
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 6

EU OVERVIEW

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

I REGULATION

i The regulators

The European Commission (Commission) is the most prominent 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 regulatory framework for electronic communications in 2009 has, *inter alia*, increased the Commission's powers to oversee the measures proposed by national regulatory authorities (NRAs) to address problems relating to competition in the various telecommunications markets.

The Body of European Regulators for Electronic Communications (BEREC) was established by Regulation (EC) No. 1211/2009,⁵ and became fully functional in 2011. Its role is to guarantee consistent application of the EU regulatory framework by, for example, delivering opinions on NRAs' draft regulatory measures and, upon request, offering assistance to NRAs in carrying out their duties under EU law. The Commission also turns to the BEREC before adopting recommendations on relevant product and service markets, which NRAs must rely on in defining the relevant national markets. The Commission may also task the BEREC with carrying out *ad hoc* market studies.

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.v, *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.

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,⁶ Directive 2009/136/EC⁷ and Regulation (EC) No. 1211/2009 were adopted to improve and revise the 2002 regulatory framework.

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 involves a procedure whereby an applicant notifies the NRA of its intentions without having to wait for any approval by the NRA.⁸ The information that may be requested in such a notification must be limited to what is necessary for the identification of the provider. By contrast, the use of spectrum in telecommunications is subject to a licence granted by the Member States and to fees.

The regulation of audiovisual 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 2010.⁹

The Commission also has extensive investigative 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.¹⁰

iii Digital Agenda and digital single market (DSM)

In 2010, the Commission launched its 'Europe 2020 Strategy' to prepare the EU economy for the challenges of the next decade.¹¹ In 2014, a new Commission took office. One of its priorities is 'to make the EU's single market fit for the digital age'.¹² In 2015, the Commission published a scoreboard showing the performance of the EU and Member

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

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

8 Article 5 of the Authorisation Directive.

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

10 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 (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).

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

12 Political Guidelines for the next European Commission – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change – Priority No. 2: A Connected Digital Single Market, Opening Statement in the European Parliament Plenary Session,

States in terms of digitalisation. In general, the results are positive: total coverage through NGA technology has now reached 68 per cent (up from approximately 30 per cent in 2010). Internet usage is increasing rapidly: it now stands at just below 75 per cent, up from 60 per cent in the previous year. However, the Commission noted that cross-border e-commerce is still limited, and the target of 20 per cent will most likely be missed; and that a mere 14.5 per cent of SMEs use the internet as a sales channel, an increase of only 3.5 per cent over five years.¹³

On 6 May 2015, the Commission adopted the DSM strategy. The DSM strategy includes 16 targeted actions to be delivered by the end of 2016.¹⁴

The first pillar of the DSM is ‘better access for consumers and businesses to digital goods and services across Europe’. This requires legislative initiatives to facilitate cross-border e-commerce in a number of areas, such as copyright.¹⁵ A further key challenge is unjustified geo-blocking,¹⁶ a practice used by online service providers to restrict access to digital content by country of residence, often re-routing them to another website showing different prices. As a complement to legislation, on 6 May 2015, Competition Commissioner Vestager launched a sector inquiry into the e-commerce sector.¹⁷ The Commission highlighted that, although the e-commerce sector in the EU has grown gradually over recent years,¹⁸ cross-border e-commerce nonetheless remains imperfect. Indeed: ‘There are also indications that undertakings active in the e-commerce sector may be engaged in anti-competitive agreements, concerted practices or abuses of a dominant position.’¹⁹ The Commission expects to publish a preliminary report for consultation in mid-2016. The final report is expected in the first quarter of 2017.

The second pillar includes a number of actions aiming at ‘creating the right conditions and a level playing field for digital networks and innovative services to flourish’. This requires, *inter alia*, a review of the regulation of audiovisual media in light of increased competition from OTT services and applications, a review of the e-Privacy

Jean-Claude Juncker, Candidate for President of the European Commission, Strasbourg, available at http://ec.europa.eu/priorities/docs/pg_en.pdf#page=6

- 13 The Digital Agenda scoreboard reports are available at <http://ec.europa.eu/digital-agenda/en/download-scoreboard-reports>.
- 14 A Digital Single Market Strategy for Europe – COM(2015) 192 final (available at http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf).
- 15 Commission’s DSM Strategy, pillar 1, action 6. See below.
- 16 Commission’s DSM Strategy, pillar 1, action 4.
- 17 Commission decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No. 1/2003 (HT.4607), C(2015) 3026 final (available at http://ec.europa.eu/competition/antitrust/e-commerce_decision_en.pdf).
- 18 See EUROSTAT data available at http://ec.europa.eu/eurostat/data/database?node_code=isoc_bdek_smi (Digital Single Market: promoting e-commerce for individuals).
- 19 See footnote 17, paragraph 3.

