

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

ELEVENTH EDITION

Editor
Matthew T Murchison

THE LAWREVIEWS

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TECHNOLOGY,
MEDIA AND
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This article was first published in December 2020
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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ISBN 978-1-83862-508-5

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANANT LAW

CLEARY GOTTLLIEB STEEN & HAMILTON LLP

CMS RUSSIA

ELVINGER HOSS PRUSSEN

LATHAM & WATKINS LLP

LEE AND LI, ATTORNEYS-AT-LAW

RÍOS FERRER, GUILLÉN-LLARENA, TREVIÑO Y RIVERA, SC

SHAHID LAW FIRM

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CONTENTS

PREFACE.....	v
<i>Matthew T Murchison</i>	
Chapter 1	AUSTRALIA..... 1
<i>Angus Henderson and Irene Halferty</i>	
Chapter 2	BELARUS36
<i>Kirill Laptev and Pavel Lashuk</i>	
Chapter 3	CHINA.....47
<i>Jihong Chen</i>	
Chapter 4	EGYPT 60
<i>Tarek Badawy, Salma Abdelaziz and Hoda ElBeheiry</i>	
Chapter 5	ESTONIA74
<i>Mihkel Miiidla, Liisa Maria Kuuskmaa and Oliver Kuusk</i>	
Chapter 6	FRANCE.....97
<i>Myria Saarinen and Jean-Luc Juban</i>	
Chapter 7	GERMANY..... 114
<i>Joachim Grittmann</i>	
Chapter 8	INDIA 128
<i>Rahul Goel and Anu Monga</i>	
Chapter 9	ITALY 145
<i>Marco D'Ostuni, Marco Zotta and Riccardo Tremolada</i>	
Chapter 10	JAPAN.....178
<i>Stuart Beraba, Hiroki Kobayashi, Takaki Sato and Benjamin Han</i>	

Contents

Chapter 11	LATVIA.....	204
	<i>Andris Tauriņš, Gunvaldis Leitens and Lūcija Strauta</i>	
Chapter 12	LITHUANIA.....	223
	<i>Stasys Drazdauskas</i>	
Chapter 13	LUXEMBOURG.....	233
	<i>Linda Funck</i>	
Chapter 14	MEXICO	259
	<i>Ricardo Ríos Ferrer, María Fernanda Palacios Medina and Sonia Cancino Peralta</i>	
Chapter 15	POLAND.....	270
	<i>Xawery Konarski and Michał Matysiak</i>	
Chapter 15	RUSSIA	283
	<i>Maxim Boulba and Elena Andrianova</i>	
Chapter 16	SAUDI ARABIA.....	295
	<i>Brian Meenagh, Alexander Hendry, Avinash Balendran, Homam Khoshaim and Lojain Al-Mouallimi</i>	
Chapter 17	SPAIN.....	313
	<i>Pablo González-Espejo and Nerea Sanjuan</i>	
Chapter 18	TAIWAN	332
	<i>Patrick Marros Chu, Vick Chien and Sam Huang</i>	
Chapter 19	UNITED KINGDOM	343
	<i>John D Colahan, Gail Crawford and Lisbeth Savill</i>	
Chapter 20	UNITED STATES	387
	<i>Matthew T Murchison, Elizabeth R Park and Michael H Herman</i>	
Appendix 1	ABOUT THE AUTHORS.....	411
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	429

PREFACE

The Technology, Media and Telecommunications Review is now in its 11th edition, and I am excited to be taking the reins of this publication after a decade under the steady hand of long-time editor John Janka. This Review occupies a unique space in the literature on TMT issues. Rather than serving a traditional legal treatise, this publication aims to provide a practical, business-focused survey of law and policy in this arena, along with insights into how this legal and policy landscape continues to evolve from year to year. In the dynamic and ever-changing TMT sector, such perspective is vitally important. And the scope of this Review is global, now covering 20 jurisdictions.

Covid-19 shook the world in 2020, and its reverberations in the TMT sector have been profound. As the threat of infection has led to widespread lockdowns, the importance of connectivity has never been greater nor more obvious. For many businesses, remote working has become the rule rather than the exception. Many schools have switched to distance learning formats. Tele-health is on the rise as doctors check in on patients via videoconference. Even tasks as mundane as grocery shopping have shifted online. And broadband connectivity, where available, has made it all possible.

For policymakers, the experience of covid-19 has begun to reshape their understanding of the TMT arena and to refocus their policy goals. The sudden shift to remote working and distance learning has stress-tested broadband networks across the world – providing a ‘natural experiment’ for determining whether existing policies have yielded robust systems capable of handling substantial increases in internet traffic. In the European Union, officials called on video-streaming platforms to downgrade high-definition content temporarily to avoid overly straining broadband networks at the start of the pandemic. In the United States, meanwhile, policymakers touted that such measures were not necessary, and have attributed the apparent resilience of broadband networks in the country to deregulatory policies.

At the same time, the pandemic has prompted new initiatives to ensure, improve and expand broadband connectivity for consumers going forward. In various jurisdictions, policymakers are moving forward with subsidy programmes and other efforts to spur the deployment of advanced networks more deeply into unserved and underserved areas. Regulators also have taken steps to preserve internet access where it already exists, including by having service providers ‘pledge’ that they will not disconnect customers for non-payment in light of the pandemic, or by pursuing more prescriptive measures. In short, covid-19 has been part cautionary tale, part rallying cry, and its long-term impact on the TMT sector remains to be seen.

New technologies likewise have required new approaches and perspectives by policymakers. A notable example is the ongoing deployment of 5G wireless networks, as regulators continue to look for ways to facilitate such deployments. These initiatives take a

variety of forms, and frequently include efforts to free up more spectrum resources, including by adopting new rules for ‘sharing’ spectrum and by reallocating spectrum from one use to another. 5G spectrum was a significant focus of the World Radio-communication Conference (WRC) of the International Telecommunication Union (ITU), held in late 2019 in Sharm el-Sheikh, Egypt. And multiple jurisdictions have continued to auction off wireless licences in bands newly designated for 5G deployment, capitalising on service providers’ strong demand for expanded access for spectrum.

Another example is the planned deployment of multiple large satellite constellations in low-earth orbit to support new broadband services. The providers proposing these networks say they will greatly expand the availability of high-speed internet access service. At the same time, the sheer scale of the planned systems has raised fresh questions about how best to prevent accidental collisions and ensure equitable sharing of spectrum resources.

Even with so many newer issues swirling in the TMT sector, familiar topics have remained in the spotlight as well. Cue network neutrality, the principle that consumers should benefit from an ‘open internet’ where bits are transmitted in a non-discriminatory manner, without regard for their source, ownership or destination. The basic principle has been around for well over a decade, but policymakers are still sorting out how best to effectuate it without undermining investment and innovation in broadband services. In the United States, network neutrality has become a point of contention between the federal government, which has opted for a light-touch approach, and certain states that wish to impose bright-line prohibitions on internet service providers. In Europe, new guidelines and rulings have addressed internet service providers’ ‘zero rating’ plans, which exempt certain data from counting against a customer’s usage allowance. Regulators in Asia are grappling with similar policy questions. And this debate dovetails with efforts in some jurisdictions to increase oversight of the content moderation policies of social media companies and other online platforms.

The country-specific chapters that follow recap these and other developments in the TMT arena, including updates on privacy and data security, regulation of traditional video and voice services, and media ownership. On the issue of foreign ownership in particular, communications policymakers have increasingly incorporated national security considerations into their decision-making, as evidenced by recent actions in the United States against Chinese equipment manufacturers and service providers.

Our authors from around the globe have lent their considerable insight, analysis and experience to the preparation of their respective chapters. I hope readers will find this 11th edition of *The Technology, Media and Telecommunications Review* as helpful as I have found this publication year in and year out.

Matthew T Murchison

Latham & Watkins LLP

Washington, DC

November 2020

FRANCE

*Myria Saarinen and Jean-Luc Juhan*¹

I OVERVIEW

The French regulatory framework is based on the historical distinction between telecoms and postal activities on the one hand, and radio and television activities on the other (the two sectors are still governed by separate legislation and by separate regulators). Amendments in the past 15 years reflect the progress and the convergence of electronic communications, media and technologies, and the liberalisation of the TMT sectors caused by the de facto competition between fixed telephony (a monopoly until 1998) and new technologies of terrestrial, satellite and internet networks. French law also mirrors the EU regulatory framework through the enactment of the three EU Telecoms Packages in 1996, 2002 and 2009, which have been transposed into French law. The reform of the Telecoms Package in 2018, which resulted in the adoption of the European Electronic Communications Code (EECC), is to be transposed into national law by December 2020.² As for the audiovisual sector, the Audiovisual Media Services Directive (AMSD) is also awaiting national transposition, the deadline initially set for September 2020 having already passed.³

The TMT sectors in France have been fully open to competition since 1 January 1998, and are characterised by the interactions of mandatory provisions originating from various sources and involving a diversity of actors (regulators, telecoms operators, and local, regional and national authorities). The TMT sectors are key to the French economy, and 2019 was once again an important year in many respects for these sectors' business.

II REGULATION

i The regulators

The regulation of the technology, media and telecommunications sector in France is characterised by the large number of authorities:

The Authority for the Regulation of the Post and Electronic Communications (ARCEP) is an independent government agency that oversees the electronic communications and postal

1 Myria Saarinen and Jean-Luc Juhan are partners at Latham & Watkins. This chapter was written with contributions from trainee Alex Park.

2 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) Text with EEA relevance.

3 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

services sector. It ensures the implementation of universal services, imposes requirements on operators exerting a significant influence on the market, participates in defining the regulatory framework, allocates finite resources (RFs and numbers), imposes sanctions, resolves disputes and delivers authorisations for postal activities.

The Superior Audiovisual Council (CSA) is the regulatory authority responsible for the audiovisual sector. The CSA sets rules on broadcasting content and allocates frequencies by granting licences to radio and television operators. It also settles disputes that may arise between TV channels and their distributors, and is empowered to impose sanctions on operators in cases of breaches of specific regulations.

The High Authority for the Distribution of Works and the Protection of Copyright on the Internet (HADOPI) is in charge of protecting intellectual property rights over works of art and literature on the internet. An audiovisual reform originally planned for early 2020 including the merger of the CSA with the HADOPI has been indefinitely pushed back.

The Data Protection Authority (CNIL) and the French Competition Authority (FCA) also exert a significant influence in the sector.

These authorities may deliver opinions upon request by the government, Parliament or other independent administrative authorities, and, at the exception of HADOPI, also render decisions and opinions that may have a structural impact on these sectors. The National Frequency Agency (ANFR) is also an important agency in charge of inter-ministerial spectrum management and use as well as the supervision of independent radio networks (see Section IV).

ii Main sources of law

The prevailing regulatory regime in France regarding electronic communications is contained primarily in the Post and Electronic Communications Code (CPCE), and regarding audiovisual communications in Law No. 86-1067 of 30 September 1986 on Freedom to Communicate, as subsequently amended.

The main legislation governing the law applicable to data protection is the GDPR⁴ and Law No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties (1978 Data Protection Law), as subsequently amended, which supplements or derogates from the GDPR.

Intellectual property rights are governed by the Intellectual Property Code.

iii Regulated activities

Telecoms

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

No specific licences or authorisations are required to become a telecoms operator. Public networks and electronic communication services to the public can be freely established and provided, subject to prior notification to the ARCEP (Articles L32-1 and L33-1 of the CPCE). The ARCEP may register on its own initiative any actor who failed to declare itself.⁵

4 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

5 Article L33-1 I of the CPCE.

The use of RFs, however, requires a licence granted by ARCEP (Article L42-1 of the CPCE). The frequencies allotted to 5G networks are expected to be subject to limited exemptions in order to encourage its deployment upon the transposition of the EECC.

Media

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

Authorisations for private television and radio broadcasting on the hertz-based terrestrial frequencies are granted by the CSA following bid tenders and subject to the conclusion of an agreement with the CSA. The term of authorisations cannot exceed 10 years in principle, but is subject to extensions and various derogations.⁶ Broadcasting services that are not subject to the CSA's authorisation – namely, those that are broadcast or distributed through a network that does not use frequencies allocated by the CSA (cable, satellite, ADSL, internet, telephony, etc.) – are nevertheless subject to a standard agreement or a prior declaration.⁷

iv Ownership and market access restrictions

General regulation of foreign investment

Since the entry into force of Law No. 2004-669 of 9 July 2004, discrimination of non-EU operators is prohibited, and they are subject to the same rights and obligations as EU and national operators.⁸ However, according to Article L151-1 et seq. of the French Monetary and Financial Code, foreign (EU or non-EU) investment in strategic sectors (such as security, public defence, cryptography or interception of correspondence),⁹ is subject to a prior authorisation by the French Ministry of Economy. Any transaction concluded without prior authorisation is null and void, and criminal sanctions (imprisonment of up to five years¹⁰ and a fine amounting to up to twice the amount of the transaction) are also applicable. The list of sectors subject to prior authorisation has been steadily expanding over the last few years and today include online general press services and activities relating to the integrity, security and continuity of the operation of networks and ECSs.

Specific ownership restrictions applicable to the media sector

French regulations impose media ownership restrictions to preserve media pluralism and competition. Any single individual or legal entity cannot hold, directly or indirectly, more than 49 per cent of the capital or the voting rights of a company that has an authorisation to provide a national terrestrial television service where the average audience for television services (either digital or analogue) exceeds 8 per cent. In addition, any single individual or legal entity that already holds a national terrestrial television service where the average audience for this service exceeds 8 per cent may not, directly or indirectly, hold more than 33 per cent of the capital or voting rights of a company that has an authorisation to provide a local terrestrial television service.¹¹

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

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

8 Article L33-1 III of the CPCE.

9 Article R151-3 of the French Monetary and Financial Code.

10 Article L165-1 of the French Monetary and Financial Code.

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

Regulation of the media sector is currently evolving in reaction to a number of changes in French media ownership. For example, Law No. 2016-1524 of 14 November 2016 requires media outlets to provide yearly information on their capital ownership and governing bodies,¹² and reinforces the powers of the CSA over French media governance with the creation of ethics committees.¹³

Regarding the radio sector, a single person cannot retain networks of which the coverage exceeds 150 million inhabitants or 20 per cent of the aggregated potential audience.¹⁴ This regulation is, however, expected to be amended in order to take into account local pluralism challenges.

Further, unless otherwise agreed in international agreements to which France is a party, a foreign national may not acquire shares in a company holding a licence for a radio or television service in France that uses RFs if this acquisition has the effect of raising (directly or indirectly) the share of capital or voting rights owned by foreign nationals to more than 20 per cent.¹⁵ In addition, such licence may not be granted to a company in which 20 per cent of the share capital or voting rights is owned (directly or indirectly) by foreign nationals.¹⁶ These provisions do not apply to service providers of which at least 80 per cent of the capital or voting rights are held by public radio broadcasters belonging to Council of Europe Member States, and of which at least 20 per cent is owned by one of the public companies mentioned in Article 44 of the Law of 30 September 1986.¹⁷ Specific rules restricting cross-media ownership also apply.¹⁸

v Transfers of control and assignments

The general French merger control framework applies to the TMT sectors, without prejudice to the above-mentioned ownership restrictions specific to the media sector. Merger control rules are enforced by the FCA.¹⁹

Regarding the telecoms and post sectors, the FCA must provide ARCEP with any referrals regarding merger control, and ARCEP can issue a non-binding opinion.²⁰ Companies active in radio or TV are subject to merger control procedures before the FCA, in addition to a non-binding opinion from the CSA.²¹

Finally, any modification of the capital of companies authorised by the CSA to broadcast TV or radio services on a frequency is subject to the approval of the CSA.²²

12 Article 19 of the Law No. 2016-1524 of 14 November 2016.

13 Article 11 of the Law No. 2016-1524 of 14 November 2016.

14 Article 41 of the Law of 30 September 1986.

15 Article 40 of the Law of 30 September 1986.

16 Article 14 of the Law of 14 November 2016.

17 Article 40 of the Law of 30 September 1986.

18 Article 41-1 to 41-2-1 of the Law of 30 September 1986.

19 For recent examples of mergers in the TMT sectors, see, e.g., FCA, Decision No. 17-DCC-76 of 13 June 2017, in which the FCA ruled on the acquisition of Group News Participations by SFR Group.

20 Article L36-10 of the CPCE.

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

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

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Under the CPCE, ECSs other than public voice telephony may be provided freely.²³

DSL networks are subject to asymmetrical regulation. Regarding ADSL networks, alternative operators must be provided with direct access to the copper pair infrastructure of France Télécom-Orange, the historical operator, following local loop unbundling.

