develop specific data protection impact assessment measures.⁹⁶

The Commission is also monitoring the development of big data (i.e., the handling of large volumes of information required by numerous applications such as e-medicine, e-banking). On 2 July 2014, the Commission published a communication titled 'Towards a thriving data-driven economy',⁹⁷ which specifically addresses the big data market and its potential for the EU economy (big data-related turnover is expected to grow worldwide to US\$16.9 billion in 2015 at an annual rate of 40 per cent). The Commission acknowledges a lack of transnational coordination, inadequate infrastructure and funding chances, as well as a patchy and excessively intricate legal framework. To face these challenges, the Commission suggests a variety of actions (i.e., developing an open data incubator to support SMEs, establishing supply chains further relying on data and cloud computing, as well as setting up a big data public-private partnership in fields such as personalised medicine and food logistics).

94 On this point see Jan Philipp Albrecht, Rapporteur on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)). www.dw.de/i-expect-merkels-actions-to-follow-her-words/a-17438783.

95 As of July 2014, there were 27 IoT projects under implementation. See http://cordis.europa.eu/fp7/ict/enet/projects_en.html.

96 See the report on the public consultation on IoT, <http://ec.europa.eu/digital-agenda/en/news/conclusions-internet-things-public-consultation>. In this vein, see European Research Cluster on the Internet of Things, *Internet of Things Strategic Research and Innovation Agenda* (O. Vermesan and P. Friess, Ed.), 2014, available at www.internet-of-things-research.eu/pdf/IERC_Cluster_Book_2014_Ch.3_SRIA_WEB.pdf.

97 European Commission, *Communication on data-driven economy* (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404888011738&uri=CELEX:52014DC0442>). On 2 July 2014, the Commission also issued a press release pushing national governments to further embrace Big Data strategies. European Commission, *Commission urges governments to embrace potential of Big Data*, IP/14/769.

iii IPRs enforcement

On 1 July 2014, the Commission adopted two communications: an action plan to address infringements of intellectual property rights in the EU; and a strategy for the protection and enforcement of intellectual property rights (IPR) in third countries.⁹⁸

The Action Plan is intended to focus the EU's IPR enforcement policy on commercial scale infringements. More precisely, the action plan envisions engaging in a dialogue with stakeholders (including online advertising agencies and payment service providers) to reduce profits from commercial-scale infringements on the internet; promoting due diligence among all actors involved in the production of goods with a high degree of intellectual property, since responsible supply chain auditing and application of due diligence reduces the risk of IP infringements; helping small businesses to enforce their intellectual property rights more effectively (to this end, the Commission will look for the first time at national schemes directly assisting SMEs in accessing justice systems); improving cooperation between Member States and facilitating exchanges of best practices; providing a comprehensive training programme for Member States' authorities with a view to achieving faster preventive actions against commercial scale IP-infringing activities across the EU and identification of barriers to cross-border cooperation.

The Strategy setting out an international approach examines recent changes and presents ways to improve the Commission's current means of action to promote enhanced IPR standards in third countries and to stem the trade in IPR-infringing goods.

The actions set out in these two communications will be carried out in 2014 and 2015, and they will be monitored by the Commission, which will consider at a later stage whether further, potentially legislative, measures are necessary.

In addition, on 29 April 2014, the Commission adopted two antitrust decisions on the enforcement of patents by Motorola and Samsung that are essential to two mobile telecom standards (standard-essential patents (SEPs)).⁹⁹ In the *Motorola* case, Motorola enforced an injunction (albeit only during one day) granted by a German court on the basis of one SEP. The enforcement led to a temporary ban on Apple's online sales of iPhones and iPads to consumers in Germany. The Commission argued that as a result of the enforcement of the injunction, Apple was obliged to enter into a settlement agreement with Motorola whereby Apple had to give up its invalidity and non-infringement claims. Similarly, in the *Samsung* case, the alleged infringement consisted of the seeking of injunctions against a willing licensee, Apple, before the German, Italian, Dutch, UK and French courts, aiming at banning certain Apple products from the market on the basis of several Samsung 3G SEPs that it had committed to license on FRAND terms. The two Commission decisions, read together, clarify that a prospective licensor of an essential patent may be found dominant even if the user of the patent owns patents reading on

98 European Commission, Commission presents actions to better protect and enforce intellectual property rights, IP/14/760 01/07/2014.