Directive²⁰ and of the Audiovisual Media Services Directive,²¹ and a comprehensive analysis of the role of platforms.²²

The third pillar brings together a number of actions aimed at ‘maximising the growth potential of the digital economy’ through a transition to an economic and industrial system that takes full advantage of the data economy (e.g., cloud computing, big data, machine-to-machine, interoperability of technological standards) and changes to the current European standardisation system.²³

The European Council of 25 and 26 June 2015 officially endorsed the DSM strategy, supporting it as a means to promote ‘inclusive growth’.²⁴ Legislative proposals should follow in the next 18 to 24 months.

II TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

EU institutions have been evaluating changes to the roaming and network neutrality (net neutrality) regime within the Commission’s ‘Connected Continent’ proposal,²⁵ which was approved at first reading on 3 April 2014 by the European Parliament.²⁶

On 26 June 2015, the European Parliament and the Council agreed on a final text, which includes the end of roaming in June 2017, and on strong net neutrality rules.²⁷ The agreement follows bitter controversy among the institutions, climaxing with a 17 December 2014 report by the BEREC concluding that ‘the removal of retail roaming surcharges across Europe is not currently sustainable or feasible in practice’.²⁸ The agreement reached in June 2015 aims to equalise the cost of calls and data so that the price does not differ depending on whether the customer is at home or roaming. This would reduce the maximum roaming charge by about 75 per cent.

As to net neutrality, the agreement set out rules prohibiting any blocking, throttling, degradation or discrimination of internet traffic by ISPs. Within the EU, all

20 Commission’s DSM Strategy, pillar 2, action 12. See below.

21 Commission’s DSM Strategy, pillar 2, action 10. See below.

22 Commission’s DSM Strategy, pillar 2, action 11. See below.

23 Commission’s DSM Strategy, pillar 3, action 15.

24 European Council conclusions, 25 and 26 June 2015, EUCO 22/15.

25 See answer given on 22 July 2013 to Parliamentary question No. E-006805/2013 (available at www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-006805&language=EN).

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

27 On 21 November 2014, the Presidency of the Council of the EU published a ‘state of play’ update on the proposals in which it declared that ‘The intensive examination of both the [original telecoms single market] proposal and of [the 19 September 2014 revised text] has resulted in an understanding to focus continuing discussions only on the two core issues, primarily roaming but also open internet/net neutrality’.

28 BEREC, International Roaming, Analysis of the impacts of ‘Roam Like at Home’, BoR (14) 206, 17 December 2014.

traffic will be treated equally, subject to some specific public-interest exceptions (e.g., those concerning network security and child pornography). Nonetheless, internet access providers will still be able to offer 'specialised services' of higher quality, such as IPTV, high-definition videoconferencing or health-care services, as long as these services are not supplied to the detriment of the quality of the open internet.

On 21 May 2015, the BEREC published a Report on How Consumers Value Net Neutrality in an Evolving Internet Marketplace.²⁹ The BEREC pointed out that, in general, ISP offerings are commonly neutral and that, from an economic standpoint, it is desirable for them to provide neutral access to the most popular applications as this is the best way to address customers' needs.

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. Access to broadband internet is currently outside the scope of universal service at the EU level.³⁰ However, broadband internet is one of the cornerstones of the Digital Agenda. The Commission's major contribution to the achievement of the goal of 'broadband for all' is the adoption of:

- a a 2010 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 2010 Recommendation on NGA Networks (NGA Recommendation); and
- c a 2013 Recommendation on non-discrimination obligations and costing methodologies for access services (Access Recommendation).³¹

In 2013, the Commission also adopted guidelines for the application of state aid rules relating to the rapid deployment of broadband networks.³²

29 BoR(15)65 (available at http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5024-berec-report-on-how-consumers-value-net-neutrality-in-an-evolving-internet-marketplace-a-report-into-ecosystem-dynamics-and-demand-side-forces).

30 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 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.