Internet service providers (ISPs) can operate freely, but must file a prior declaration with ARCEP.²⁴ A failure to comply with this obligation constitutes a criminal offence.²⁵

More generally, ISPs must comply with the provisions of Law No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy governing e-commerce, encryption and liability of technical service providers, as subsequently amended. A liability exemption regime for hosting service providers is also set out by the same law, expressly excluding a general obligation to monitor the information they transmit or store or the obligation to look for facts or circumstances indicating illicit activity. Nevertheless, knowledge that obviously illicit content is stored will trigger the obligation to remove or render inaccessible such content. In that respect, the question of the qualification as 'hosting service provider' is still widely debated before French courts.²⁶ A hosting service provider will benefit from the liability exemption regime if its role is limited to a purely technical, neutral and passive service (e.g., structuring and classifying the content made available to the public to facilitate the use of its service). However, if it plays an active role providing it with knowledge or control of content (e.g., determining or verifying the content published, broadcasted or uploaded), the provider will qualify as a website publisher and would be fully liable for any unlawful or harmful content published, broadcast or uploaded on its website.²⁷

23 Article L32-1 of the CPCE.

24 Article L33-1 of the CPCE.

25 Article L39 of the CPCE.

26 This issue now seems resolved regarding video-sharing sites: see, for instance, the judgment of the French Supreme Court (Cass., Civ. 1ère, 17 February 2011, No. 09-67896, *Joyeux Noël*) in which the Supreme Court recognised a simple hosting status for Dailymotion. The Supreme Court ruled that host websites did not have to control a priori the content they host but need to ensure the content is not accessible once it has been reported as illegal (Cass., Civ. 1ère, 12 July 2012, No. 11-15165 and No. 11-15188, *Google and Aufeminin.com*). This issue is still to be debated with respect to online marketplaces such as eBay from which it follows that French courts, which are favouring a very factual analysis of the role of the services provider, will give significant importance to judges' discretion. In that respect, see Cass., Com., 3 May 2012, No. 11-10.507, *Christian Dior Couture*, No. 11-10.505, *Louis Vuitton Malletier* and No. 11-10.508, *Parfums Christian Dior*, in which the Supreme Court confirmed an earlier decision of the Paris Court of Appeals that did not consider eBay as a 'host provider', and therefore refused to apply the liability-exemption regime. See, in contrast, *Brocanteurs v. eBay*, Paris Court of Appeals, Pôle 5, ch 1, 4 April 2012, No. 10-00.878, in which second-hand and antique dealers accused eBay of encouraging illegal practices by providing individuals with the means to compete unfairly against professionals, and in which the Paris Court of Appeals considered eBay as a host provider able to benefit from the liability-exemption regime. The Court of Appeals based its decision on the fact that eBay had no knowledge or control of the adverts stored on its site. If the seller was asked to provide certain information, it was for the purpose of ensuring a more secure relationship between its users. The issue is also debated in the context of online forums. The Supreme Court ruled on 3 November 2015 that publishing directors are responsible for 'personal contribution spaces' from the moment they become aware of their content and must be held criminally liable for failing to take down defamatory comments (Cass., Crim., 3 November 2015, No. 13-82645).

27 See judgment of the High Court of Paris, 4 December 2015, *Goyard St-Honoré v. LBC France*.

ii Universal service

The EU framework for universal services obligations, which defines universal services as the ‘minimum set of services of specified quality to which all end users have access, at an affordable price in the light of specific national conditions, without distorting competition’,²⁸ has been implemented by Law No. 96-659 of 26 July 1996 and further strengthened by Law No. 2008-3 of 3 January 2008. Universal service is one of the three components of public service in the telecoms sector in France (the other two being the supply of mandatory services for electronic communications and general interest missions).

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

- a* telephone services: connection to an affordable public telephone network enabling end users to take charge of voice communications, facsimile communications and data communications at data rates that are sufficient to allow functional internet access and free emergency calls; and
- b* enquiry and directory services (either in printed or electronic versions).

The transposition of the EECC is expected to extend the coverage of universal services to high-speed internet.

These services must be provided under strictly defined pricing and technical conditions taking into consideration difficulties faced by certain categories of users, such as low income populations, and provide equal access across geographical locations. Following calls for applications (one per category), the Minister in charge of electronic communications designates the operator or operators in charge of the universal service for a period of three years. France Télécom-Orange was designated as such until 2020.²⁹

ARCEP determines the cost of the universal service and, determines the amount of the other operators’ contributions to the financing of USOs through a sectoral fund when the provision of USOs represents an excessive burden for the operator in charge. In principle, every operator contributes to the financing, with each contribution being calculated on the basis of the turnover achieved by the operator in its electronic communications activities.³⁰

iii Restrictions on the provision of service

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

The Digital Republic Law³¹ introduced the principle of net neutrality into the national legal framework and granted ARCEP with new investigatory and sanctioning powers to ensure compliance (see also Section VI.i).³² In particular, ARCEP is now in charge of implementing net neutrality in accordance with Regulation No. 2015/2120 of

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

29 See Ministerial Order of 27 November 2017 designating Orange (JORF No. 0282 of 3 December 2017).

30 Article L35-3 of the CPCE.

31 Law No. 2016-1321 of 7 October 2016 for a Digital Republic.

32 Articles 40 to 47 of Digital Republic Law.

25 November 2015 establishing measures concerning open internet access.³³ When ARCEP identifies a risk of infringement by an operator, it can require said operator to comply ahead of time. The Digital Republic Law also reinforces the conditions under which the Minister in charge of electronic communications and ARCEP can conduct an investigation.³⁴

ARCEP has been taking on a more active role regarding net neutrality since the adoption of the Digital Republic Law. For example, ARCEP has been publishing an annual report on the state of the internet in France, identifying various threats that could undermine the internet's proper functioning and neutrality, and setting out the regulator's actions to contain these threats. The most recent issue addresses data interconnection, transition to IPv6,³⁵ the quality of fixed internet access, net neutrality, open platforms and the environmental impact of networks.³⁶

Pursuant to the Law of 21 June 2004, ISPs have a purely technical role regarding content, and do not have a general obligation to review the content they transmit or store. Nevertheless, when informed of unlawful information or activity, they must take prompt action to withdraw the relevant content, failing which their civil liability may be sought.

Since 2009, HADOPI has been competent to address theft and piracy matters, intervening when requested by regularly constituted bodies for professional defence that are entitled to institute legal proceedings to defend the interests entrusted to them under their statutes (e.g., SACEM) or by the public prosecutor. After several formal notices to an offender, the procedure may result in a €1,500 fine.³⁷

Finally, French e-consumers benefit from consumer law provisions and specific regulations. In particular, they are protected against certain unsolicited communications via email if their consent has not been obtained prior to the use of their personal data.³⁸ Moreover, consumers must be provided with effective means for requesting the cessation of unsolicited communications.³⁹ In addition, Article L223-1 of the French Consumer Code provides for the implementation of an opposition list on which any consumer can add his or her name in order to refuse advertising material.⁴⁰ All telephone operators also have the obligation to offer their users the possibility to register on an opposition list.⁴¹ With regard to phone-based advertising, the Bloctel service has been implemented since 1 June 2016 to prevent unsolicited communications to consumers registered on an opposition list.⁴²

33 Article 40 of Digital Republic Law.

34 Article 43 of Digital Republic Law.

35 IPv6 is the most recent version of the Internet Protocol, the communications protocol that provides an identification and location system for computers on networks and routes traffic across the internet. IPv6 has been developed to deal with the issue of IPv4 address exhaustion, and is intended to replace IPv4.

36 2020 report: 'The state of internet in France', ARCEP report, June 2020 (available at https://www.arcep.fr/uploads/tx_gspublication/rapport-etat-internet_edition-2020_250620.pdf).

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

38 See Article L34-5 of the CPCE.

39 See Article L34-5 of the CPCE.

40 See www.bloctel.gouv.fr.

41 The red list service ensures that contact information will not be mentioned on user lists. The orange list service ensures that contact information will not be communicated to corporate entities with the goal of advertisement. The contact information remains available on universal directories made available to the public.

42 See Ministerial Order of 25 February 2016 designating SA Opposetel (JORF No. 0050 of 28 February 2016).

iv Privacy and data security

Substantial changes in the legal framework regarding security in telecommunications have been made in the past few years.

Law No. 91-646 of 10 July 1991 concerning the secrecy of electronic communications, now codified in the Internal Security Code, provides that the Prime Minister may exceptionally authorise, for a maximum period of four months (renewable only upon a new decision), the interception of electronic communications in order to collect information relating to the defence of the nation or the safeguarding of elements that are key to France's scientific or economic capacity. In addition, pursuant to Law No. 2015-912 of 24 July 2015 (new Article L851-3 of the Internal Security Code) and only for the purpose of preventing terrorism, the Prime Minister may impose on providers of electronic communication services the obligation to implement an automated data-processing system for a maximum period of two months (renewable only upon a new decision) with the aim of detecting connections likely to reveal a terrorist threat. Article L851-2 of the Internal Security Code as amended by Law No. 2016-987 of 21 July 2016 provides that the administration is authorised, for prevention of terrorism, to collect real time connection data concerning pre-identified individuals likely to be connected to a terrorist threat.⁴³

Further, Law No. 2013-1168 on Military Programming (LPM) introduced a new chapter in the Internal Security Code relating to administrative access to data connection, including real-time geolocation.⁴⁴ This regime, which entered into force on 1 January 2015,⁴⁵ authorises the collection of 'information or documents' from operators as opposed to the collection of simply 'technical data' without judicial control. Requests for implementing such measures are submitted by designated administrative agents to a 'chosen personality' appointed by the National Commission for the Control of Security Interceptions (CNCIS) upon the proposal of the Prime Minister. CNCIS is in charge of controlling (a posteriori) administrative agents' requests for using geolocation measures in the course of their investigation. The Minister for Internal Security, the Defence Minister and the Finance Minister can also issue direct requests for the implementation of real-time geolocation measures to the Prime Minister who, in this case, will directly grant authorisations.

Law No. 2014-1353 of 13 November 2014, implemented by Decree No. 2015-174 of 13 February 2015, also entitles the administrative authorities to request ISPs to prevent access to websites supporting terrorist ideologies or projects.⁴⁶ Additionally, laws linked to the state of emergency created extraordinary means of data search and seizure and expanded the provisions of Law No. 2014-1353.

In the context of the terrorism threat, the French legislator has amended the Criminal Proceedings Code to tackle organised crimes such as terrorism acts.⁴⁷ Law No. 2016-731

43 Initially, this article provided that the collection could be authorised against the individual's relatives. However, the Constitutional Council, in decision No. 2017-648 QPC of 4 August 2017, censored this provision because it infringes the balance between public security and right to privacy.

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

45 Article 20 IV of the LPM.

46 See Article 6-1 of Law No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy as introduced by Article 12 of Law No. 2014-1353 of 13 November 2014 reinforcing regulations relating to the fight against terrorism.

47 However, the Constitutional Council established boundaries in the fight against terrorism regarding infringements of the freedom of communication. In Decision No. 2016-611 QPC of 10 February 2017, the Council considered as unconstitutional Article 421-2-5-2 of the French Criminal Code introduced

of 3 June 2016⁴⁸ allows police officers, with the authorisation and under the control of a judge, to access, remotely and without consent, the correspondences stored in electronic communications available through identification.⁴⁹ Police officers can also be authorised, by a judge and under his or her control, to use a technical method, such as an international mobile subscriber identity-catcher, to collect technical connection data to identify terminal equipment or users' subscription numbers as well as data regarding the location of the terminal equipment used.⁵⁰ This Law also extended existing investigating powers to all organised crimes, such as the real-time collection of computer data without consent, in the context of both preliminary investigations and investigations of flagrancy.⁵¹

In addition to the general rules applicable to the protection of personal data laid down in the 1978 Data Protection Law, the CPCE provides specific rules pursuant to which operators must delete or preserve the anonymity of any traffic data relating to a communication as soon as it is complete.⁵² Exceptions are provided, in particular for the prevention of terrorism and in the pursuit of criminal offences.

Unauthorised access to automated data-processing systems is prohibited by Articles 323-1 to 323-7 of the French Penal Code. In addition, with regard to cyberattacks, Law No. 2011-267 on Performance Guidance for the Police and Security Services (LOPPSI 2) introduced a new offence of online identity theft in Article 226-4-1 of the French Penal Code and empowers police officers, upon judicial authorisation and only for a limited period, to install software in order to observe, collect, record, save and transmit all the content displayed on a computer's screen. This facilitates the detection of infringements, the collection of evidence and the search for criminal activities by facilitating the creation of police files and coordination. The National Agency for the Security of Information Systems (ANSSI), a branch of the Secretariat-General for Defence and National Security created in 2009, is in charge of cybersecurity threats.⁵³

Moreover, LOPPSI 2 increases the instances where authorities may set up, transfer and record images on public roads, premises or facilities open to the public in order to protect the rights and freedom of individuals,⁵⁴ and recognises that the CNIL has jurisdiction over the control of video protection systems.⁵⁵

With regard to the detection of cyberattacks, Law No. 2018-607 of 13 July 2018⁵⁶ created Article L33-14 of the CPCE that involves operators in the detection of cyberattacks.

by Law No. 2016-731 of 3 June 2016, which punishes any person who frequently accesses online public communication services conveying messages, images or representations that directly encourage the commission of terrorist acts or defend these acts when this service has the purpose of showing images or representations of these acts that consist of voluntary harm to life.

48 Law No. 2016-731 of 3 June 2016 reinforcing the fight against organised crime and terrorism and their funding, and improving the efficiency and the protection of guarantees of criminal proceedings.

49 Articles 706-95-1 to 706-95-3 of the French Criminal Proceedings Code added by Article 2 of Law No. 2016-731 of 3 June 2016.

50 Articles 706-95-4 to 706-95-10 of the French Criminal Proceedings Code added by Article 3 of Law No. 2016-731 of 3 June 2016.

51 Article 706-102-1 of the French Criminal Proceedings Code amended by Article 5 of the Law No. 2016-731 of 3 June 2016.

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

53 See Decree No. 2009-834 of 7 July 2009 as modified by Decree No. 2011-170 of 11 February 2011.

54 See Article L. 251-2 of the French Internal Security Code.

55 See Article L. 253-2 and L. 253-3 of the French Internal Security Code.

56 Law No. 2018-607 of 13 July 2018, Military Planning Law 2019–2025 (LPM).

Pursuant to this article, electronic communications operators are entitled to use technical markers such as IP addresses to detect or prevent any potential threat that may affect the security of information systems of their subscribers. In this case, operators shall inform the ANSSI without delay.

With regard to the protection of children online, Article 45 of the 1978 Data Protection Law requires that clear information be provided to minors, using terms that are adapted to their age. Adequate vigilance and warning systems shall also be implemented (e.g., awareness messages, age gates with reliable controls, possibility of parental supervision, etc.). Regarding consent, specific rules apply in France. The age of a child's consent in relation to the offer of information society services is 15 years old (whereas it is, by default, 16 years old under Article 8 of the GDPR). Children under 15 years old may only give their consent after being duly authorised to do so by the holder of parental rights. The lawfulness of the processing activity, therefore, requires a double consent: that of the minor as well as that of the holder of parental rights.⁵⁷

In terms of personal data protection, obligations were reinforced with the entry into application of the GDPR.⁵⁸ The CNIL published in 2018 a new guide on the security of personal data, recalling basic precautions to be implemented systematically and providing risk management methodologies.⁵⁹

v The implementation of the Network and Information Security Directive

With regard to cybersecurity, the Network and Information Security Directive (NISD)⁶⁰ has been implemented into French law by Law No. 2018-133 of 26 February 2018 and Decree No. 2018-384 of 23 May 2018. This framework imposes an obligation in terms of security of network and information systems on two categories of entities: (1) the operators of essential services (OESs) and (2) digital service providers (DSPs).