99 Case AT.39985-Motorola - Enforcement of GPRS standard essential patents, Commission Decision of 29 April 2014 (see IP 14/489), and Case AT.39939-Samsung - Enforcement of UMTS standard essential patents, Commission Commitment Decision of 29 April 2014 (see IP 14/490). See also MEMO/14/322.

the licensor's products, and that the seeking and enforcing of injunctions may infringe Article 102 TFEU when two conditions are met: a dominant SEP holder has given a commitment to license on FRAND terms during standard setting; and the potential licensee is willing to enter into a licence on FRAND terms and, if no negotiated agreement is reached within a reasonable time, it agrees to a determination of FRAND terms by a court or arbitral tribunal. The details in the Samsung commitment decision indicate the process that may be followed. A licensee may be found 'willing' even if it continues to challenge validity and infringement. Thus, the two decisions provide directions to the industry on the competition law boundaries of using SEPs to eliminate competitors from the market or to extract detrimental licensing terms. The Commission confirmed that there may be other exceptional circumstances that could justify a compulsory licence or a ban on injunctions of essential patents.

iv Music licensing

As part of its support of a digital single market, the Commission has vowed in its Digital Agenda to simplify copyright clearance, management and cross-border licensing by, *inter alia*, enhancing governance, transparency and pan-European licensing for online rights management.

On 4 February 2014, the EU Parliament approved the landmark directive on the functioning of collective rights management associations as well as the introduction of a pan-European licence system (CRM Directive).¹⁰⁰ The purpose of the CRM Directive is twofold: to increase transparency and efficiency in the functioning of collective management organisations (CMOs); and to facilitate the granting of cross-border licensing of authors' rights in the online music market.

The first objective is addressed in the general provisions on collective rights management for all areas and comprises a governance and transparency framework. The second objective of the CRM Directive (i.e., to facilitate the granting of cross-border music licensing) is addressed through the establishment of a passport model, by which collective management organisations that satisfy certain minimum requirements are enabled to license authors' online rights in musical works on a multiterritorial basis. This is not limited to downloading or streaming services only but also covers the use of music in games or audio-visual content.

The Directive will enter into force on the 10 April 2014 and Member States have until 10 April 2016 to implement it into national laws.

The Commission also planned to issue a white paper on a comprising review of online copyright ('A copyright policy for Creativity and Innovation in the European Union'). However, in July 2014 the Commission endowed the new Commission with this task.

100 Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multiterritorial licensing of rights in musical works for online use in the internal market.

v **Review of regulatory instruments within the framework for telecommunications**

Revision of the Recommendation on relevant markets

On the basis of the public consultation held between October 2012 and January 2013, the Commission is expected to adopt a revised version of Recommendation No. 2007/879/EC, which lists product and service markets within the electronic communications sector susceptible to *ex ante* regulation, by the end of 2014.

According to Article 15 of Directive 21/2002/EC (Framework Directive), the Commission should identify the electronic communications product and service markets whose characteristics justify the imposition of *ex ante* regulation. The Commission could veto NRAs' attempts to define (and hence regulate) markets not included in the recommendation.¹⁰¹

Therefore, the revised recommendation is key to the overall functioning of the EU regulatory framework since it allows NRAs to focus their regulatory efforts on markets where competition is not yet effective, helps NRAs to regulate critical markets in a coordinated manner, thereby contributing to the development of the internal market and provides market players with legal certainty.

The current version of the draft recommendation proposes further reducing the list of relevant markets susceptible to *ex ante* regulation from seven to four. In particular, no retail markets would be subject to *ex ante* regulation any longer. This is because retail markets will tend to be competitive, especially taking into account expected improvements in innovation and competition. At the wholesale level, a relevant novelty has been introduced. Indeed, the three current markets for wholesale access would be reduced to two, one of them will include high-quality broadband access for business customers.

The Commission has also analysed the increasing role of OTT providers in the market as certain OTT services may grow to the extent to which they could be considered an alternative to electronic communications services normally provided by operators (e.g., voice calls and SMS). But the Commission has concluded that, at the EU level, OTTs currently exercise only limited competitive constraints on traditional telecommunications operators. As a consequence, OTT operators will not be subject to *ex ante* regulation.

On 9 June 2014, BEREC adopted an opinion on the draft recommendation, which is broadly supportive of the Commission's overall approach.

Connected Continent proposal

The Commission's legislative proposal released on 11 September 2013 relies on three pillars: a European passport intended to allow operators to freely supply (and end-users to freely enjoy) services in the whole single market; a consistent application of remedies particularly

101 See Article 7 of the Framework Directive.

for those ‘European inputs’ such as frequencies; and a harmonised set of rules on the protection of end-users intended to increase consumer confidence in the internal market.¹⁰²

On 3 April 2014, the EU Parliament approved the first reading of the legislative resolution on the draft regulation.¹⁰³ The EU Parliament *de facto* chips away at two pillars of the Commission’s proposal. Indeed, it removed both the new single EU authorisation regime and the Commission’s veto power on national proposals for remedies addressed to dominant undertakings. Instead, the EU Parliament proposed a new regime wherein the notification for the general authorisation, if national legislation so allows, would be filed with BEREC (as opposed to a notification to the NRA).