31 See 'Broadband Communication', 'Recommendation on NGA Networks' and 'Access Recommendation', below.

32 Communication from the Commission, EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C25/01).

On 11 June 2015, the EU Court of Justice (CJEU) issued a judgment clarifying the scope of the Universal Service Directive.³³ It remarked that the Directive expressly enacts an obligation to guarantee the connection at a ‘fixed location’ to a public communications network. Yet ‘mobile’ communication services are excluded from the minimum set of universal services defined by the Universal Service Directive.

iii Restrictions on the provision of service

NGA Recommendation

The Commission adopted the NGA Recommendation on 20 September 2010.³⁴ 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 scope of the Recommendation primarily covers remedies to be imposed on operators deemed to have significant market power.³⁵ 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 making use of its powers under the 2009 regulatory framework to review national measures, the Commission has extensively relied on the NGA Recommendation. For instance, during 2014 and 2015 it has issued critical comments to Italy for failure to 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.³⁶

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.’³⁷

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

33 Case C-1/14, *Base Company NV and Mobistar NV v. Ministerraad*, ECLI:EU:C:2015:378.

34 Commission Recommendation of 20 September 2010, OJ 2010 L251/35.

35 For more details on the applicable remedies, see this chapter in the fourth edition of this publication.

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

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

company's downstream units) is in principle 'the surest way' to avoid non-price-related discrimination.³⁸

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'³⁹ to guarantee market stability and regulatory consistency, thus favouring broadband investments. Therefore, the Commission has suggested the adoption of a common costing methodology (called '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).⁴⁰ To enhance regulatory stability and market consistency, the Commission has recommended 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 Commission has extensively relied on the Access Recommendation's principles to criticise NRA proposals that were inconsistent with the above-mentioned principles.⁴¹

Monitoring and control of content

Directive 2000/31/EC (the Electronic Commerce Directive) explicitly sets out that no 'intermediary' should be obliged to engage in monitoring activities of a general nature ('mere conduit' rule).⁴² This was confirmed in the 2009 reform of the regulatory framework (see, in particular, Recital 30 of Directive 2009/13).

The interpretation of the mere conduit rule was also probed in two cases before the CJEU, which involved *Scarlet* (an ISP) and *Netlog* (a social networking website) and each company's responsibility for exchanges of allegedly unlawful content by its users.⁴³

In *Scarlet*, the Court held that EU law precludes 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

38 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.

39 *Idem*.

40 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.

41 See for example the recommendation issued against Italy on 11 December 2013.

42 See Section 4, Articles 12 to 15.

43 Cases C-70/10, *Scarlet Extended v. SABAM*; and Case C-360/10, *Sabam v. Netlog NY*.

expense of the hosting service provider, and for an unlimited period of time.⁴⁴ However, the Court left open the question on the admissibility of injunctions against specifically determined copyright-infringing practices.

On 27 March 2014, the CJEU held that an ISP may be ordered to block its customers' access to a copyright-infringing website (*UPC Telekabel*).⁴⁵ The CJEU, 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,⁴⁶ as well as some of the fundamental rights enshrined in EU law. Specifically, 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 material or, at least, of making it difficult to achieve and 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 'right to be forgotten'. On 13 May 2014, the CJEU held that, by searching systematically for information published on the internet, indexing websites, and 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/EC⁴⁷ (*Google Spain*).⁴⁸ Following its earlier decision (*Satakunnan Markkinapörssi and Satamedia*), the Court confirmed that, even when the information collected by the operator of a search engine has already been published elsewhere by others, the search engine's related activities still must 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'.⁴⁹

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

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

46 Directive 2001/29/EC, OJ 2001 L 167, p. 10.

47 Paragraphs 28 and 41, *Google Spain*.

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

49 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).

In assessing whether the data subject would be entitled to require the search engine to remove information relating to him or her ‘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 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.⁵⁰

iv Security

*Privacy and data retention*⁵¹

General EU rules on privacy are set out in Directive 95/46/EC.⁵² Special legislation translates the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector (see Directive 2002/58/EC (the e-Privacy Directive), as amended by Directive 2006/24/EC and Directive 2009/136/EC).

Pursuant to the e-Privacy Directive, ISPs 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). 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). ISPs must keep traffic data and geolocation data (e.g., data that indicates the location of a computer or mobile phone) generated or processed by them, and the data necessary to identify the subscriber or registered user, for a period of between six months and two years. Activities like listening, tapping, storing or otherwise intercepting or monitoring communication without a 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 to further harmonise data protection legislation throughout Europe.