The categories of services considered as essential services are listed in the appendix of Decree No. 2018-384 (e.g., payment services, insurance, services involving preventive medicine, diagnosis and healthcare, distribution of electricity and gas). The Prime Minister can designate operators as an OES if they provide at least one of the enumerated services.⁶¹ The operator is notified of the Prime Minister's intent to designate it as an OES and can formulate observations.⁶²

DSPs are providers of cloud, online marketplace and search engine services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.⁶³

Nevertheless, the French implementing law excludes from its scope certain types of entities already subject to information system security regulations, such as operators for

57 Article 45 of the 1978 Data Protection Law.

58 See Article 32 of the GDPR.

59 Available at <https://www.cnil.fr/en/new-guide-regarding-security-personal-data>.

60 Directive No. 2016/1148 of 6 July 2016.

61 Article 3 of Decree No. 2018-384 dated 23 May 2018.

62 Article 3 of Decree No. 2018-384 dated 23 May 2018.

63 Article 10 of Law No. 2018-133 of 26 February 2018.

their activities related to the operation of ECNs or the provision of ECSs and providers of trust services for electronic transactions subject to Article 19 of Regulation 910/2014 dated 23 July 2014.⁶⁴

Both OESs and DSPs shall appoint a representative in charge of the contact with the ANSSI.⁶⁵ For DSPs, this representative acts in the name of the provider for compliance with its obligations set forth of the NSID framework.⁶⁶ DSPs shall keep an updated list of all networks and information systems necessary for the provision of their services within the European Union.⁶⁷

OESs must comply with security measures defined in the Order of 14 September 2018 adopted for its implementation.⁶⁸ DSPs shall ensure, based on the state of art, a level of security for all networks and information systems necessary for the provision of their services within the European Union appropriate to the existing risks.⁶⁹ DSPs shall refer to Article 2 of the Commission Implementing Regulation of 30 January 2018 for the security measures that should be implemented.⁷⁰ Documents attesting to this implementation should be made available to the ANSSI in case of control.⁷¹

Both OESs and DSPs shall report to the ANSSI, without delay, after becoming aware of any incident affecting networks and information systems that has or is likely to have a significant impact on the continuity of services.⁷²

Non-compliance with the obligations set forth in the NSID framework may be sanctioned with criminal fines ranging from €100,000 to €125,000 for OESs⁷³ and from €75,000 to €100,000 for DSPs.⁷⁴

IV SPECTRUM POLICY

i Development

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

ii Flexible spectrum use

The trend towards greater flexibility in spectrum use is facilitated in France by the ability of operators to trade frequency licences, as introduced by Law No. 2004-669 of 9 July 2004.⁷⁵

64 Article 2 of Law No. 2018-133 of 26 February 2018.

65 Articles 5 and 16 of Decree No. 2018-384 dated 23 May 2018.

66 Article 16 of Decree No. 2018-384 dated 23 May 2018.

67 Article 17 of Decree No. 2018-384 dated 23 May 2018.

68 Article 10 of Decree No. 2018-384 dated 23 May 2018.

69 Article 12 of Law No. 2018-133 of 26 February 2018.

70 Article 18 of Decree No. 2018-384 dated 23 May 2018.

71 Article 19 of Decree No. 2018-384 dated 23 May 2018.

72 Articles 7 and 13 of Law No. 2018-133; Articles 11, 12, 20 and 21 of Decree No. 2018-384 dated 23 May 2018.

73 Article 9 of Law No. 2018-133 of 26 February 2018.

74 Article 15 of Law No. 2018-133 of 26 February 2018.

75 Article L42-3 of the CPCE.

The general terms of spectrum licence trading are defined by Decree No. 2006-1016 of 11 August 2006, and the list of frequency bands the licences of which could be traded are laid down by a Ministerial Order of 11 August 2006. A frequency database that provides information regarding the terms for spectrum trading in the different frequency bands open in the secondary market is publicly accessible. A spectrum licence holder may transfer all of its rights and obligations to a third party for the entire remainder of the licence (full transfer) or only a portion of its rights and obligations contained in the licence (e.g., geographical region or frequencies). The transfer of frequency licences is subject either to the prior approval of or notification to ARCEP, which may refuse such assignment.⁷⁶ Another option available for operators is spectrum leasing, whereby the licence holder makes frequencies fully or partially available for a third party to operate. Unlike in a sale, the original licence holder remains entirely responsible for complying with the obligations attached to the frequency licence. All frequency-leasing operations require the prior approval of ARCEP.

iii Broadband and next-generation mobile spectrum use

Spectrum in the 800MHz and 2.6GHz bands was allocated for the deployment of the ultra-high-speed 4G mobile network: in that respect, licences for the 2.6GHz frequency were awarded to Bouygues Telecom, Free Mobile, Orange France and SFR in September 2011,⁷⁷ and in December 2011, licences for the 800MHz were awarded to the same operators except Free Mobile,⁷⁸ which has instead been granted roaming rights in priority roll-out areas. New spectrum in the 700 and 800MHz bands was transferred in December 2015 to promote better network capacities in areas with low population density. The French government launched a call for applications, to be sent before 2 October 2018, in order to reassign the 900MHz, 1,800MHz and 2.1GHz bands, whose authorisations will expire between 2021 and 2024.⁷⁹ As a result of an agreement reached between ARCEP, the French government and operators on 14 January 2018, the reassignment procedure will take into account operators' stated commitments to improve voice and data coverage in all territories, making regional development targets a priority.

On 16 June 2017, ARCEP had authorised Bouygues Telecom and SFR to deploy 4G networks in the 2.1GHz band, historically used by French mobile operators' 3G networks, to improve 4G speeds.⁸⁰

Additionally, under ARCEP supervision, 5G deployment is being prepared, with network coverage estimated to begin in 2020. The European Union's public-private partnership between the European Commission and telecom industries, the 5G-PPP, which was launched on 1 July 2015, provides a framework for national 5G development. On 30 September 2015, ARCEP gave Orange authorisation to conduct initial tests for 5G in the city of Belfort until the end of 2016. The authorisation delivered to Orange tests three formerly unused spectrum ranges, namely the 3,600–3,800MHz, 10,500–10,625MHz and 17,300–17,425MHz frequencies.⁸¹ On 16 July 2018, the French government officially

76 Article R20-44-9-2 et seq. of the CPCE.

77 ARCEP, Decision No. 2011-1080 of 22 September 2011.

78 ARCEP, Decision No. 2011-1510 of 22 December 2011.

79 See ARCEP press release of 2 August 2018.

80 ARCEP, Decisions No. 2017-0734 (*Bouygues Telecom*) and No. 2017-0735 (*SFR*) of 13 June 2017.

81 See ARCEP press release of 30 September 2015.

launched its 5G roadmap.⁸² Three main goals have been announced: (1) launching of several 5G pilot programmes in various regions; (2) allocation of new 5G frequencies and ensuring a commercial rollout in at least one major city by 2020; and (3) provision of 5G coverage for main transport routes by 2025. Additionally, four main working areas have been identified: (1) free-up and attribute RFs for the 5G network; (2) foster the development of new industrial uses; (3) accompany the deployment of 5G infrastructures; and (4) ensure transparency and dialogue on 5G deployments and the exposure of the public.

On 15 July 2019, ARCEP launched a public consultation in connection with its draft procedure for awarding licences to use frequencies in the 3,490–3,800MHz band, followed by the launch of the allocation procedure in late 2019.⁸³ As of April 2020, Bouygues Telecom, Free Mobile, Orange and SFR had qualified to participate in the auction for allocation of frequencies.⁸⁴ The auction for the award of 3,490–3,800MHz band was closed on 1 October 2020.⁸⁵

iv Spectrum auctions and fees

Spectrum auctions in the case of scarce resources

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

Fees

Pursuant to Articles R20-31 to R20-44 of the CPCE, licensed operators contribute to the financing of the universal services.

V MEDIA

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

i Content requirements

At least 60 per cent of the audiovisual works and films broadcast by licensed television broadcasters must have been produced in the EU, and 40 per cent must have been produced originally in French.⁸⁶

Private radio broadcasters must, in principle, dedicate at least 40 per cent of their musical programmes to French music.⁸⁷

82 See: https://www.economie.gouv.fr/files/files/Actus2018/Feuille_de_route_5G-DEF.pdf.

83 See ARCEP Draft Decision of 15 July 2019 proposing the procedure for awarding the 3,490–3,800MHz band in Metropolitan France.

84 See ARCEP press release of 2 April 2020.

85 See ARCEP press release of 1 October 2020.

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

87 Article 28 2^e-bis of the Law of 30 September 1986.

In addition, pursuant to Law No. 2014-873 of 4 August 2014 for genuine equality between women and men, audiovisual programmes have the duty to ensure fair representation of both women and men. Furthermore, audiovisual programmes and radio broadcasters must combat sexism by broadcasting specific programmes in this respect.⁸⁸

Law No. 2018-1202 of 22 December 2018⁸⁹ with regard to ‘fake news’ suggests several measures to limit the impact of false information on the public election process. For instance, Article 11 of the Law provides that certain operators of online platforms – in the context of public elections – should implement measures to combat the broadcasting of false information likely to disturb public order or alter polls’ reliability. Operators must implement easily accessible and visible systems that will allow users to report such false information, including when they are financed by third parties.

Decree No. 2020-984 dated 5 August 2020 relaxed certain rules regarding the broadcast of films, increasing the maximum number of hours allotted per year.

ii Advertising

Advertising in television broadcasting is subject to strict regulations in France.⁹⁰ In particular, advertising must not disrupt the integrity of a film or programme, with at least 20 minutes between two advertising slots. Films may not be interrupted by advertising that lasts more than six minutes.

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

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

Media owners are also subject to transparency requirements in order to protect advertisers of digital advertisement. According to Article 2 of the Decree No. 2017-159 dated 9 February 2017, media owners have to provide advertisers with the date and place of diffusion of the advertisements; the global price of the advertising campaign; and the unitary price charged for each advertising space.

Decree No. 2020-983 dated 5 August 2020 introduced a relaxation of certain rules regarding publicity by authorising segmented advertisement and advertisement for the movie industry on television.

iii Online representation of content

The Copyright Directive 2019/790 came into force on 7 June 2019. The Directive is part of a wider strategy to reform the laws relating to digital marketing, e-commerce and telecommunications, to bring the EU into the digital age and achieve greater harmonisation of the laws governing these areas. Member States have until 7 June 2021 to transpose the Directive into national law.⁹¹

88 Article 56 of the Law of 4 August 2014.

89 Law No. 2018-1202 of 22 December 2018 regarding the fight against the manipulation of information.

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

91 Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market.

France became the first Member State to transpose Article 15 of the Copyright Directive by the Law of 24 July 2019, creating a neighbouring right to the benefit of press publishers and news agencies for the online reproduction and representation of their publications by an online communication service provider.⁹²

It introduces new provisions under the French Intellectual Property Code by implementing an obligation to obtain an authorisation from publishers of online news services or news agencies before any reproduction or communication to the public of all or part of their press publications in a digital form by an online communication service provider. These rights will expire two years after the press publication is published, a term calculated from 1 January of the year following the date on which that press publication is published.

Press publishers and news agencies shall be granted compensation by online communication service providers using all or part of a press publication based on the exploitation revenues of any kind, direct or indirect, of the said communication service provider and if not possible on a flat-rate basis. The Law specifies that such compensation shall take into account quantitative and qualitative elements such as ‘human, material and financial investments made by publishers and news agencies’, as well as ‘the contribution of press publications to political and general information and the importance of the use of press publications by an online communication service to the public’.

Finally, the Law has duly included the exceptions to such neighbouring right that relate to: hypertext links, the use of isolated words and the use of ‘very short extracts’ of a press publication and outlines that the use of isolated words or very short extracts may not impact the effectiveness of the new neighbouring right and that this effectiveness is ‘notably affected when the use of very short extracts replaces the press publication itself or exempts the reader from referring to it’.

VI THE YEAR IN REVIEW

i The transposition of the European Electronic Communications Code and the Audiovisual Media Services Directive

A legislative bill transposing both the EECC and the AMSD is currently being debated before the National Assembly.⁹³ According to the proposed bill, major revisions required under the EECC, such as the regulation of OTT services, new consumer protection obligations to be imposed on electronic communications providers, as well as those required under the AMSD, such as the regulation of online video platforms and the investigatory powers of the CSA, are to be adopted through ordinance.⁹⁴ The same bill, however, aims to directly transpose requirements regarding the expansion of universal services to cover high-speed internet access and voice services.⁹⁵

92 Law No. 2019-775 of 24 July 2019.

93 Bill including various provisions for the application of the law of the European Union in economic and financial matters (ECOM1935457L).

94 *ibid.*, Articles 24 *ter* and 26.

95 *ibid.*, Article 27.

ii Hate speech regulations

Following the adoption of Law No. 2018-1202 of 22 December 2018⁹⁶ with regard to ‘fake news’, another law regarding content regulation, Law No. 2020-766 of 24 June 2020 regarding hateful content on the internet has been enacted. Law No. 2020-1202 created additional obligations for platform operators to delete child pornography and terrorist content within one hour when notified by the relevant authority, and to delete any hateful content that is ‘obviously illicit’ within 24 hours when notified by any end user. However, these obligations were found to be unconstitutional and invalidated by the French Constitutional Court.⁹⁷

iii Additional GDPR sanctions

On 21 January 2019 the CNIL imposed a €50 million fine on Google LLC for breach of its transparency and information obligations and lack of legal basis for the processing of targeted advertising.⁹⁸

This decision was appealed by Google, but subsequently confirmed by the French Supreme Administrative Court.⁹⁹

The CNIL continues to act as an active regulatory authority, and has recently imposed its first sanction as a lead supervisory authority (Article 60 of the GDPR) in July 2020.¹⁰⁰

iv The CNIL’s new guidance on cookies

On 4 July 2019, the CNIL published new guidance on cookies providing general requirements for obtaining valid consent to the placement of cookies and other tracking devices.¹⁰¹ This guidance was partially struck down by the French Supreme Administrative Court,¹⁰² prompting the adoption of amended guidelines and new recommendations.¹⁰³

The modified guidance largely reiterates the data protection principles already applied by the CNIL on previous occasions. Organisations shall not place cookies or process personal data obtained through them unless users have previously positively accepted the placement in a free, specific, informed and unambiguous manner, in line with the definition and conditions of Articles 4(11) and 7 of the GDPR, and withdrawal of consent must be as easy as giving consent.

96 Law No. 2018-1202 of 22 December 2018 regarding the fight against the manipulation of information.

97 Cons. Const. 18 June 2020, No. 2020-801.

98 CNIL Decision No. SAN - 2019-001 of 21 January 2019 imposing a pecuniary sanction against GOOGLE LLC.

99 Conseil d’Etat, 19 June 2020, req. No. 430810.

100 CNIL decision No. SAN – 2020-003 of 28 July 2020 regarding SARTOO SAS corporation.

101 CNIL decision No. 2019-093 of 4 July 2019 adopting guidelines on the application of Article 82 of the amended law dated 6 January 1978 to the reading or writing operations in a user’s terminal (in particular cookies and other tracking devices) (corrigendum).

102 Conseil d’Etat, 19 June 2020, req. No. 434684.

103 CNIL decision No. 2020-091 of 17 September 2020 adopting guidelines on the application of Article 82 of the amended law dated 6 January 1978 modified to the reading or writing operations in a user’s terminal (in particular cookies and other tracking devices) and abrogating decision No. 2019-093 of 4 July 2019; CNIL decision No. 2020-092 of 17 September 2020 adopting a recommendation proposing the practical modalities of compliance for the use of ‘cookies and other tracking devices’.

'Cookie walls' as well as whether audience management cookies or performance cookies may be exempted from the opt-in consent requirement are now subject to a case-by-case review. The CNIL also recommends operators give users the opportunity to periodically renew their consent, for example, every six months.

Further clarifications on information obligations are provided in the new guidance documents. The identity of every third-party cookie provider must now be communicated to users, as well as greater details regarding the cookies' functionalities.

The CNIL announced that website providers will have until March 2021 to comply with the new guidelines.

v **The implementation of Article 15 of the Copyright Directive under French law**

The saga surrounding the implementation of Article 15 of the Copyright Directive under French law continues. As the national law did not prohibit the assignment of a licence free of cost, Google decided to withdraw longer displays of copyrighted content unless the rights holders agreed to give free authorisation. In April 2020, the FCA ordered Google to enter into good faith negotiations with publishers to decide on remuneration for the display of copyrighted content in Google News or Search.¹⁰⁴ Google lodged an appeal before the Paris Court of Appeal, which confirmed the FCA's order in a decision dated October 2020.

vi **The creation of a national Pole of Expertise on Digital Regulation (PEReN)**

On 31 August 2020, the creation of a national Pole of Expertise on Digital Regulation (PEReN) was announced.¹⁰⁵ The PEReN will be in charge of providing expertise regarding the regulation of digital platforms, in particular regarding the technical aspects including data analysis, data sharing, algorithmic processing and data science.

VII CONCLUSIONS AND OUTLOOK

With the national transposition of the EEC Directive and the AMSD still underway and the unsettled questions surrounding the Digital Services Act remaining at the European Parliament, significant changes are expected in the French TMT regulatory framework in the year to come. The inclusion of the OTT services under the telecommunications regulations, new regulations regarding platforms, and implementation of provisions transposing the Copyright Directive are only few of the moving pieces that can have a large impact on the legal landscape. Content regulation and the reshuffling of regulatory authorities are two other areas that should also be closely monitored.