The EU Parliament also amended the text to ban roaming charges (extra fees for using a mobile phone to call, send text messages or access the internet in another EU country) anywhere in the EU as of 15 December 2015.

Finally, the Parliament text recognises the role of BEREC as a driver of regulatory consistency in the sector, by entrusting it with new tasks across several areas. For example, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down general guidelines on traffic management measures.¹⁰⁴

The Connected Continent proposal has to be approved by the Council of Ministers to become law. The European Commission aims to complete the legislative process by the end of 2014.

vi Antitrust and merger control

Trend of merger control in mobile markets

In 2014 the Commission has cleared two mergers in the mobile telephony sector, both reducing the number of operators from four to three. The commitments in both cases include a package aimed at ensuring the short-term entry of other mobile virtual network operators (MVNOs) through obligations to sell capacity on the merged companies’ networks to one or several (up to three) MVNOs.¹⁰⁵

The industry and high-level politicians are increasingly asking for a more lenient application of the merger control rules, on the grounds that the current strict policies prevent the integration of EEA-wide telecoms businesses, and that continuing

102 On 16 September 2013, BEREC expressed some concerns about the Commission’s proposals, noting in particular that ‘the proposals represent a substantial shift in the balance of power between the Commission, Member States and national regulatory authorities, centralising competences at the Community level’ with the ‘risk’ of undermining the ability of NRAs ‘to take appropriate and proportionate regulatory action’.

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

104 Amendment 155, Proposal for a regulation, Article 24 – paragraph 3.

105 Case No. M.7018 - *Telefónica Deutschland/E-Plus* and No. M.6992 - *Hutchinson 3G UK/Telefónica Ireland*.

fragmentation hampers investments in the sector (particularly for the roll-out of fibre optic and 4G networks).

So far the Competition Commissioner has resisted, pointing out that the emergence of European champions is slowed down by regulatory barriers, not by the application of competition law, and that a more lenient approach could lead to higher prices to the detriment of end-users.

To this extent, it is noteworthy that the merger between Hutchison 3G Austria and Orange Austria, cleared by the Commission on December 2012 subject to commitments (Case No. M.6497), has allegedly led to price increases in the Austrian market.¹⁰⁶

ECJ confirms that compliance with regulation does not exclude antitrust intervention

On 10 July 2014 the European judicature confirmed that compliance with telecommunications regulation – and, in particular, compliance with the decisions taken by the NRA on the basis of the regulatory framework – does not protect operators against an intervention by the Commission on the basis of competition law. In that respect, it pointed out that the rules of the European Union on competition law supplement, through the carrying out of an *ex post facto* verification, the regulatory framework adopted by the European Union legislature for regulating the telecommunications markets.¹⁰⁷

VI CONCLUSIONS AND OUTLOOK

Four years after the launch of the 2010 Digital Agenda Communication, a new college of Commissioners is set to start a new term in the Autumn of 2014. The new President of the Commission, Jean-Claude Juncker, has already announced that ‘The first thing we should do is to rethink the application of our competition rules in digital markets [...] If we ask companies to offer their networks and services no longer only nationally, but also on a continental scale, we should in my view also apply EU competition law with a continental spirit’.¹⁰⁸ It is true that, despite several regulatory measures, the sector is still asking for a more lenient approach in reviewing mergers, arguing that more concentration is needed if the investment is to reach a critical mass. President-elect Juncker is also determined to reduce regulatory inconsistencies across national markets.¹⁰⁹ The Connected Continent

106 See www.bloomberg.com/news/2014-01-16/austrian-mobile-service-prices-rise-11-after-2013-merger.html; and http://www.ft.com/intl/cms/s/dba557c8-9c91-11e3-b535-00144feab7de,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2Fdba557c8-9c91-11e3-b535-00144feab7de.html%3Fsiteediti on%3Dintl&siteedition=intl&_i_referer=.

107 ECJ, Case C295/12, *Telefónica and Telefónica de España v. Commission*.

108 President-elect Juncker stressed this idea in the mission letter sent on 10 September 2014 to Margrethe Vestager, Commissioner-designate for Competition.

109 In the 10 September 2014 mission letter directed to Günther Oettinger, Commissioner-designate for Digital Economy and Society, Juncker stressed that ‘We must make much better use of the opportunities offered by digital technologies which know no borders. To do so, we will need to break down national silos in telecoms regulation [...] and in the application of

proposal, which should become law in 2015 at the latest, may already provide an answer to these needs. However, this suggests that in the coming years, the sector will continue to be confronted with a complex coexistence of cooperation between operators, public intervention, and interplay between regulation and competition law. Moreover, if the text approved by Parliament becomes final, Connected Continent will not resolve the tensions between the Commission, on the one hand, and NRAs and BEREC, on the other, with the risk of markets becoming even more fragmented.

competition law. The more markets are regulated transnationally, the more competition rules can become transversal or even continental.’

Appendix 1

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