On 12 March 2014, the Parliament passed the compromise texts of the general data protection regulation⁵³ together with the Police and Criminal Justice Data Protection

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

51 On protection for children, see this chapter in the 4th edition of this publication.

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

53 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.⁵⁴ On 15 June 2015, the EU Justice and Home Affairs Council agreed a general approach to the proposed general data protection regulation. The trilogue discussions are expected to start soon with a view to adopting a text by the end of 2015.⁵⁵

The Council of Ministers made important changes to the Commission's proposal, remarking that, *inter alia*:

- a* data protection is not an absolute right and must be weighed against other fundamental rights;
- b* data portability is restricted to data provided by the individual and does not apply if it would infringe intellectual property rights in relation to the processing of the data;
- c* automated decision-making, including profiling, is permitted for fraud and tax evasion monitoring and prevention purposes, and to ensure the security and reliability of a service provided by the controller; and
- d* sanctions are to be proportionate.

The new rules will principally advantage small and medium-sized enterprises, reducing unnecessary administrative requirements such as notification requirements for companies. The right to be forgotten will be reinforced and a right to data portability will facilitate transfer of personal data between service providers. Furthermore, the regulation provides that market operators established outside of Europe will have to apply the same rules when offering services in the EU, and it brings forward a 'one-stop shop' for companies and users, who will only have to deal with one single supervisory authority, facilitating cross-border operations and business in the EU.⁵⁶

The adoption of the Data Protection Regulation, which will replace Directive 95/46/EC, will have consequences also for the e-Privacy Directive, which is *lex specialis* for the electronic communications sector. Thus, the DSM Strategy calls for a reassessment of the e-Privacy Directive, particularly since most of the articles of the current Directive exclusively apply to providers of electronic communications services, that is, traditional telecoms companies, thus not including in its scope information society service providers using the internet to provide communication services.⁵⁷

54 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.

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

56 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) – Preparation of a general approach, Interinstitutional File: 2012/0011 (COD), available at <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>

57 Commission's DSM Strategy, pillar II, action 12.

Cybersecurity

Since 2004, the European Network and Information Security Agency (ENISA) has worked with national authorities and with the European institutions to disseminate knowledge, facilitate the sharing of best practices and coordinate responses to common threats.⁵⁸ The role of ENISA was reaffirmed in the 2009 reform of the regulatory framework.

On 13 March 2014, the Parliament approved the draft Network and Information Security (NIS) Directive, also known as the Cybersecurity Directive,⁵⁹ which was developed within the framework of the Commission's 'EU Cyber Security Strategy'.⁶⁰ 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.⁶¹ On 29 June 2015, the Latvian presidency of the Council reached an understanding with the Parliament on the principles to be endorsed in the draft NIS Directive.⁶² Pursuant to this draft, Member States should ensure that market operators take appropriate technical and organisational measures to manage the risks related 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. The draft also requires designated operators that provide essential services to take measures to cope with the risks to their networks and report incidents to the authorities. The designation criteria are still under discussion by the Council telecom working party. It was agreed that digital service platforms would be treated in a different manner from essential services, although details have not yet been discussed. The role of Member States is reinforced, as they will be required to establish an NIS plan and designate competent authorities, while at the EU level a cooperation group will be established to address NIS matters and lead operational activities.

Cloud computing

The DSM Strategy calls for a 'European free flow of data initiative' to promote the free movement of data and encourage innovation in the EU, while protecting personal data.⁶³ The Commission will also launch a European Cloud initiative concerning certification of cloud services, the switching of cloud service providers and a 'research cloud'. This is key, as estimates of the cost of an incomplete DSM for cloud computing are between €31.5 billion and €63 billion per year.⁶⁴ On the other side, cloud computing can

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

59 COM(2013) 48.

60 JOIN(2013) 1 final.

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

62 www.consilium.europa.eu/en/press/press-releases/2015/06/29-network-information-security.

63 Commission's DSM Strategy, pillar III, action 14.

64 European Parliament Research Service, Mapping the cost of Non-Europe, 2014–19.

potentially contribute a total of €450 billion to the EU's GDP between 2015 and 2020, as well as leading to the creation of an additional 1 million jobs and 300,000 companies in the EU, throughout all sectors of the economy.⁶⁵

III SPECTRUM POLICY

Originally, the 'Connected Continent' proposal aimed to address spectrum as a 'European input', and therefore established a number of common rules, nurturing unified rules on spectrum use. Nonetheless, Member States in the Council removed those provisions from the proposed draft regulation. The Commission is now calling for coordination of the auctioning procedures for allocating spectrum band, which would, however, continue to be carried out at the national level.