104 FCP decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

105 Décret No. 2020-1102 du 31 août 2020 portant création d'un service à compétence nationale dénommé 'Pôle d'expertise de la régulation numérique' (PEReN)

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I OVERVIEW

With an annual business volume of approximately €260 billion in 2018, the ICT sector did not only increase business volume by 3.6 per cent compared to 2017; it is also one of the largest economic sectors in Germany, employing already more than 1.2 million people.² ICT has become a driving force in Germany's economy, contributing to 4.8 per cent of the national gross value-added services in 2018.³

By focusing on key issues such as convergence, mobility, data protection and internet security, the government has tried to advance the information society through targeted policies to modernise legal and technical frameworks and to promote research and market-oriented development over the past decade. As part of this overall effort, the federal government has adopted specific programmes and strategies tailored to the needs of the ICT sector. On 20 August 2014, it concluded the Digital Agenda 2014–2017, focusing on a strategy for the digital future of Germany,⁴ which was extended by the Digital Strategy 2025⁵ in 2016. In the current coalition agreement, politicians have set the goal of supplying the whole of Germany via gigabit networks by the end of 2025.⁶

The Digital Agenda further includes topics such as digital security and the Strengthening Industry 4.0 initiative. Beyond that, ethical aspects in the ICT sector are increasingly moving into the political spotlight.⁷

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2 www.bmwi.de/Redaktion/DE/Artikel/Branchenfokus/Wirtschaft/branchenfokus-informationstechnik-und-telekommunikation.html.

3 https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/ikt-branche-2018.pdf?__blob=publicationFile&v=6, p. 3.

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

5 www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/digitale-strategie-2025,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

6 See also <https://www.bmvi.de/DE/Themen/Digitales/Breitbandausbau/Breitbandfoerderung/breitbandfoerderung.html>.

7 On 18 July 2018, the German Federal Government set up the Data Ethics Commission (DEK), which is responsible for ethical standards and guidelines. A first report was published in 2019; see <https://www.bmi.bund.de/DE/themen/it-und-digitalpolitik/datenethikkommission/datenethikkommission-node.html>.

II REGULATION

i The regulators

All television and radio broadcasters are subject to state control. Public service broadcasters are supervised by internal committees: content-related supervision is carried out by the respective broadcasting council. The respective administrative board, which is appointed by the broadcasting council, supervises all management decisions made by the director. Private broadcasters, in contrast, are subject to external supervision. The competent authority is the respective state media authority of each German state,⁸ whose responsibilities – apart from supervision – include granting authorisations and assigning transmission capacities.⁹ They also have a wide range of powers to supervise broadcasters, such as warnings, prohibitions, or withdrawals and revocations of licences.¹⁰

The state media authorities work together in a committee concerning licensing and supervision as well as in the development of private broadcasting on fundamental questions, primarily with a view to the equal treatment of private TV and radio broadcasters.¹¹

The state media authorities are also responsible for the compliance of private TV and radio broadcasts with basic programming principles. They supervise the observance of regulations on advertising limitations, the protection of minors and the protection of pluralism. Their tasks are carried out by several committees.

The main regulator in the area of telecommunications is the federal legislator due to the competence regarding telecommunications. Important federal laws are the Telecommunications Act (TKG) and, for telemedia services, the Telemedia Act (TMG).

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

The Federal Commissioner for Data Protection and Freedom of Information (BfDI) is responsible for the supervision of data protection at telecommunications companies insofar as they provide telecommunications services.¹²

8 Four states have joint media authorities: Berlin and Brandenburg as well as Hamburg and Schleswig-Holstein.

9 Section 50 et seq. of the Inter-State Broadcasting Treaty (RStV).

10 Section 38(2) of the RStV.

11 The goals and remits of this cooperation are laid down in the Contract on the Cooperation of the Media Authorities in the Federal Republic of Germany. The focus is on promoting programming diversity, and thus freedom of information and opinion in private television and radio. This involves, in addition to controlling media power by means of licensing limitations and licence monitoring, the promotion of media literacy among viewers and listeners.

12 Whereas other data processing activities in the ICT area are supervised by local data protection authorities.

ii Main sources of law

The use and distribution of media and telecommunications are first of all protected by fundamental rights. The Basic Law (GG) guarantees the freedom of information, the freedom of the press for journalists and publishers, as well as the freedom of broadcasting and film (Article 5(1)) and the freedom of art (Article 5(3)). Furthermore the GG guarantees the secrecy of telecommunications.

Broadcasting law is the responsibility of the 16 federal states. They have agreed on a fundamental treaty regulating the legal framework, the State Treaty on Broadcasting (RStV). The 22nd amendment to the RStV came into effect on 1 May 2019.¹³ However, the RStV will be replaced by the State Treaty on Media (MStV), which has already been passed. This serves primarily to adopt the Audiovisual Media Services Directive 2010/13/EU and is scheduled to come into force at the end of 2020.

Further legal sources, at the level of the federal states, are various other interstate treaties, such as the Interstate Treaty on the Protection of Minors in Broadcasting and in Telemedia (JMStV).

In addition, broadcasting is regulated in the TMG, which includes in particular the transmission of media via the internet.

Telecommunication law lies in the shared competence between the EU and the Member States.¹⁴ The EU has issued several regulations and directives relating to this matter.¹⁵

Germany adopted the most important regulations in particular in the TKG. The next reform of the TKG will be comprehensive and will adopt the EECC requirements.

iii Regulated activities

Private and public television broadcasting is governed by the RStV, which outlines the side-by-side existence of public and private broadcasting. All private broadcasters require a licence for the purpose of providing broadcasting services.¹⁶ According to the RStV, the provider of an electronic information and communications service – if it is categorised as a broadcast – requires a licence as well.¹⁷ If the competent state media authority determines that this is the case, the provider, after being notified of this classification, must at his or her choice either submit a licence application within three months or change the service in a way that it is no longer qualified as a broadcast.

When providing telecommunication or network services, operators have to adhere to the TKG. The TKG does not generally oblige telecommunications services or network

13 See https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Rundfunkstaatsvertrag_RStV.pdf.

14 Article 4(2) lit. h, 170 et seq. TFEU.

15 e.g., Roaming Regulations (EU) 531/2012, the Universal Service Directive 2002/22/EC, the Access Directive 2002/19/EC, European Electronic Communications Code Directive (EU) 2018/1972 (EECC), which has to be adopted by the Member States by 21 December 2020 (Article 124 EECC).

16 Section 20(1) RStV.

17 Section 20(2) RStV.

providers to apply for a licence; however, it requires them to notify the BNetzA when they start to provide the services or the network.¹⁸ It is not unequivocal in each case which services are exempt from a notification.¹⁹

iv Ownership and market access restrictions

German law provides for certain restrictions on foreign investments. The Federal Ministry of Economics and Technology (BMWi) may prohibit transactions that might interfere with German or foreign interests according to Section 4 of the Foreign Trade Law (AWG) and Section 55 et seq. of the Foreign Trade Law Ordinance (AWV). The scope of the foreign investment control has developed in the last years by stipulating a list of particularly sensitive business areas which relate to critical infrastructures²⁰ and which, depending on certain threshold values, explicitly cover specific ICT activities.

The TKG imposes certain obligations on telecommunications service providers and network operators. Agreements relating to telecommunications services and network access can be negotiated freely²¹ with providers and operators, unless one party has significant market power (in which case, price terms and access obligations are regulated by the TKG; a provider with significant market power is not able to choose its customers freely).²²

The RStV contains special ownership control provisions²³ that are designed to achieve media-plurality objectives. These rules apply in addition to the general merger control regime under German and European competition law and are administered by the Commission on Concentration in the Media. Section 11d (2) No. 3 RStV further states that public broadcasting companies are not entitled to offer non-broadcasting-related print media. Criteria to evaluate content are to what extent the offer meets a democratic, social and cultural need of society, whether the offer will contribute to journalistic competition and the financial costs.

Since 2012, proceedings concerning the Tagesschau-App have been ongoing. Publishing houses claimed that the Tagesschau-App provides a high amount of non-broadcasting-related textual content and therefore has a competition-distorting effect. On 30 April 2015, the Federal Court of Justice (BGH) held that not only the concept of the App has to comply with the RStV, but also the specific content, which is subject to full judicial review.²⁴ If broadcasting and non-broadcasting elements are implemented, it is necessary to determine the focus. On 30 September 2016, the Higher Regional Court of Cologne (OLG Köln) came to the conclusion that the app content on the relevant day was not sufficiently broadcasting-related but equivalent to print media and hence not permitted.²⁵ In 2018, the BGH did not accept the appeal of the decision, ultimately bringing the case before the Federal Constitutional Court (BVerfG).²⁶

18 Section 6 TKG.

19 The BNetzA publishes a list of notified undertakings at regular intervals: <https://www.bundes-netzagentur.de/EN/Areas/Telecommunications/Companies/Notification/NotificationRequirement-node.html>.

20 Listed in the BSI-Kritis Ordinance, https://www.bmi.bund.de/SharedDocs/downloads/EN/themen/it-digital-policy/bsi-kritis-ordiance-poster.pdf?__blob=publicationFile&v=4.

21 e.g., access, payment terms, currency and billing.

22 See Sections 21 and 28 TKG.

23 Section 25 et seq. RStV.

24 BGH ruling of 30 April 2015 – I ZR 13/14 – GRUR 2015, 1228 et seq.

25 OLG Köln ruling of 30 September 2016 – 6 U 188/12 – GRUR 2017, 311().

26 MMR-Aktuell 2018, 402395.

v Transfers of control and assignments

The German merger control provisions are enforced by the Federal Cartel Office (BKartA). The current legislation can be found in Chapter VII of the Act Against Restraints of Competition (GWB), which deals with the control of concentrations affecting the German market. In addition, Section 101 et seq. of the TFEU and the EC Merger Regulation apply.²⁷

The filing of merger notifications in Germany is mandatory if the turnover thresholds according to Section 35(1) of the GWB are met and none of the *de minimis* exemptions apply.²⁸ If the statutory conditions for prohibition are fulfilled, the BKartA will prohibit the merger or order the divestment or disposal of certain assets of a completed merger.

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

There are no legal deadlines for a notification of a concentration, but notifiable concentrations must not be completed before clearance. Therefore, it is advisable to submit a notification well before the envisaged completion date. It is possible to file a pre-merger notification even prior to the signing of the transactional documents. Furthermore, parties should not forget to submit the mandatory post-completion notice to the BKartA, which needs to be filed without undue delay following completion of the transaction.²⁹ In principle, all parties involved in a merger are responsible for filing.

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

The BKartA can also consider services provided without remuneration and scaling effects in its assessment of market share or market power, and the threshold for merger control is a transaction value of €400 million.³⁰

27 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139>.

28 Two *de minimis* exemptions apply under the following conditions:

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

29 See *Getting the Deal Through – Merger Control*, <https://gettingthedealthrough.com/area/20/jurisdiction/11/merger-control-germany>.

30 Cf. Section 18 (3a) and Section 35 (1a) GWB; cf. also Seeliger/deCrozals, ZRP 2017, 37.

III TELECOMMUNICATIONS & INTERNET ACCESS

i Internet and internet protocol regulation

All IP-based services are regulated under the TMG.³¹ Commercial rules for telemedia are covered in the TMG, while aspects relating to journalistic content are regulated in the RStV³² and the JMStV. Telemedia services are permission-free and generally do not need to be registered.

Telecommunications services and telemedia services are mutually exclusive; therefore, telecommunications are excluded from the scope of the TMG. In practice, the distinction is often difficult to make. When granting access to the internet, a distinction must be made according to the services and functions offered by the provider. If the provider restricts itself to the exclusive data transmission of third-party content from the internet to the user and does not prepare any content, this constitutes a telecommunications service and thus not a telemedium.

ii Universal service

Broadband availability continues to increase steadily throughout Germany. At the end of 2019, about 92 per cent of households connected with broadband connections of at least 50Mbit/s. Over 43 per cent of households have gigabit (1,000Mbit/s) connections. Bandwidths of at least 200Mbit/s are available for about 75 per cent of households. While the increasing use of super-vectoring technology has contributed to increased availability in the bandwidth classes up to 200Mbit/s, the expansion of cable TV networks (CATV) based on the new DOCSIS 3.1 technology and the expansion of FTTB/H fibre optic networks are driving growth in the higher bandwidth classes. However, LTE coverage can still be improved in Germany. The network operators had promised to provide LTE network coverage of 98 per cent (by population) nationwide by the end of 2019. In each federal state, 4G coverage had to be at least 97 per cent. According to a recent inquiry by the BNetzA from May 2020, this proof could not be provided by the network operators in all federal states.³³

The federal government intends to give a further boost to the development of the broadband network by, for example, capitalising on synergies in the construction of infrastructure, using the digital dividend³⁴ and formulating regulations that foster investments. Various initiatives exist at the federal, state and local levels.³⁵

Moreover, the federal government encourages projects to pursue industry solutions. For example, small and medium-sized telecommunications companies can borrow funds on privileged terms and with adequate risk pricing through the corporate financing programme of Germany's state-owned development bank.³⁶

31 Adopted on 18 January 2007 and last amended on 11 July 2019.

32 Section 54 et seq. RStV.

33 While some states are nearly 100% covered, others have only 80.7% coverage or even less: https://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/OeffentlicheNetze/Mobilfunknetze/mobilfunknetze-node.html.

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

35 e.g., the German broadband initiative, the Netalliance Digital Germany initiative and Zukunftsoffensive Gigabit Germany; the Netalliance Digital Germany initiative started on 7 March 2014.

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

In any event, the existing federal and state loan guarantee scheme is generally available to companies in the telecommunications sector to prevent economically desirable broadband projects from failing as a result of the lack of suitable financing.

White areas³⁷ are shrinking rapidly, partly thanks to ongoing investment by the network operators. The reduction has also largely been achieved thanks to the hosting of action programmes offered by the federal states, local authority broadband initiatives in those areas, and the nationwide activities of associations such as the German Association of Internet Enterprises,³⁸ the Association of the Providers of Telecommunications and Value-Added Services³⁹ and the Association of Towns and Municipalities.⁴⁰

The next revision of the TKG is expected to make a further contribution to broadband expansion.⁴¹ For example, the federal government is planning a right to fast internet access based on criteria defined by the BNetzA. In addition, certain sanctions will be laid down in the event that a network operator fails to deliver the guaranteed transmission rates. In order to drive the expansion forward, the revision also aims to implement the newly permitted, more comprehensive regulatory incentive mechanisms from the EECC.⁴²

iii Restrictions on the provision of service

An amendment of the TKG in 2012 initially introduced the concept of net neutrality. The federal government was authorised to draft a regulation that sets out, *inter alia*, the requirements for non-discriminatory data transmissions.⁴³ However, with the entry into force of the European Net Neutrality Regulation,⁴⁴ a national regulation was no longer pursued and the TKG provision was repealed. Article 3 of the Net Neutrality Regulation provides, *inter alia*, that providers of internet access shall treat all traffic equally, but permits reasonable traffic management measures provided these are transparent, non-discriminatory and proportionate, and are not founded on commercial considerations. The BEREC⁴⁵ published guidelines for the implementation of the obligations of national regulatory authorities.

An example of controversial restrictions on network provisioning is the reduction of the internet speed on mobile phone plans. In Germany, mobile phone plans usually only grant few gigabytes⁴⁶ of traffic with full speed. Having exceeded this data amount, Internet-speed will be reduced to 16 or 32kbit/s. For some years, mobile network carrier offered so called 'passes', which exclude certain music streaming services or social media services from this amount of data.⁴⁷ In 2018, the BNetzA prohibited certain conditions of a zero-rating mobile tariff option, which has been challenged by the provider. The Administrative Court of Cologne referred questions to the European Court of Justice

37 White areas are rural areas in Germany that still lack high-speed internet connections.

38 www.eco.de.

39 www.vatm.de.

40 www.dstgb.de.

41 <https://www.heise.de/news/TKG-Novelle-Verzoegerung-beim-Recht-auf-schnelles-Internet-4865581.html>.

42 <https://www.bundesregierung.de/breg-de/themen/digital-made-in-de/fortentwicklung-telekommunikationsregulierung-1546632>.

43 See former Section 41a(1) of the TKG.

44 European Net Neutrality Regulation 2015/2120/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>.

45 Body of European Regulators for Electronic Communications.

46 Usually 1 to 15 GB.

47 Known as 'zero-rating' or 'zero tariff'.

(CJEU), which has not been answered yet.⁴⁸ In a second case, regarding the reduction of internet speed by a provider, the same Court also referred a question to the CJEU concerning the conformity with Article 3 of the Roaming Directive.⁴⁹ In a recent ruling, the CJEU states that ‘the requirements to protect internet users’ rights and to treat traffic in a non-discriminatory manner preclude an internet access provider from favouring certain applications and services by means of packages enabling those applications and services to benefit from a “zero tariff” and making the use of the other applications and services subject to measures blocking or slowing down traffic’.⁵⁰

Finally, the UWG provides restrictive provisions regarding unsolicited calls, emails and text messages.⁵¹ Making first contact with consumers by such measures requires, as a general principle, the explicit approval of the consumers.⁵²

iv Privacy and data security

Privacy

The protection of personal data in the ITC area is governed by (1) the EU General Data Protection Regulation (GDPR), (2) the Federal Data Protection Act (BDSG) as well as (3) sector-specific telecommunications and telemedia laws. The regulation is supervised by the BfDI, data protection authorities on federal states level and partly the BNetzA.

In a 1983, the BVerfG developed a right to privacy as an element of the general right to free development of one’s personality, which is protected under Article 2(1) in conjunction with Article 1(1) GG. Until 2018, the protection of individuals regarding the processing of their personal data was laid down in local data protection law, especially the BDSG.

With the enactment of the GDPR further strengthening individual rights and meeting the challenges of globalisation and new technologies, the BDSG was also heavily amended and revised with effect from 25 May 2018. The GDPR is a uniform framework laying down principles for legitimate data processing in the EU and the EEA. Compared to the predecessor Data Protection Directive (95/46/EC), the GDPR entails significantly stricter requirements for data protection. The GDPR introduced substantial sanctions for non-compliance and, depending on the nature of the infringed provision, may consist of civil liabilities, criminal sanctions or administrative fines. Administrative fines can amount to €20 million or up to 4 per cent of the total worldwide annual revenue, whichever is higher, for each violation.

In addition, both the TKG and the TMG provide sector-specific privacy rules. The TMG provides a legal framework as regards online privacy including requirements for the collection and further processing of usage and location data. The TKG provides rules for telecommunication service provider including requirements for collection and further processing of traffic and location data. Section 88 TKG stipulates provisions pertaining to the telecommunication secrecy (content data and partly traffic data). With the announced

48 Administrative Court of Cologne decision of 19 November 2019 – 9 K 8221/18 – https://www.vg-koeln.nrw.de/behoerde/presse/Pressemitteilungen/Archiv/2019/26_191119_01/index.php.

49 Administrative Court of Cologne decision of 20 January 2020 – 9 K 4632/18 – https://www.vg-koeln.nrw.de/behoerde/presse/Pressemitteilungen/03_200121/index.php.

50 CJEU Press Release No. 106/20: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-09/cp200106en.pdf>.

51 Section 7 UWG.

52 Fines can be as high as €300,000; see Section 20(1) and (2) UWG.

renewal of the telecommunications laws it is discussed whether the TMG and TKG data protection rules may be consolidated in a new sector-specific act for electronic communication, telemedia and telecommunications.

Data security

Data security in Germany is governed by the Law on the Federal Office for Information Security (BSIG), sector-specific regulations in the TKG as well as the the GDPR. A major amendment of the BSIG has been made in 2015, aiming at an improvement in the IT security of critical infrastructure⁵³ including ICT infrastructure. Parts of the BSIG strengthen the position of the Federal Office for Information Security (BSI) as described below, while other sections impose obligations on private entities maintaining critical infrastructure that are relevant for common welfare.

The BSI is a superior federal authority with wide-ranging tasks of threat prevention in IT systems. The BSI tasks include developing criteria, procedures and tools to test and evaluate the security of information technology systems and components. Therefore, the BSI is the central reporting office for disruptions and attacks on IT systems in private enterprises.

The BSIG especially imposes obligations on private enterprises to safeguard IT security, such as the duty to report disturbances in IT systems to the BSI. Private enterprises that are subject to these obligations are, in particular, operators of critical infrastructure in the energy, like the IT and telecommunication sectors. Within two years of the BSIG coming into force, they had to upgrade their IT systems to make them state of the art, and from then on must prove their compliance once every two years through security audits or certificates.⁵⁴

Operators of telecommunication services have the duty to inform their customers of any IT security risk, and to provide information on solutions for these problems.⁵⁵ Telemedia services operators must ensure that their users are protected from attacks on IT security through state-of-the-art technical and organisational means.⁵⁶

The EU Commission has adopted several measures to prepare Europe against cyber incidents. In particular, the Directive on Security of Network and Information Systems (NIS Directive) was the first EU-wide legislation on cybersecurity.⁵⁷ It includes measures to ensure a high common level of network and information security across the EU. The NIS Directive was implemented into German law on 29 June 2017.⁵⁸

On 27 March 2019, the German Federal Ministry of the Interior proposed a new bill for an IT Security Act 2.0 (IT-SiG 2.0). The IT-SiG 2.0 aims, inter alia, to further strengthen the BSI by transferring new competences. It also prescribes additional obligations

53 Further defined in the BSI KRITIS Ordinance; see above Fn. 19.

54 Section 8a BSIG.

55 Section 109a(4) TKG.

56 Section 13(7) TMG.

57 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1148&from=EN>.

58 <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX%3A32016L1148>. Gesetz zur Umsetzung der Richtlinie (EU) 2016/1148 des Europäischen Parlaments und des Rates vom 6 Juli 2016 über Maßnahmen zur Gewährleistung eines hohen gemeinsamen Sicherheitsniveaus von Netz- und Informationssystemen in der Union, BGBl, 2017, 1885, https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl117s1885.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s1885.pdf%27%5D__1600694321765.

on manufacturers, providers and operators of critical infrastructure while introducing stricter penalties. A new draft of the bill was published in May 2020 further strengthening the position of the BSI.⁵⁹

The BNetzA has published a revised catalogue of security requirements for the operation of telecommunications and data processing systems and for the processing of personal data pursuant to Section 109 TKG (Version 2.0).⁶⁰

Data retention for the purpose of inner security

Since the BVerfG rendered data retention of traffic data as intended under the TKG of 2007 to be unlawful,⁶¹ the question of whether and to what extent data retention is in line with national and European law has been discussed widely. The CJEU decided similarly that European Directive 2006/24/EC setting out the framework for data retention is invalid.⁶² After two drafts of a German data retention act in 2011 and 2013 were not adopted, a new law came into force on 18 December 2016.⁶³ However, further legal proceedings prevented the retention of traffic data. In proceedings for interim relief before the Higher Administrative Court of Münster, a telecommunications service provider obtained a temporary exemption from the retention obligation.⁶⁴ In response to this decision of 22 June 2017, the BNetzA declared that until final clarification in the main proceedings, telecommunications providers who do not comply with the retention obligation as of 1 July 2017 will not be held responsible under supervisory law. In its ruling of 20 April 2018, the Cologne Administrative Court followed the Higher Administrative Court. The Court found that the plaintiff – a telecommunications service provider – is not obliged to retain the telecommunications connection data of its customers in the context of data retention because the statutory provisions are not compatible with EU law. On 25 September 2019, the Federal Administrative Court (BVerwG) decided to refer the final interpretation of the Data Protection Directive for Electronic Communications (Directive 2002/58/EC) to the CJEU.⁶⁵ Pending final clarification in Luxembourg, data retention in Germany remains suspended. In addition, several constitutional complaints against the 2015 law are currently pending before the BVerfG in Germany.

Where the journey before the CJEU could take us is shown by the Opinion of the Advocate General of 15 January 2020 in similar proceedings. The Advocate General considers the current rules in France, the United Kingdom and Belgium violating EU law. From his point of view, the retention of telephone and internet connection data to be lawful only to a very limited extent.⁶⁶

59 https://intrapol.org/wp-content/uploads/2020/05/200507_BMI_RefE_IT-SiG20.pdf.

60 The draft has been notified to the EU Commission: <https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=496>.

61 BVerfG ruling of 2 March 2010 – 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 – BeckRS 2010, 46771.

62 CJEU ruling of 8 April 2014 – C-293/12 and C/594/12 – BeckEuRS 2014, 393023.

63 Gesetz zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten, BGBl 2015, 2218, www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&bk=Bundesanzeiger_BGBl&start=//**%25B@attr_id=%2527bgbl115s2218.pdf%2527%25D#_bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl115s2218.pdf%27%5D__1471357640831.

64 Higher Administrative Court of Münster decision of 22 June 2012 – Az. 13 B 238/17 – NVwZ-RR 2018, 43.

65 BVerwG ruling of 25 September 2019 – Az. 6 C 12/18 – NVwZ 2020, 1108.

66 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200004en.pdf>.

Enforcement of law in social networks

With effect from 1 January 2018, the Network Enforcement Act (NetzDG) was implemented to secure and improve the enforceability of penalties against unlawful contact on significant social media platforms. Social network providers are obliged to combat fake news and hate speech by blocking, and to remove unlawful content. Furthermore, it is required that a transparent, accessible and effective procedure for users to report unlawful content has to be established under which social network providers have to report biannually.⁶⁷

Protection of children

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

The Federal Department for Media Harmful to Young Persons (BPjM) is the authority responsible for protecting children and adolescents from media⁶⁸ that might contain harmful or dangerous content under the JuSchG. The BPjM can act only at the request of other administrative institutions. Once an official request has been filed, the BPjM is obliged to process the complaint. Possible measures in the event of a violation are a prohibition on publication, blocking the provider and fines of up to €500,000.

The JMStV forms the legal basis for assessing content distributed in broadcast or media services. The compliance of broadcast and media services with the JMStV is controlled by the Commission for the Protection of Minors in the Media (KJM). The JMStV distinguishes between illegal content and content that impairs the development of minors: illegal content must not be distributed via broadcasting or media services. Content that is rated as impairing the development of minors (e.g., a severe depiction of violence) is subject to access restrictions. In the event of a breach of the provisions of the JMStV, the KJM decides on the sanctions to be imposed against the respective media content provider.⁶⁹

IV SPECTRUM POLICY

i Development

Originally, frequencies in Germany were used – with a few exceptions – by Germany’s federal mail service, Deutsche Bundespost. Since 1996, however, the markets for network and telephony have been fully liberalised.

Today’s development goes hand in hand with the population’s increasing demand for mobile communication services. Not least because of the technical possibilities opened up by, inter alia, UMTS and LTE, demand for more bandwidth will continue to rise in line with increasing mobility. Growing demand and technological innovation both call for the availability of an adequate frequency spectrum. The next generation of mobile network – 5G

67 Failure to comply with the obligations may result in fines of up to €50 million.

68 The types of media monitored include, inter alia, videos, books, computer games and websites.

69 The measures depend on the severity of the breach, and can range from a complaint against the content provider to fines. The issue may even be handed over to the State Prosecutor.

– is already being realised. Since the current allocations for the 800MHz, 1,800MHz and 2.6GHz frequencies will expire by 31 December 2025, there is a public inquiry being carried out to guarantee early availability of suitable frequencies for high-performance networks.⁷⁰

ii Flexible spectrum use

The use of a spectrum requires its prior allocation.⁷¹ The TKG states that the allocation of spectra shall be regulated by a Spectrum Regulation, and requires the Federal Council's consent.⁷² Based on the allocation of frequencies and the specifications set out in the Spectrum Regulation under Section 53 TKG, the BNetzA shall divide the spectrum ranges into spectrum uses and related terms of use.⁷³ Spectra for wireless access to telecommunication networks must be assigned in a technologically and service-neutral manner.⁷⁴

The TKG provides the framework for a flexible use of allocated spectra. Owners of an allocated frequency have the possibility to trade their frequency, and to let third parties use their frequency, for example, by way of a lease, co-use or in the form of a joint use via spectrum pooling. It is necessary, however, that the BNetzA releases such forms of use for flexible use and specifies the corresponding conditions.⁷⁵

iii Broadband expansion through spectrum auctions

A few rural areas in Germany still lack high-speed internet connections. Thus, the federal government concentrates on the development of the broadband network towards a fibre-optic network with planned investments of €100 billion by 2025.⁷⁶

If the BNetzA finds that the number of available spectra is not sufficient for their allocation, it can order that the allocation of frequencies be preceded by a procurement procedure.⁷⁷ Often, the procurement is held in the form of a spectrum auction, which is organised by the BNetzA.⁷⁸

On 12 June 2019, the latest auction of mobile broadband spectrum ended following 497 bidding rounds over seven weeks.⁷⁹ The auction of 5G-frequencies in the fields of 2 and 3.6GHz aggregated a total amount of approximately €6.5 billion.

70 Frequency Compass (Frequenzkompass), https://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/OeffentlicheNetze/Mobilfunknetze/mobilfunknetze-node.html.

71 Section 55(1) TKG.

72 Section 53(1) TKG.

73 Section 54(1) TKG.

74 Section 54(2) TKG.

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

76 https://www.bmvi.de/SharedDocs/DE/Publikationen/DG/netzallianz-digitales-deutschland.pdf?__blob=publicationFile.

77 Section 55(10) TKG.

78 Section 61 TKG.

79 After the merger of Telefónica and E-Plus in the summer of 2014, only four operators (Drillisch, Telefónica, Telekom and Vodafone) were allowed to bid.

V MEDIA

i Regulation of media distribution generally

Media distribution is currently mainly regulated by the RStV.⁸⁰ The regulation differs according to the different persons involved. In the future, the focus will be primarily on the intermediaries.

Various aspects of regular distribution are regulated, such as product placement. For example, Sections 7, 15 and 44 of the MStV deal with permissible and impermissible product placement. According to these provisions, product placement is generally prohibited and may only be carried out with a clear indication and without significant influence on the editorial responsibility and independence of the content.⁸¹

ii Internet-delivered video content

In future, internet-delivered video content will be more strictly regulated at the level of intermediaries and slightly less regulated at the level of content creators. The new MStV stipulates that intermediaries (in particular very large video platforms) will operate completely non-discriminatorily in the future. To ensure this, increased transparency requirements and obligations to state reasons are established. The European Commission also released the Guidelines on Video Sharing Platforms 2020/C 223/02.⁸²

The need for a broadcasting licence according to the RStV for streamers or influencers is a particularly controversial and difficult topic. Up to now, the legal framework of these broadcasting licences has been almost exclusively designed for TV broadcasts, from which online streaming usually differs significantly. The requirements for the need of a broadcasting licence have so far been – for online streaming – relatively low. A live-stream ('linear') with more than 500 potential viewers and editorial design⁸³ as well as regular broadcasting is sufficient.⁸⁴ In the new MStV in particular the spectator requirement is raised to 20,000 persons. In addition, such offers, which have only a small meaning for the formation of opinion, are in the future excluded from the requirement.

VI THE YEAR IN REVIEW

In 2019, the CJEU ruled on two noteworthy cases, which originate in the increased regulation by the BNetzA. Both concern whether or not over-the-top services (OTT) are electronic communications services. OTT services use the internet to provide special communication services such as email or internet-calls (VoIP), regardless of the internet provider.

80 The RStV will soon be replaced by the MStV.

81 For example, a private broadcaster recently broadcast a certain format for one week under the theme of a current motion picture. During the broadcast, excerpts of the new film were shown and scenes were re-enacted. The State Media Authority declared a violation of the RStV, which was confirmed by the Administrative Court of Cologne in a ruling of 9 June 2020 – 6 K 14278/1 – https://www.vg-koeln.nrw.de/behoerde/presse/Pressemitteilungen/29_200617/index.php.

82 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0003.01.ENG&toc=OJ:C:2020:223:TOC.

83 Even the insertion of comments or the editing of the video may be sufficient.

84 <https://www.medienanstalt-nrw.de/themen/rundfunklizenzen.html>.

The first decision⁸⁵ concerned the SkypeOut internet telephone service, which made it possible to call telephone numbers connected to the ‘normal’ telephone network via the internet from inside the Skype application (VoIP). The Court ruled that a ‘service which allows the user to call a fixed or mobile number covered by a national numbering plan from a terminal via the public switched telephone network (PSTN) of a Member State constitutes an “electronic communications service”’. Therefore, SkypeOut is subject to regulations by the BNetzA under the TKG.

The second decision⁸⁶ concerned the email service provider Gmail by Google. Both the BNetzA and the administrative court considered Gmail to be a telecommunications service although the service was free of charge and the services took place in the ‘open internet’. The administrative court argued, that the individual procedural steps (transmission via the open internet, storage on Gmail servers) could not be evaluated separately from each other. The CJEU, however, ruled that the decisive criterion was not the functional usage of (third-party) infrastructure but responsibility for the data transmission. While SkypeOut must (necessarily) guarantee the connection between the internet and the public telephone network through a gateway, Gmail only provides a service that depends on data transmission on a foreign network (the internet) without (technically) guaranteeing this transmission. Therefore Gmail may not be considered a telecommunications service.