The DSM strategy considers a European spectrum policy to be necessary to boost investment, as some countries were slow in allocating the 800MHz band used for mobile communications, and lagged behind in rolling out 4G technology for mobile networks as a result.⁶⁶ On the other side, some Member States have already outpaced EU regulation (e.g., Germany started auctioning spectrum from the 700MHz band for mobiles in May 2015).

On 9 June 2015, the Commission presented the outcome of a public consultation on the September 2014 Pascal Lamy report concerning the UHF band.⁶⁷ The report discusses how the scarce spectrum resource in the UHF broadcasting band should be used in future. The results of the consultation suggest that there is general backing for spectrum-efficient technologies for DTTV equipment. The Commission thus launched a study on the subject.⁶⁸ It is also engaging with the Member States in Council to ensure a coordinated position for the World Radiocommunication Conference 2015 and, in light of the DSM Strategy, in the next few months it will make specific proposals on the coordinated release of the 700MHz band.

IV MEDIA

The AVMSD provides for a minimum harmonisation of certain aspects of national legislation related to audiovisual media services (e.g., advertising, protection of minors and promotion of European works) with a view to facilitating the circulation of audiovisual services in the Internal Market on the basis of the country-of-origin principle. According to this principle, audiovisual media service providers must abide only by the rules of the Member State with jurisdiction over them.

65 The International Data Corporation, *Uptake of Cloud in Europe: Follow-up of IDC Study on Quantitative estimates of the demand for Cloud Computing in Europe and the likely barriers to take-up*, 2015.

66 Commission's DSM Strategy, pillar II, action 9.

67 Summary report, Brussels, 9 June 2015 DG CONNECT/B4.

68 SMART 2015/0010: 'Economic and social impact of repurposing the 700 MHz band for wireless broadband services in the European Union'.

The AVMSD applies to all audiovisual media services, whether linear (traditional television) or non-linear (VOD), irrespective of the technology used to deliver the content (the principle of technological neutrality).⁶⁹

The Commission's DSM Strategy envisages a 'regulatory fitness evaluation' of the AVMSD to gauge whether it still represents a satisfactory regulatory regime, taking account of technological advances, and whether it is effective in attaining its objectives. Namely, the evaluation will assess the current material and geographical scope of the Directive as well as the system of graduated regulation (i.e., the difference in regulatory treatment between linear and non-linear services). In coming months, the Commission will assess possible amendments, including a liberalisation of rules for traditional services, stricter rules for non-linear services, changes in the definition of audiovisual media services and geographical scope.⁷⁰

V IPR ENFORCEMENT

i Standard essential patents (SEP) and injunctions

The *Samsung* and *Motorola* Commission decisions⁷¹ clarify that a prospective licensor of an essential patent may be found dominant even if the user of the patent owns patents on the licensor's products, and that the seeking and enforcing of injunctions may infringe Article 102 TFEU when two conditions are met, namely: 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 that a licensee may be found 'willing' even if it continues to challenge validity and infringement. The Commission confirmed in these decisions that there may be other exceptional circumstances that could justify a compulsory licence or a ban on injunctions of essential patents.

On 16 June 2015, the CJEU ruled on a dispute between Huawei and ZTE regarding a patent 'essential' to the LTE wireless broadband technology standard.⁷² The judgment, backing an earlier opinion of Advocate General Wathelet,⁷³ confirmed that SEP holders cannot seek injunctions against the unlicensed use of their intellectual property unless they first offered a licence on FRAND terms to users who are willing

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

70 Commission's DSM Strategy, pillar II, action 10.

71 Case AT.39985-*Motorola – Enforcement of GPRS standard essential patents*, decision of 29 April 2014 (see IP 14/489), and Case AT.39939-*Samsung – Enforcement of UMTS standard essential patents*, commitment decision of 29 April 2014 (see IP 14/490). See also MEMO/14/322.

72 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*, ECLI:EU:C:2015:477.

73 Advocate General's Opinion in Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*, 20 November 2014.

to negotiate. If the infringer rejects the offer, it must make a detailed counter-offer. On balance, the judgment places SEP holders in a stronger position than they appeared to be under the Commission's *Motorola* and *Samsung* decisions. In particular, the judgment removes SEP users' unique 'safe harbour' that allowed them to avoid an injunction by agreeing to have the terms of the licence determined by a court or arbitration tribunal. Instead, third-party determination will only be available by common agreement. Moreover, if the parties fail to reach agreement on the terms of the licence, the SEP user must provide appropriate security and be able to render accounts, putting a clear and important burden on the SEP user. However, the judgment fails to give a conclusive answer on how courts should decide cases where there is no agreement on third-party determination; moreover, it provides no guidance on what constitutes FRAND terms.

ii Copyright

On 4 February 2014, the 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).⁷⁴ The purpose of the CRM Directive is twofold: to increase transparency and efficiency in the functioning of collective management organisations; and to facilitate the granting of cross-border licensing of authors' rights in the online music market. Member States have until April 2016 to implement it into national laws.