VII CONCLUSIONS AND OUTLOOK

The ICT sector in Germany is highly important and fast growing, entailing a fast-paced legal and policy environment. Convergence presents an abundance of challenges for policymakers, industry and society. Cooperation on a European and global level is vital for most German ICT policy issues, including telecommunication and frequency policies, ICT research, anti-spam measures as well as consumer, copyright and youth protection in the context of new media.

85 CJEU ruling of 5 June 2019 – C-142/18 – ECLI:EU:C:2019:460.

86 CJEU ruling of 13 June 2019 – C-193/18 – ECLI:EU:C:2019:498.

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JAPAN

Stuart Beraha, Hiroki Kobayashi, Takaki Sato and Benjamin Han¹

I OVERVIEW

The media and telecommunications environment in Japan has continued its rapid development throughout 2019 and 2020. While the country has already achieved a broadband penetration rate of 100 per cent, numerous measures have been (and continue to be) implemented to enhance the nation's telecommunications networks.

i Japan's covid-19 response

As in many other countries, the covid-19 pandemic has significantly impacted several aspects of Japanese society, including work life and business operations. Despite the near-100 per cent broadband penetration and near-universal 3G/LTE, and increasingly 5G, coverage throughout Japan, Japanese businesses have lagged behind the government's pandemic-related goal of having 70 per cent or more of each company's employees work from home. That said, many companies have taken this opportunity to re-evaluate their notions of a 'traditional office', which typically has been characterised by long hours at the office and packed commutes, and the necessity of office space, particularly in metropolitan areas like Tokyo where office space is in short supply.

ii Society 5.0

Additionally, the Japanese government has begun pursuing its 'Society 5.0' initiative: the digitisation of the entire society by integrating digital innovations (like artificial intelligence (AI) and big data analysis) into the physical (real) world. In furtherance of this initiative, the Japanese government has pursued a number of programmes and measures in the telecommunications space.

For example, the government is now strongly pushing the rollout of 5G and other cutting-edge technology that is capable of transferring data at even higher rates than is currently possible with LTE. NTT DOCOMO, KDDI, Softbank and Rakuten Mobile were each allocated 5G spectrum by Japan's Ministry of Internal Affairs and Communication (MIC) in April 2019. These four mobile services providers have launched 5G telecommunication services in 2020.

In addition, to combat the spread of covid-19, the Japanese government released the Contact-Confirming Application (COCOA), a social tracing app developed by Microsoft that allegedly does not store personally identifiable information but allows a user to report

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if he or she has tested positive for covid-19 and notifies any phone with the app installed if it has been in the vicinity of such user's phone. The app reached 4.4 million users in its first week, but registrations have reportedly slowed substantially since its debut.

Society 5.0 will inevitably result in a significant increase in personal data communication, both domestic and cross-border. The security of such data is a key concern with respect to such communication, which the government has addressed through various regulations. That said, the government seeks to strike a balance between the protection of personal data and the potential economic benefits of big data analysis. One approach that the government has been exploring is the creation of a personal-data-store-type regime known as personal information banks, which would entail personal data being collected by a trusted entity (i.e., the 'personal information bank') and such entity providing service providers with access to such data in accordance with the data subject's instructions.

iii Recent digitisation efforts

The Japanese government is also pursuing a number of efforts aimed at digitising government services and making them more easily accessible to residents. For example, the MIC has pursued 'Open Data' initiatives with respect to governmental data, encouraging all governmental agencies (including municipal ones) to allow citizens to easily access and use governmental data in digital format for free. However, as of the end of 2019, 63 per cent of municipal governments have taken no measures to address the Open Data initiative.

Additionally, to allow Japanese residents to access more government services online or more conveniently, the Japanese government has rolled out personal identification cards known as 'My Number' cards. Among other services, My Number card holders are able to make certain tax filings online (electronically authenticated with My Number card data) and receive family, tax, residency and other records at convenience stores (which are ubiquitous in most Japanese cities) rather than at their local city hall or ward office. That said, despite being introduced in 2015, the adoption of My Number cards has been sluggish – reportedly only 17 per cent of Japanese residents have My Number cards as of July 2020 and the government's incentive programme that rewards ¥5,000 of cashless payment credit (e.g., PayPay credit) to registrants has attracted less than 10 per cent of expected applicants as of September 2020.

Even where residents have received My Number cards, there have been hiccups in the implementation of programmes attempting to leverage the system. Notably, the Japanese government offered an online application option for the Japanese government's ¥100,000 special covid-19 stimulus payment to residents with My Number cards. However, local municipal offices were flooded by requests to reset My Number card passcodes (required to log into the government's application page) from residents who forgot them and many residents reported having trouble accessing the application page even with correct passcodes – in some cases, it was simply quicker for residents to post a physical application. Additionally, even when residents were able to submit an application online, all applications were reportedly reviewed by government officials by hand, meaning an online application was not necessarily processed any more quickly than a physical application.

The government is nevertheless expected to continue pursuing data and digitisation initiatives. Yoshihide Suga, prime minister of Japan, voiced a commitment to further digitise government services and 'allow people to receive government services 24 hours a day, 7 days a week so long as they have a My Number card.' In furtherance of this goal, Prime Minister

Suga has instructed the Digital Transformation Minister, Takuya Hirai, to establish a new governmental agency named the Digital Agency. The bill establishing the Digital Agency will be submitted to the legislature in January 2021.

Under the current bureaucratic system, the responsibility for digitisation measures is scattered among several governmental agencies, based on whether such measures relate to the sectors within such agency's purview. Some have said that such decentralised responsibilities partially account for the slow progress of Japan's digitisation efforts, particularly when compared to other countries. For example, agencies have implemented different IT systems and data formats, rather than coordinate standardised systems and formats. This disparity reportedly made it more difficult for governmental agencies to share covid-19 data.

While the final details regarding the Digital Agency will depend on the bill that is ultimately passed by Japan's legislature, the Digital Agency will seek to consolidate responsibility and authority for digitisation efforts into one centralised agency. The aim is to facilitate more efficient implementation of digitisation efforts and help agencies share data and coordinate more smoothly by standardising IT systems and formats.

Other initiatives that the Digital Agency is planning to pursue include consolidation of various identification cards into the My Number card (e.g., public health insurance cards). This will enable citizens to reduce the number of identification cards that they must carry to receive services. Additionally, Digital Transformation Minister Hirai announced that he seeks to have the Digital Agency serve as a 'control tower' to expedite digitisation in the private sector as well as the public sector. Few public details about this initiative are available at the time of writing.

iv Expansion of telecommunications market access and competition

The government is also increasingly prioritising the expansion of market access and competition within the Japanese telecommunications industry. For example, the government is looking to equalise competition between Japanese service providers and non-Japanese service providers. In 2020, telecommunication regulations were amended to ensure the government may enforce such regulations equally between domestic and foreign service providers.

The MIC and other government authorities have taken steps to eliminate, or rigorously regulate, various business practices considered by many to be anticompetitive, such as SIM card locking and automatically renewing two-year service contracts. The MIC and other governmental agencies remain committed to improving high-quality telecommunications network access and reducing associated costs for consumers, and we foresee significant regulatory reforms on the horizon to accomplish these goals. In addition, digital platform businesses have recently drawn additional scrutiny from government regulators who are concerned with the fairness of transactions. In 2020, a new law was enacted to ensure fairness of digital platform businesses, mainly via disclosure requirements.

v Digital piracy prevention initiatives

Recently, the Intellectual Property Strategy Headquarters of the Cabinet Office (IPSHQ) expressed significant concern about the growing number of websites promoting and enabling the piracy of media content in Japan, which the IPSHQ views as harmful to its 'Cool Japan' policy. In 2018, the IPSHQ announced its intent to adopt more concrete regulations during 2019 designed to block access to piracy websites. The IPSHQ's proposal was vigorously

debated among politicians, scholars and industry insiders, and eventually the IPSHQ's approach did not result in legislation. Instead, the Agency for Cultural Affairs (ACA) addressed this issue by amending the Copyright Act.

II REGULATION

i The regulators

The MIC's broad authority to regulate in the telecommunications and broadcasting spaces is derived from a series of statutes, which are the ultimate source of law in these sectors in Japan. The core statutes conferring this authority include:

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

The Broadcast Act and the Radio Act were amended in November 2010 to provide a more streamlined regime for the review and granting of broadcast licences, which included the separation of broadcasting licences from transmission licences, previously a single licence, in order to make the process of receiving a licence easier for applicants.

Prior to this amendment, general broadcasting licences, cable radio broadcasting licences, CATV broadcasting licences and licences to broadcast content through third-party facilities were granted by the MIC under different statutes using different procedures that had developed over time as the underlying technologies were developed and implemented. The statutory licensing provisions for these activities were consolidated into the amended versions of the Broadcast Act and Radio Act, under which broadcasting activities have been divided into two major licensing categories: main broadcasting, consisting of both terrestrial broadcasting and broadcasting through broadcasting and communication satellites located over 110 east longitude; and regular broadcasting, covering broadcasting through all other satellites, CATV and IPTV.

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

These reforms have lessened the regulatory burdens on telecommunications and broadcasting companies to provide flexibility as to the management of those companies and to open up competition by decoupling the ownership of broadcasting facilities from the production of broadcasting content.

ii Regulated activities

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

The MIC is also charged with allocating radio spectrum to licence holders, and has adopted detailed regulations to monitor and establish technical standards applicable to spectrum users and their licensed facilities and businesses. The process through which the MIC exercises this decision-making authority is often criticised as opaque and arbitrary. For example, the allocation of radio spectrum frequencies to private sector service providers is based on the overall judgement of the MIC, and not on any clear set of factors, leaving applicants unsure as to what elements are being considered and opening the MIC to accusations of favouritism or political manipulation. Spectrum policy in Japan is further discussed in Section IV.

The Broadcasting Act requires licensed broadcasters to stay politically neutral and report the ‘truth’. In February 2016, the Minister of the MIC stated during a legislative session that a broadcaster would violate the Broadcasting Act if it repeatedly broadcasted lengthy content supporting a particular political view without reporting on other political views. The Minister further indicated that, in the event of such a violation, the MIC could issue an order to suspend such broadcaster’s business. This statement was criticised for potential chilling effects on freedom of speech.

iii Ownership and market access restrictions

Restrictions on foreign investment

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

As discussed in Section II.i, the Broadcast Act and the Radio Act, each amended in 2010, now divide broadcasting activities into two categories: main broadcasting and regular broadcasting. Under the amended Broadcast Act, no foreign national, foreign entity or Japanese entity that has either a non-Japanese director or 20 per cent or more of its voting shares directly owned by one or more foreign nationals or entities may hold or receive a licence for main broadcasting. Further, the indirect foreign ownership of 20 per cent or more of a licence holder’s voting shares through a domestic subsidiary or affiliate is not permitted for terrestrial (non-satellite) main broadcasting licences. If foreign nationals or entities acquire 20 per cent or more of the voting shares of a main broadcasting licence holder, the licence will be cancelled. To avoid the unintended cancellation of its licence, a main broadcasting licence holder whose shares are traded on a stock exchange is permitted by statute to refuse to recognise any transfer of its shares that would cause it to violate the foreign ownership restrictions. By contrast, foreign investment in regular broadcasting licence holders is not restricted. As a result, several foreign-owned broadcasters now broadcast into Japan through cable television and third-party satellites.

Restrictions on cross-ownership

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

iv Transfers of control and assignments

In addition to foreign ownership and management restrictions, and cross-ownership limits, MIC approval is required for mergers and acquisitions that result in a new entity holding a main broadcasting or wireless transmission licence. Therefore, a statutory merger pursuant to which a licence holder will not be the surviving company, or the divestiture of a business conducted under such licence, each generally require MIC approval. The MIC's review process focuses on the proposed transferee rather than the transferred broadcasting or wireless business, and primarily involves a determination as to whether that transferee would have been eligible to independently qualify as a new licensee if it had submitted a full application. According to the MIC, it generally endeavours to finish the licence transfer review process within one month, which is significantly shorter than the typical review process for licence renewals or new applications.

Further, the Telecommunications Business Act was amended in May 2015 to require the major telecommunications companies² to renew their respective telecommunications business registrations when they engage in mergers or share acquisitions. This amendment, which came into effect in 2016, allows the MIC to review the potential anticompetitive effects of any proposed merger or share acquisition on business operations and fair trade. Anticompetitive concerns are particularly important in the Japanese telecommunications industry, which was monopolised by three major private telecommunication companies – NTT DOCOMO,³ KDDI and SoftBank – until Rakuten Mobile entered the market in October 2019.

In addition, pursuant to Japan's Foreign Exchange and Foreign Trade Act, certain acquisitions of shares in broadcasting licence, wireless transmission licence and telecommunication business licence holders by non-Japanese parties are subject to prior

2 These renewal requirements apply to any fixed line provider with greater than 50 per cent market share and any mobile provider with greater than 10 per cent market share.

3 NTT Corporation is 33.93 per cent owned by the Japanese Ministry of Finance as of 30 June 2020. NTT DOCOMO is a publicly traded subsidiary of NTT Corporation, but on 29 September 2020, NTT Corporation announced that it plans to take NTT DOCOMO private by making a tender offer for, and purchasing, all of NTT DOCOMO's publicly traded shares (around 34 per cent of NTT DOCOMO's outstanding common shares) for around ¥4.25 trillion. NTT Corporation expects that the buyout will be completed by the end of the fiscal year ending 31 March 2021.

filing and waiting periods unless the acquiring investor satisfies criteria for exemption from such prior filing requirement.⁴ When there are no national security concerns present, this is ordinarily a pro forma requirement.

III TELECOMMUNICATIONS & INTERNET ACCESS

i Internet and internet protocol regulation

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

The Act not only regulates service providers that operate their own network facilities, but also service providers that facilitate telecommunications between users but do not operate their own network facilities (such as dedicated hosting services on which clients can operate an email server). Internet-based services that are not designed to facilitate telecommunication, such as internet banking and internet-based newsletter and media subscriptions, are not deemed to be telecommunications services and therefore are not regulated under the Act. However, personal matching services, SNS providers and other businesses not traditionally considered 'telecommunications' services may nonetheless be regulated under the Act, necessitating a filing with the MIC before commencing business.

ii Universal service

Under the Telecommunications Business Act and the NTT Act, the NTT group is required to provide wired telephony services (analogue or IP over optical fibre), pay phone services and emergency call services to all areas of Japan. NTT East and NTT West⁵ provide services to depopulated areas, and a telecommunications trade association comprised of each of the major telecommunications companies in Japan, then reimburses NTT East and NTT West for any cost deficits incurred by the NTT group's provision of the service. National law requires each telecommunication service provider connecting its network with that of NTT East or NTT West to pay a small fee (approximately ¥2 to ¥8, varying from year to year) per landline and mobile phone number (customer), which costs are typically passed along to individual users in connection with their monthly telephone service bills. Notwithstanding such funding assistance, NTT East and NTT West have operated at a deficit in their landline businesses due to the burden of owning and maintaining all of the facilities necessary to provide services to the entirety of Japan, even to rapidly depopulating areas. To reduce this burden, the NTT Act was amended in May 2020 to permit NTT East and NTT West to use wireless telecommunication facilities owned by other telecommunications companies to fulfil their duties of providing universal service.

4 Regulated transactions include an acquisition of 1 per cent or more of the shares of a licence holder whose shares are traded on a stock exchange or over-the-counter market; and an acquisition from a Japanese party of any shares in a licence holder whose shares are not traded on a stock exchange or over-the-counter market.

5 NTT East and NTT West are subsidiaries of NTT (Nippon Telegraph and Telephone Corporation), which is itself 33.93 per cent government-owned. NTT was initially a single consolidated conglomerate that conducted all of the activities now conducted by the individual NTT group companies. In 1999, the NTT conglomerate was forced to split into multiple smaller companies for antitrust purposes.

Currently, there is no similar law requiring universal broadband service, but the MIC's Information and Communications Council announced in December 2019 that it is considering extending universal service requirements to include broadband service. Notwithstanding the lack of a formal requirement for universal coverage, as of 2015, the broadband infrastructure (3.5G, satellite internet, 3.9G, DSL, optics fibre/FTTH, etc.) penetration rate in Japan has already reached 100 per cent, and super-broadband infrastructure (optical fibre/FTTH, 3.9G and other infrastructure with data transmission speed over 30Mb per second, including DSL, FWA, satellite, BWA, etc.) penetration rate has similarly reached 99.98 per cent. That said, rolling out optical fibre will be especially important to enable the proliferation of 5G. Optical fibre's nationwide penetration rate is 98.8 per cent as of March 2019 but it is below 95 per cent in a few prefectures. The MIC is planning to complete installing optical fibre in all cities, towns and villages that desire it by March 2022.

Rakuten Mobile: a new mobile network operator service provider

Rakuten KK, a major e-commerce platform operator, has long had the largest market share of all mobile virtual network operators (MVNOs) in Japan. Its recently established subsidiary, Rakuten Mobile, was approved to become Japan's fourth mobile network operator (MNO) in April 2018. Rakuten Mobile was allocated 1.7GHz 40MHz bandwidth in April 2019, and shortly thereafter announced the launch of its MNO services. To consolidate its service offerings, Rakuten K.K. also assigned its MVNO business to Rakuten Mobile in April 2019.

Rakuten Mobile planned to launch MNO services by October 2019, but the launch was delayed because of delays in installing base stations. In the interim, Rakuten Mobile offered free service to around 5,000 customers in limited areas like Tokyo and Osaka while its full network service was being rolled out. Rakuten Mobile launched MNO services in April 2020, and seeks to attract customers by offering a competitively priced unlimited data plan – Rakuten reported that it has received over 1 million applications for the service as of 30 June 2020. However, data usage is capped at 5GB when roaming in areas where Rakuten has not yet built out its own network and relies instead on KDDI's network (i.e., areas outside certain major metropolitan areas like Tokyo, Nagoya and Osaka). Furthermore, Rakuten has only launched its 5G network in around 20 locales, which is limited compared to the other MNO providers.

Public Wi-Fi access

According to a 2017 survey of foreign visitors conducted by the Japan Tourism Agency, the lack of free public Wi-Fi in Japan was ranked the third most inconvenient aspect of their visit to Japan.

The MIC has been planning and implementing improvements to public Wi-Fi services in an effort to increase the number of foreign visitors to Japan. In particular, the MIC has been managing the implementation of the SAQ2 JAPAN Project⁶ since June 2014. The goals of the SAQ2 JAPAN Project include:

- a increasing the number of free Wi-Fi hotspots and improving the accessibility of these hotspots to the public;
- b facilitating the availability and installation of Japanese SIM cards for foreign mobile phone users in Japan;

6 SAQ is an acronym for selectable, accessible and quality.

- c reducing international roaming fees applicable to foreign mobile phone users in Japan; and
- d implementing multi-language interpretation systems (i.e., translation applications).

In November 2013, an NTT group affiliate began providing a smartphone application called Japan Connected-free Wi-Fi, which allows users to connect to approximately 190,000 public Wi-Fi access points across Japan,⁷ including those at airports, train stations, convenience stores and tourist spots, with a one-time new user registration. The smartphone application is available in 16 languages, including English, French, German, Spanish, Italian, Chinese, Korean, Thai and Bahasa Indonesia.⁸ This NTT group affiliate also continues to install additional Wi-Fi access points.

In preparation for hosting the Olympic Games in Tokyo that were originally scheduled to take place in 2020, in February 2016 the MIC issued a policy statement encouraging the adoption of a simplified and unified authentication protocol with the goal of increasing foreign visitors' access to free public Wi-Fi services. In furtherance of this goal, the MIC is conducting field tests to prove the workability of a unified authentication protocol using smartphone applications and is disseminating this protocol to local municipalities to aid in the revitalisation of local economies through increased tourism. On behalf of the MIC, Gateway App Japan, a non-profit organisation, publishes a smartphone application called the Omotenashi app⁹ with the cooperation of KDDI and SoftBank, the primary competitors of the NTT group. It has yet to be decided whether the two smartphone applications (Japan Connected-free Wi-Fi and the Omotenashi app) will be consolidated or made compatible. Recently, a handful of private companies, such as Accenture and SoftBank, have launched first-party applications enabling foreign visitors to access thousands of Wi-Fi access points across Japan. With users' consent, some of these private companies gather anonymised data from the use of their applications, including data user attributes and location history, which they then analyse and sell to third parties as reports.

Tokyo Metro, a railway company owned by the Japanese national and local Tokyo governments that operates many of the subway lines in Tokyo, provides public Wi-Fi access points at nearly all stations. In 2017, Tokyo Metro announced that it would equip all of the subway trains it operates with Wi-Fi by 2020. Both Japan Connected-free Wi-Fi and Travel Japan Wi-Fi will be available on these trains.

In January 2019, the government began imposing a ¥1,000 departure tax, informally known as the 'international tourist tax', on all foreign visitors to improve Japan's tourism infrastructure, including through the proliferation and enhancement of public Wi-Fi.

Separately from the above improvements to free Wi-Fi services, major Japanese mobile phone service providers have established an emergency disaster service set identifier (SSID): 00000JAPAN. This SSID enables each Wi-Fi user to use all Japanese mobile service providers' Wi-Fi networks during natural disasters regardless of the provider to which they are subscribed.¹⁰ This SSID was made available for the first time during a two-week period

7 As of March 2020.

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

9 Omotenashi means hospitality.

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

following an earthquake in the Kumamoto area in April 2016. More recently, this SSID was activated following flood disasters in the Hiroshima and Osaka areas in July 2018 and September 2018, respectively, as well as following a large earthquake in Hokkaido in September 2018, and severe typhoons during the fall of 2019. During the 2018 Hokkaido earthquake, however, the Wi-Fi access points were rendered unusable due to widespread electrical outages. In light of growing security and privacy concerns, the MIC recently warned that communications sent through this SSID are intentionally unencrypted to prioritise accessibility, and therefore subject to interception by third parties.

Use of foreign mobile devices

As a general rule, it is prohibited to use mobile devices in Japan that do not meet Japanese radio wave emission standards, and with respect to which the manufacturer has not obtained authentication from the government. Therefore, until relatively recently, many foreign visitors' use of their personal mobile devices in Japan was technically illegal, although there are no known cases of any foreign visitor being charged with Radio Act violations for personal mobile device use. In August 2016, an amendment to the Radio Act took effect, permitting foreign visitors to Japan to use their personal mobile devices (even if not authenticated in Japan) for up to 90 days, so long as the devices have either been certified by the Federal Communications Commission in the United States or received CE certification in the European Economic Area using standards equivalent to those imposed upon Japanese technology. This Radio Act amendment was implemented to encourage foreign tourists to visit Japan in anticipation of the Olympic Games originally scheduled to take place in 2020. While there had previously been concerns that devices not authenticated in Japan could adversely affect the radio use environment, the MIC eventually concluded that the likelihood of any adverse effect was minimal. The MIC further loosened the restrictions to allow Japanese residents to use foreign mobile phones for R&D purposes via an amendment to the Radio Act. Under the amended Radio Act, which came into force in force in November 2019, Japanese residents are permitted to use foreign mobile phones for R&D purposes for up to 180 days, though the user is required to file a prior notification with the MIC and this exception only allows users to connect devices that have received certain foreign certifications to Wi-Fi or Bluetooth.

In addition to government-imposed restrictions, private companies in Japan have in certain cases voluntarily adopted policies prohibiting the sale of certain foreign mobile devices. In May 2019, for example, NTT DOCOMO, KDDI and Softbank voluntarily ceased distribution of mobile devices manufactured by Huawei after sanctions were imposed upon it by the United States. These carriers eventually resumed sales of Huawei devices after the US government announced it was extending the pre-'ban' grace period.

Proliferation of the IoT

To address the rapid increase in the number of IoT devices, which could exhaust the number of available mobile phone numbers, the MIC in January 2017 amended its regulations on the assignment of phone numbers to assign the designation '020' to M2M data connection devices, keeping them separated from standard mobile numbers designated with '090', '080' and '070'. It is expected that M2M data connections conducted through mobile networks will initially be used primarily for telemeters (e.g., remote management of water and gas meters, vending machines and elevators) and telematics (e.g., GPS and other information services

equipped in vehicles) and will eventually cover connected cars and other IoT devices. NTT DOCOMO, KDDI and several MVNOs commercially launched M2M data connection services in October 2017.

New regulations have recently been adopted to address IoT devices' vulnerability to cybercrime (see the 'Cybercrime' section below).

IP network

In November 2015, NTT announced a plan to switch from the use of fixed-line PSTN to IP telephony. According to NTT's updated implementation plan, NTT will commence work on the switch to IP telephony in January 2024 with planned completion in January 2025. As the existing PSTN is a fundamental telecommunications infrastructure, the MIC is paying close attention to what kind of IP telephony will emerge as well as the process through which NTT will transition away from PSTN. In light of the importance of PSTN to the existing infrastructure, in February 2016 the MIC asked the Telecommunication Council to identify potential issues that could arise from the switch to IP telephony. To mitigate certain concerns identified by the Council (such as consumers' ability to retain existing telephone numbers), the MIC presented a proposed amendment to the Telecommunications Business Act to the Diet in March 2018, which was subsequently enacted in May 2018. Under the proposed amendment, each telecommunication company must obtain the MIC's approval of its plans regarding the use of telephone numbers, and must thereafter comply with the approved plans. Additionally, when telecommunication companies cease to provide services during the shift to IP telephony, those companies must file notice of such cessation with the MIC so that the MIC may make a public announcement of the terminating services to customers.

iii Restrictions on the provision of service

The telecommunications industry in Japan has traditionally been dominated by NTT East and NTT West and by three major private telecommunication companies: NTT DOCOMO, KDDI and SoftBank. A fourth major service provider, Rakuten Mobile, was granted an MNO business licence in April 2018 and launched commercial MNO services in April 2020. Because existing providers can become dominant to the exclusion of new entrants once their network or technology standard has been adopted by a critical mass of users, the MIC and the Japan Fair Trade Commission (JFTC) have jointly adopted guidelines to regulate anticompetitive practices by service providers with high market shares. For example, the guidelines state that the JFTC could take corrective action, such as issuing a cease and desist order, if a telecommunications service provider with a high market share, such as a mobile phone carrier, were to contractually restrict its customers from switching to another service provider or to charge an excessive cancellation fee for doing so.

Pricing restrictions

Under the Telecommunications Business Act, prices charged to end users by NTT East and NTT West for wired telephony and payphone services are subject to caps to be determined by the MIC. These caps are intended to prevent these companies from abusing their near-monopoly over these fundamental services and to encourage them to improve efficiency. Prices to be charged by NTT East and NTT West for optical data services, and prices to be charged by KDDI, NTT DOCOMO and SoftBank for mobile services, must all be submitted to the MIC for review before implementation. If the MIC finds a pricing scheme inappropriate, either because it is anticompetitive or otherwise significantly unreasonable,

the MIC may require the carrier to change its pricing scheme. Otherwise, prices charged to end users and the other terms of service are not regulated. This may change, however, as the government has recently started applying pressure on the major telecommunications companies to reduce prices for mobile phone services.

As a general rule, all telecommunication business licence holders must provide access to any other carrier that seeks to interconnect with their network. However, the prices charged for, and the methods of, interconnection have been areas of both public controversy and regulatory scrutiny. Telecommunications companies have pressed for greater access to NTT's infrastructure, including its optical fibre network. NTT only provided access to its fibre optic network on a bulk basis until 1 February 2015, after which NTT East and NTT West respectively began to offer single-line fibre optic wholesale to other carriers, including to non-traditional telecommunication companies such as Sohgo Security Services (ALSOK) and Tsutaya, a rental video company. These fibre optic wholesale programmes are designed to facilitate fibre optic use by reducing fees for fibre optic services at the end user level. As of December 2018, approximately 751 operators had commenced use of these fibre optic wholesale services.

Prior to the commencement of NTT's fibre optic wholesale programme, there were competition-related concerns stemming from the confidential nature of NTT East's and NTT West's contracts with the secondary retailers to whom they provided fibre optic wholesale services. At the time, other major telecom service providers, such as KDDI and Softbank, expressed concerns that NTT East and NTT West were providing their fibre optic wholesale services to NTT group companies at lower prices than to unaffiliated companies, which in turn enabled NTT group companies to provide fibre optic services to end users at lower prices. In response to these concerns, the MIC issued guidelines relating to the provision of fibre optic wholesale that prohibit the disparate treatment of select service providers and also provide the MIC with potential enforcement mechanisms. A survey conducted by the MIC showed that NTT DOCOMO and NTT Communications (a data communication company within the NTT group) obtained approximately 60 per cent of the fibre optic wholesale service market by offering large fee discounts on their respective mobile services to end users. Given the prominence of this market share, and due to their relationship to NTT East and NTT West, other fibre optic service providers have argued that the discounted fees charged by NTT DOCOMO and NTT Communications are anticompetitive in nature. To address these concerns, the MIC decided in May 2016 to launch investigations into NTT DOCOMO's business practices. In its investigation report, which was issued in August 2018, the MIC concluded that the discounted fees charged by NTT DOCOMO and NTT Communications did not constitute anticompetitive practices. However, the MIC did determine during its investigation that NTT DOCOMO's online description of the terms and conditions applicable to its pricing discount was misleading to customers. NTT DOCOMO voluntarily modified this description, but in June 2018 the MIC nonetheless issued an administrative direction to NTT DOCOMO to prevent future occurrences of misleading marketing.

MVNOs

Along with the introduction of fibre optic wholesale services, the availability of mobile line wholesale services MVNOs in Japan has also begun to expand. While MVNOs have existed in Japan since 2001, until recently the number of service providers and subscribers had been few in number. In 2007, the MIC's guidelines regarding MVNOs were amended to clarify

the relative rights and obligations between MVNOs and MNOs, and a formalised dispute settlement procedure was established. After this amendment, the number of MVNO service providers using MNOs' mobile lines or WiMAX lines significantly increased. In 2014, the guidelines for the operation of Type II designated telecommunication facilities were amended, which included a change in the calculations for mobile line wholesale pricing. These calculation changes have reduced mobile line wholesale prices to the benefit of MVNOs. More recently, in 2017 the guidelines regarding MVNOs were amended twice to, among other things, clarify that the MIC is authorised to issue business improvement orders to MNOs who discriminate against MVNOs with respect to providing access to its network.¹¹

The aforementioned guideline amendments have spawned a recent increase in MVNO activity. In FY 2013, only 22 MVNOs provided data communication services or voice communication services in Japan. However, as of March 2020 the number of active MVNOs has increased to 1,128. Correspondingly, there were 24.65 million MVNO subscribers by March 2020, up from 7.17 million in December 2013. However, despite this recent increase in MVNO activity, MVNO service subscribers still only constituted 13.2 per cent of all mobile service subscribers as of March 2020.

Anticompetitive business practices

One of the reasons MVNO penetration remains low stems from MNOs' common practice of permitting subscribers to purchase new mobile devices on monthly instalment plans – often simultaneously offering discounts on monthly subscription fees equal to or greater than the amount of such monthly instalment payments. MNOs advertise that this instalment and discount programme renders subscribers' new devices 'effectively free'. In contrast, the vast majority of MVNOs do not have the financial resources to permit subscribers to pay for new mobile devices in instalments. Instead, MVNO subscribers seeking a new mobile device must often pay its entire purchase price upfront. This resource disparity has made it difficult for MVNOs to compete with MNOs for new subscribers.

Recognising the high barriers to entry created by these 'effectively free' mobile device programmes, in March 2016 the MIC issued guidelines compelling MNOs to decrease the size of their mobile device discounts so that subscribers are required to make reasonable payments toward their new devices. The intended result of these guidelines is to bolster competition and, eventually, reduce mobile service subscription fees. In October 2016, the MIC issued official warnings to NTT DOCOMO, KDDI and SoftBank for attempting to subvert the March 2016 amended guidelines by distributing coupons to subscribers and potential subscribers in lieu of discounts.

The MIC has also made efforts to address the issues of SIM locking and mandatory two-year service contracts with automatic contract renewal, in each case to facilitate competition between MNOs and MVNOs and reduce consumers' mobile expenses.

Since the MIC's initial adoption of guidelines in 2010, it has encouraged mobile service providers to provide SIM unlock options for customers' mobile devices, as it believes that the practice of SIM locking prevents consumers from freely choosing mobile service carriers and causes competition stagnation. Following an August 2018 amendment to the guidelines, mobile service providers will be required to honour SIM unlock requests for all mobile devices

11 The MIC, as part of its regulatory enforcement powers, has the authority to issue business improvement orders to telecommunications companies to the extent it deems their activities to significantly disrupt the sound development of telecommunications services.

effective as of 1 September 2019, including devices purchased on second-hand markets, other than mobile devices for which the purchase price is being paid in instalments (in which case, SIM unlock requests must still be honoured starting 100 days after the purchase).