The 2015 DSM Strategy aims to eliminate inconsistencies between national copyright regimes that hinder access to online content across the EU. Legislative proposals should be tabled before the end of 2015. The proposal should likely include:

- a* portability of legally acquired content;
- b* ensuring cross-border access to legally purchased online services;
- c* greater legal certainty for cross-border use of content for specific purposes (e.g., research, education, text and data mining) through harmonised exceptions;
- d* clarifying the rules on activities of intermediaries in relation to copyright-protected content; and
- e* modernising enforcement of IPR, focusing on commercial-scale infringements (the 'follow the money' approach), as well as its cross-border applicability.⁷⁵

As regards the music-licensing market, on 16 June 2015 the Commission approved a joint venture for multi-territorial online music licensing and copyright administration services by three music collecting societies: PRSfM in the UK, STIM in Sweden and GEMA in Germany.⁷⁶ The joint venture will deliver copyright holders a number of services, specifically licensing music to online platforms, and the offer of copyright administration services to collecting societies and 'Option 3 music publishers'.⁷⁷ The authorisation was

74 Directive 2014/26/EU of 26 February 2014 on collective management of copyright.

75 Commission's DSM Strategy, pillar I, action 6.

76 Case No. M.6800 PRSfM/STIM/GEMA/JV.

77 'Option 3 publishers' are large music publishers that have withdrawn the mechanical rights related to their Anglo-American repertoire from collecting societies and have started to license these rights directly.

made conditional upon the proposed joint venture implementing commitments that will enable other players to compete with the joint venture in the supply of copyright administration services.

VI THE YEAR IN REVIEW

i Adoption of the new recommendation on relevant markets

Pursuant to Article 15 of the Framework Directive, the Commission should adopt a recommendation to identify the electronic communications product and service markets whose characteristics justify the imposition of *ex ante* regulation. Thus, the 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 and helps them to regulate critical markets in a coordinated manner, thereby contributing to the development of the internal market; and provides market players with legal certainty.

While 18 and seven markets, respectively, were noted in the previous two versions of the recommendation, in the 2014 recommendation the relevant markets dropped to four. The decrease in the number of markets is due to the success of the liberalisation process. The Commission foresees that all retail markets (including access to fixed networks) will tend to be competitive, especially given the expected entry of new operators rolling out next-generation networks and increasing fixed-mobile substitutability. All the relevant markets are national in scope, which confirms the antitrust practice.⁷⁸

The markets included in the 2014 recommendation constitute long-standing bottlenecks. In particular, markets for fixed and mobile wholesale termination services continue to be included (the only way to see competition in these markets would be the full transition to an all-IP environment). The rationale for the inclusion of a market for wholesale high-quality access for business customers is that more sophisticated customers will look for high-quality services and, in return, alternative operators will need to gain access to the incumbent facilities' to meet that demand.

More generally, the Commission found that OTT services cannot yet be considered substitutes to the services provided by traditional operators. Finally, the recommendation somewhat blurs the traditional distinction between markets for fixed and mobile phone services.⁷⁹ Indeed, while the recommendation excludes that, at the European level, the current degree of fixed-mobile substitution is sufficient to identify a single market, it also notes that it is 'likely' that the NRAs could reach this conclusion at the national level, if substitution between fixed and mobile services turned out to be high.

78 See, e.g., *Telefónica/Portugal Telecom*, paragraph 198; and, more recently, the Commission's MEMO14-387 of 28 May 2014.

79 See the Commission's decision of 12 December 2012, case COMP/M.6497, *Hutchison 3G Austria/Orange Austria*, paragraph 28.

ii **Merger and antitrust control in telecommunication markets**

A considerable number of mergers have been authorised by the Commission between September 2014 and July 2015, confirming the trend towards increasing consolidation. Commissioner Vestager noted that, while price is a critical parameter of competition, safeguarding the competitive pressure that drives investment and innovation should be at the core of competition analysis. The Commissioner opposed the incumbents' claim that, if they cannot merge with their rivals in the same country, they will be unable to intensify their investments. Conversely, she held that 'there is ample evidence that excessive consolidation may lead not only to less competition and more expensive bills for consumers, but that it also reduces the incentives in national markets to innovate'.⁸⁰

On 4 December 2014, the Commission opened an in-depth (Phase II) investigation into the proposed acquisition of Jazztel plc, a telecommunications company registered in the UK but mainly active in Spain, by rival Orange SA of France. In Spain, Orange operates mobile and fixed telecom networks, while Jazztel operates a fixed telecom network and offers mobile telecom services on Orange's network.⁸¹ On 19 May 2015, the Commission cleared the acquisition, subject to a number of commitments by Orange, based on two different technologies: on optical fibre, Orange has committed to divesting an independent FTTH network, which is similar to the size of Orange's current FTTH network in Spain; on copper, Orange has committed to grant the purchaser of the FTTH network wholesale access to Jazztel's national ADSL network for up to eight years.

On 20 April 2015, the Commission cleared the acquisition of the Portuguese telecommunications operator PT Portugal by the multinational cable and telecommunications company Altice, subject to commitments.⁸² In particular, the decision was conditional upon the divestment of Altice's current Portuguese businesses ONI and Cabovisão.

At the time of writing, the Commission is assessing a proposed joint venture between Danish operators TeliaSonera AB and Telenor ASA. The Commission has concerns that, on the Danish mobile telecommunications markets, the merged entity would face insufficient competitive constraint from the only two remaining players. The Swedish and Norwegian operators received negative feedback from the European competition regulators on their initial commitments, submitted on 12 August 2015. TeliaSonera and Telenor are expected to submit revised proposals. The Commission has until 7 October 2015 to make a decision, but this deadline will likely be pushed back.

In addition to the continued consolidation in telecoms markets across the EU, a number of transactions in the TV sector have also been scrutinised by the Commission.

80 Vestager, *The State of the Union: Antitrust in the EU in 2015–2016*, (http://ec.europa.eu/commission/2014-2019/vestager/announcements/state-union-antitrust-eu-2015-2016_en).

81 European Commission, *Mergers: Commission opens in-depth investigation into Orange's proposed acquisition of Jazztel*, press release IP/14/2367, December 2014.

82 Case No. M.7499 *Altice/PT Portugal*.

On 11 September 2014, the Commission authorised the proposed acquisition of Sky Deutschland AG and Sky Italia Srl by Sky Broadcasting Group plc (BSkyB) of the UK.⁸³ The transaction brings together the leading pay-TV operators in the UK, Ireland, Germany, Austria and Italy. The Commission found that the transaction would not lead to any material overlaps in the parties' activities, as they primarily operate in different national markets and thus are 'geographically complementary'.⁸⁴ The Commission also evaluated whether the merged company would enjoy amplified bargaining power in relation to 'premium' content (including certain pan-European sports events and films), or for the acquisition of pay TV channels for its pay TV programmes, thereby harming its pay TV rivals. The Commission established that it was unlikely that the merged entity would be able to impose a variation from existing licensing practices, which are concentrated on national territories or language areas, towards the joint purchase or simultaneous negotiations for premium content across several countries.

On 16 September 2014, the Commission authorised the acquisition by Liberty Global plc and Discovery Communications Inc of joint control over All3Media Holdings Limited, a UK-based TV, film and digital production company.⁸⁵ On 9 October 2014, the Commission cleared another TV content production and distribution joint venture between 21CF and Apollo, whereby 21CF contributed its Shine subsidiary and Apollo contributed Endemol and CORE Media.⁸⁶ In both valuations, the Commission's market investigation found that the production of TV content and the licensing of broadcasting rights for TV content belonged to separate relevant product markets, and that 'a distinction could be made between films, sports and other TV content'.⁸⁷

As for antitrust enforcement, on 15 October 2014, the Commission fined Slovak Telekom and its parent company, Deutsche Telekom, for having pursued for more than five years an abusive strategy to exclude rivals from the Slovak market for broadband services.⁸⁸ Namely, the Commission concluded that Slovak Telekom prevented or delayed the entry of competition into the retail broadband services market in Slovakia by withholding network information necessary for local loop unbundling; unilaterally reducing the scope of its regulatory obligation; and setting other unfair terms and conditions. Furthermore, the Commission found that Slovak Telekom had applied an illegal margin squeeze in setting local loop access prices and retail prices. Deutsche

83 Case No. M.7332, *BSkyB/Sky Deutschland/Sky Italia*.

84 Commission approves acquisition of Sky Deutschland and Sky Italia by BSKyB, press release IP/14/1004, 11 September 2014. Shortly after (i.e., on 10 October 2014) the Commission cleared Liberty Global's acquisition of the Dutch cable TV operator, Ziggo, with commitments, on the theory that combining the two cable 'footprints' of Ziggo and Liberty Global (together accounting for around 90 per cent of the Netherlands and between 60 to 70 per cent of Dutch pay TV subscribers) would have reduced competition in the market for the acquisition of content.

85 Case M.7288, *Liberty Global/Discovery/All3Media*.

86 Case M.7360, *21st Century Fox/Apollo/JV*.

87 Case M.7360, *21st Century Fox/Apollo/JV*, at paragraph 43.

88 Case No. 39523, *Deutsche Telekom/Slovak Telekom*.

Telekom, as parent company with decisive influence, was also held jointly and severally liable for Slovak Telekom's fine. It received an additional sanction, representing a measure for deterrence as well as a sanction for its recidivism, as it had already been fined in 2003 for a margin squeeze in broadband markets in Germany.

Finally, on 15 April 2015 the Commission sent a statement of objections⁸⁹ to Google in relation to allegations of favourable treatment given to its own specialised online search services within Google's search results at the expense of competing specialised search services.⁹⁰ On the same day, the Commission opened a formal in-depth investigation against Google to investigate whether the company's conduct in relation to its Android mobile operating system as well as applications and services for smartphones and tablets has breached EU antitrust rules.⁹¹

VII CONCLUSIONS AND OUTLOOK

A new Commission, headed by Jean-Claude Juncker, commenced its activities on 1 November 2014 with ambitious promises to adopt new measures for a 'connected digital single market'. In the first eight months of 2014, the Commission started to consult on several initiatives, and the formal launch of several of these is likely in the coming year.

The trend towards consolidation in the telecoms sector continued unabated with the approval of *PT Portugal/Altice* and *Orange/Jazztel* in April and May 2015, respectively. More transactions are likely in the second half of 2015 and in 2016, also at a national level. For instance, in the UK, the Competition and Markets Authority issued a statement on 17 July 2015 following its referral of BT's planned acquisition of EE for a full investigation on 9 June 2015.⁹² On 19 April 2015, Liberty Global plc announced that its subsidiary Telenet Group Holding NV had entered into a definitive agreement to acquire BASE Company NV, the third-largest mobile network operator in Belgium.⁹³ On 6 August 2015, Hong Kong Hutchison Holdings announced its merger with telecom firm VimpelCom Ltd's Wind Group in a move to combine their wireless assets in Italy.⁹⁴

2016 will also be a test for the *Google* investigation, as the Commission is unlikely to issue a decision before the end of 2015.

89 MEMO/15/4781, available at http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm.

90 Case No. 39740, *Google Search*. See press release IP/10/1624, available at http://europa.eu/rapid/press-release_IP-10-1624_en.htm.

91 Press release IP/15/4780, available at http://europa.eu/rapid/press-release_IP-15-4780_en.htm.

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

93 See www.libertyglobal.com/pdf/press-release/Liberty-Global-BASE-Acquisition-FINAL.pdf.

94 See www.wsj.com/articles/hutchison-agrees-to-merge-3-italia-with-vimpelco-ms-wind-1438871813.

Appendix 1

ABOUT THE AUTHORS

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Maurits J F M Dolmans is a partner based in the London and Brussels offices. His practice focuses on EU, UK and international competition law, as well as EU regulatory and EU intellectual property law. Mr Dolmans has extensive experience in the information technology, telecoms, entertainment, energy, chemicals and manufacturing industries. He has appeared in proceedings before EU and ESA institutions and the EU courts, the UK antitrust authority, the courts of several Member States, and ICC and NAI arbitrations. Many of his competition cases involve abuse of dominance, licensing or refusals to license (such as the EU's *Microsoft* case, where he represented various complainants and interveners on the side of the European Commission, and the *Motorola SEP* case), European standardisation, access to networks, mergers, joint ventures and other transactions in IT, telecoms and other areas, intellectual property arbitration and litigation, alleged abuses of dominance (such as the *Google* cases) and cartels. He has published widely in these areas.

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Dr Marini-Balestra obtained a PhD from the University of Rome LUMSA in 2013 with a thesis on the third phase of EU communications regulation, and received an LL.M degree from the University of Cambridge (Trinity College) in 2007.

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