Until recently, there had been little progress toward the abolishment of automatically renewing two-year service contracts. For years MNOs frequently required customers enjoying the benefits of their ‘effectively free’ mobile device programmes to enter into two-year contracts under which customers were required to pay approximately ¥10,000 for early termination, plus an accelerated payment of the purchase price of a smartphone that would otherwise be paid by instalments during the two-year term. The two-year contract system, in conjunction with the effectively free mobile device practice, has long been identified as reducing customers’ freedom of choice in mobile service carriers. Though the MIC issued guidelines on numerous occasions over the years to address these contracting practices, which it viewed as raising anticompetitive concerns, the guidelines were largely ineffective at addressing the fundamental issue of automatically renewing two-year contracts.

However, the Japanese government finally took the next step in May 2019 by legislatively imposing restrictions on the use of automatically renewing two-year contracts through an amendment to the Telecommunication Business Act – a significantly more affirmative step than its prior non-binding guidelines. As a general principle, the newly amended Telecommunication Business Act prohibits the use of any contract provisions that would restrict consumers’ ability to terminate their mobile service contracts if the restrictions rise to a level that would be deemed to have anticompetitive effects. Given the generality, the MIC has been delegated the task of adopting specific regulations to carry out this mandate. The MIC has drafted proposed regulations to clarify the types of anticompetitive behaviour that are prohibited under the amended Telecommunication Business Act, which have been reviewed by the Information & Communication Council and are in the process of being revised. The latest draft of the MIC’s proposed regulations lists, among others, the following as examples of prohibited provisions in consumers’ mobile service contracts:

- a* any termination penalty (regardless of amount) in conjunction with a contract term longer than two years;
- b* regardless of contract length, any early termination penalty in excess of ¥1,000; and
- c* automatic renewal clauses coupled with an early termination fee, regardless of the initial contract term, unless the following conditions are met:
 - the contract must be terminable without a fee during a minimum three-month window – extending from one month prior to expiry of the original contract term through the first two months of the renewal period;
 - consumers must be given the choice, upon execution of the original contract, not to have any termination penalty apply to renewal periods;
 - consumers must be given the choice, at the time of automatic renewal, not to have any termination penalty apply to that renewal period; and
 - the service provider cannot change pricing or terms to incentivise customers to consent to a longer termination penalty period.

The MIC has also recently begun analysing the state of competition between MVNOs. In particular, the MIC has expressed concerns that MNOs might favour affiliated MVNOs and, in turn, discriminate against unaffiliated MVNOs by providing them slower data traffic speeds. The MIC did not mention any MNOs by name, but many commentators believe that the MIC was referring specifically to KDDI (with respect to UQ Communications,

an MVNO that is 32 per cent-owned by KDDI) and SoftBank (with respect to Y!Mobile, a low-cost mobile service affiliated with SoftBank). In October 2018, the MIC established new regulations prohibiting MNOs from discriminating between MVNOs with respect to data traffic speeds.

Similar to the primary mobile service providers described above, the MIC has also recently expressed concerns that the market shares of UQ Communications and Wireless City Planning (WCP) could permit them to stifle competition by rejecting competitor MVNOs' requests to connect to their telecommunication facilities. In response, the MIC designated UQ Communications and WCP as 'Type II designated telecommunication' companies effective as of December 2019. This designation requires UQ Communications and WCP to each file with the MIC its respective terms and conditions regarding competitor MVNOs' access to its telecommunication facilities.

In light of increasing customer complaints, effective as of October 2018, the amended regulations implementing the Telecommunication Business Act added MVNO voice communication services to the list of services for which customers have an eight-day 'cooling-off period' after signing a new service contract, during which the agreement can be terminated without penalty.

The MIC also seeks to address another competition issue – the cost of complying with the Telecommunication Business Act may differ between Japanese enterprises and foreign ones. The cost difference is primarily owing to the difficulty of extraterritorial enforcement of the act, resulting in uneven enforcement between domestic and foreign enterprises. Under the current Telecommunication Business Act, a foreign company is not subject to extraterritorial enforcement unless the company has an establishment or a facility in Japan, even if it provides services to Japanese consumers. To address this gap, the MIC amended the Telecommunication Business Act in May 2020 to extend its extraterritorial enforcement to foreign enterprises that provide services to Japanese customers that are equivalent to those provided by domestic enterprises that are regulated by the Telecommunications Business Act. These amendments are expected to be in full force by May 2021. The amended Telecommunication Business Act requires such foreign telecommunication companies to register with the MIC and to designate a local representative in Japan to ensure that the MIC can realistically enforce sanctions. This Amendment also aims to enhance the protection of Japanese consumer's privacy rights. As a consequence of extraterritorial application, even foreign telecommunication companies must comply with the obligation to protect the consumer's right to 'secrecy of communication', which is protected even more stringently than personal data under Privacy Act. However, foreign telecommunication companies may face difficulty in complying with these 'secrecy of communication' requirements because the regulations do not always clearly identify what categories of data fall within those requirements in the context of digital communication (which may include header-data, IP addresses, location data, etc.), despite the MIC's issuing guidelines that provide some (incomplete) clarity as to this issue. Foreign telecommunication companies should monitor how discussions develop with respect to understanding these requirements and the MIC will hopefully issue further guidelines as recommended by Information and Communications Council.

Unsolicited communications

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

- a* the transmission of emails using false sender information as a means of advertisement for the sender's own or another person's sales activities;
- b* the transmission of emails to persons who have not opted in to receive such specified emails; and
- c* even where the recipient has opted in to receive emails from the sender, the transmission of an unreasonably large number of emails for the purpose of corroborating or promoting the sender's own or another person's sales activities.

Violators of these prohibitions on unsolicited texts and emails may face penalties of up to one year's imprisonment or a fine of up to ¥1 million. Regulations pertaining to unsolicited phone calls are handled at the local prefectural level. Accordingly, each local prefectural government has established a local ordinance prohibiting the making of unsolicited phone calls. For example, in July 2018 the Metropolitan Government of Tokyo increased penalties under an anti-nuisance ordinance prohibiting continued unsolicited phone calls, facsimiles, emails, and SNS messages, with offenders now being penalised with up to one year's imprisonment or a fine of up to ¥1 million.

As a result of a study conducted by the Working Group on Consumer Protection Rules based on the MIC's collection and analysis of consumers' complaints trends the MIC has recognised that there are widespread consumer complaints about solicitations made by telecommunication business providers that intentionally mislead consumers as to the identity of such provider or omit the purpose of communication (e.g., to solicit customers to enter into subscription contracts they may not desire). Some consumers were induced to enter into agreements with small-sized enterprises that misleadingly portrayed themselves as larger, more well-known enterprises, while others switched service providers under the mistaken belief that they were just switching to a different subscription plan provided by their existing service provider. To address these issues, the MIC amended the Telecommunication Act to require telecommunication service providers and distributors to clearly state their identity and the purpose of a communication prior to each communication for solicitation. The amendment came into full force and effect in October 2019.

iv Security

Protection of personal information

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

As a general matter, the Law Concerning the Protection of Personal Information (the Privacy Act) protects personal information or data that can be used to identify specific living persons. Under the Privacy Act, the entities handling such information are required to publish a 'purpose of utilisation' regarding its use. Personal information incorporated into a database must be kept accurately, and necessary and proper measures to maintain its security must be instituted. Any person whose personal data is kept in a database for more than six months has a right to request access to the data, and add to, modify or delete it. In August 2015, the Privacy Act was amended to strengthen the protection of personal information,

including through expanded protection of sensitive personal information, restrictions on the transfer of personal information outside Japan and the establishment of protocols for the use of anonymised data to facilitate big data analysis.

Further, the MIC has issued Privacy Act guidelines that are specific to telecommunications businesses. As these guidelines are structured to reflect the requirements under both the Privacy Act, which generally applies to all businesses handling personal information, and the Telecommunications Business Act, which provides protections relating to the secrecy of communication (a constitutional right), they are considered even more stringent and robust than the Ministry of Economy, Trade and Industry guidelines, which solely reflect Privacy Act regulations. Under the MIC's Privacy Act guidelines, information related to persons making or receiving communications, such as their usage history, identity and user location, may only be disclosed to third parties in very limited circumstances, such as pursuant to a search warrant. In addition, the MIC's Privacy Act guidelines were amended on 2 November 2011, allowing telecommunications business providers to provide a user's locational information to third parties only if they have the user's consent, a search warrant or other valid justification; and to obtain a user's locational information pursuant to law enforcement agencies' requests only if a warrant is issued. The MIC's Privacy Act guidelines also require telecommunications businesses to establish internal regulations regarding the length of time they may retain communication log records, and to delete this information after the expiry of such period. In June 2015, the MIC amended the guidelines again to set out a suggested length of time during which communication log records may be retained (six months to a year, depending on the business reasons for retaining such information).

In response to amendments to the Privacy Act, the MIC, in April 2017, amended the guidelines to, among other things, require telecommunications business operators to publish privacy policies regarding their collection and use of private information and, in particular, the collection of information through smartphone applications. Telecommunications business operators are particularly likely to transfer personal data across borders, which is subject to certain restrictions under the Privacy Act when a business operator processing personal data in Japan transfers the data to third parties located in foreign countries. Even foreign businesses (not directly processing personal data in Japan) should pay attention to the extraterritoriality of Japan's data privacy rules, which is triggered when the foreign business collects personal data from a data subject located in Japan when supplying goods or rendering services to him or her. In an effort to facilitate the international exchange of information, in July 2018 the Personal Information Protection Committee and the Commissioner for Justice, Consumers and Gender Equality of the European Commission mutually recognised each other's personal data protection regimes as equivalent. Beginning in January 2019, the restrictions on the cross-border transfer of personal data between Japan and the EU have been exempted.

Further amendments to the Privacy Act were passed in June 2020. The amendments pertain to various matters, including the enhancement of data subject rights, narrowing the scope of permissible opt-out transfer of personal data, creating a new category of 'pseudonymised data' with less cumbersome requirements, heightening filing duties upon data breach, strengthening extraterritorial enforcement, etc. Regulations implementing the new amendments and guidelines are expected to clarify how to manage day-to-day data operation in compliance with the amendment by around June 2022, at which time the amendment is likely to come into full force and effect.

The Japan Fair Trade Committee (JFTC) has also approached personal data protection from the perspective of competition law. In December 2019, the JFTC issued guidelines on abuse of market dominance in the context of digital platforms collecting personal data from platform users. This suggests that in the JFTC's view, abuse of market dominance could occur in the business-to-consumer context, rather than solely in the business-to-business context. Whether a digital platform provider has 'market dominance' is a fact-intensive inquiry. The JFTC guidelines list types of behaviour constituting 'abuse,' which mainly consist of violations of the Privacy Act. However, it should be noted that the guidelines are non-exhaustive – other behaviour may constitute 'abuse' even if it does not violate the Privacy Act. Also, certain 'abusive' behaviour covers collection of information which is related to a person but not identifiable. Such unidentifiable information is not protected by the Privacy Act, but the JFTC may still seek to protect it.

At the same time, in the furtherance of the Society 5.0 initiative, which will be facilitated by easier data circulation, the government has sought to establish systems by which data subjects can provide personal data in exchange for services, while being protected against illegitimate use of such data. As a result, the personal information bank (PIB) regime has been adopted. Under this regime, a PIB enters into a contract with a data subject under which the PIB is authorised to manage the data subject's personal data, and when necessary, to collect personal data which the data subject already provides to other companies (such as e-commerce platform, SNS, etc.). When a company desires to use the personal data managed by the PIB, the PIB is authorised to determine whether to give the consent to such usage on behalf of the data subject following the general policy specified by the data subject. The data subject also has the right to opt-out of usage. There are no constraints on the kinds of benefits that may be offered to data subjects in exchange for access to their personal data. Accordingly, the PIB may offer benefits to incentivise the data subjects to participate in its service.

A PIB is not legally required to obtain any governmental licence to operate its data business, but a PIB may obtain certification from the Information Technology Federation of Japan (ITFJ) if desired, primarily to demonstrate the PIB is reputable. The MIC and METI issued the latest guidelines setting forth the criteria that an applicant must satisfy to obtain such certification in October 2019. As of April 2020, five PIBs have obtained the ITFJ certification and one PIB has launched data services.

Protection of digital platform users

As illustrated by the JFTC's approach to digital platform operators' collection and processing of personal data, Japanese regulators have taken great interest in protecting users (both of marketplace participants and customers). For this purpose, the Ministry of Economy, Trade and Industry (METI), JFTC and MIC pushed for the Act For Transparency of Digital Platformer Transaction (the Platformer Act). The Platformer Act was enacted in June 2020, and is expected to be in full force around June 2021.

METI is expected to specify the digital platform businesses that will be subject to the Platformer Act (specified platformer). The list of specified platformers has not been released, but foreign digital platform businesses operating in Japan are likely to be treated similarly to Japanese digital platform businesses because officers of METI explicitly announced that Platformer Act will apply to both foreign and domestic digital platform businesses. Specified platformers will be subject to three types of obligations: (1) disclosure requirements; (2) requirements to establish procedures and structures to effectively communicate with marketplace participants and to handle inquiries and complaints from marketplace participants; and (3) requirements

to submit annual reports to METI on the compliance status and self-assessment thereof with respect to compliance with the requirements of (1) and (2). In order to comply with the disclosure requirements, a specified platformer may need to disclose items that are not included in typical terms of use, including the criteria used to determine the ranking of products, and the criteria for banning participation in a marketplace.

Treatment of infringing content

ISPs are not currently required to proactively delete content that infringes upon the intellectual property rights or privacy of others. However, the Internet Provider Liability Limitation Act, enacted in 2001, provides a safe harbour for ISPs that delete such content. Under this safe harbour, no ISP may be held liable for the deletion of content on its network if the ISP reasonably believes that the content infringes the intellectual property rights or privacy of others, or if a third party alleges infringement and the content sender does not respond to the ISP's inquiry within seven days. The Internet Provider Liability Limitation Act further shields ISPs from tortious liability for failing to delete infringing content. In reliance on this statutory defence to liability, ISPs generally do not take steps to monitor the content passing through their networks. The Act does, however, authorise persons whose rights are infringed by content delivered over the internet to demand information regarding the sender of the content from ISPs so that legal action may be taken against the sender. However, as a practical matter, it is often not possible to identify the original sender of such infringing content where content passes through multiple networks. In recent years, the government has paid close attention to piracy issues affecting Japanese businesses, in particular those piracy activities that target the types of media relevant to its Cool Japan policy (e.g., manga and animation).

In April 2018, the IPSHQ took what many viewed to be an aggressive step by issuing a policy called Urgent Countermeasures against Piracy Sites directed at piracy issues. Under this policy, the IPSHQ declared that it is appropriate for private ISPs to voluntarily block access to three major piracy websites: Manga-mura, Anitube and Miomio. The policy does not legally oblige ISPs to block access to these sites, but the IPSHQ nonetheless expects ISPs to voluntarily comply. Notably, there has been strong backlash against the policy from the Japan Internet Providers Association, which has argued that blocking access to these sites violates laws protecting the secrecy of communications. According to the IPSHQ, the policy is simply a temporary measure intended to bridge the gap until the government passes more permanent legislation concerning piracy websites. The IPSHQ established a council of experts for the purpose of drafting such legislation, and initially targeted the issuance of an interim report in September 2018. However, there has been strong disagreement among the council's members concerning the legitimacy of blocking access to online content, which led to a failure to meet the intended report timing. The final meeting of the council in October 2018 ended without a subsequent meeting being scheduled. According to reports, the council may discontinue further discussions.

Although the IPSHQ did not reach a consensus, the ACA approached this issue from the perspective of the Copyright Act and successfully pushed for an amendment thereto, whereby an operator of piracy sites is subject to a criminal penalty of imprisonment up to five years or fines of up to ¥5 million or both, and a person posting a hyperlink to infringing content on a piracy site is subject to imprisonment up to three years or fines of up to ¥3 million. In addition to the ban on piracy sites, the ACA addressed illegal downloads of infringing content. Before the amendment, the statutory ban on illegal downloads pertained only to a limited category of infringing contents: music and movies. The amended Copyright

Act will ban downloads of all the categories of infringing contents, including books, theses and computer programs. The ban on piracy sites will come into full force and effect on 1 October 2020. The extension of infringing content categories come into full force and effect on 1 January 2021.

Protection of minors

A statute for the protection of minors from harmful internet content, known as the Youth Internet Environment Act, became effective in April 2009. The statute directs government bodies to improve internet safety for juveniles (under the age of 18) by encouraging ISPs to use technologies that limit juvenile access to harmful content. The statute targets content glorifying crime or suicide, obscene sexual content, and other depictions of extreme violence or cruelty. The statute further exhorts parents to monitor their children's internet use, and to limit access to inappropriate content by using filtering software and other measures.

The statute requires mobile network service providers to filter internet content for customers that are juveniles, except where a parent has expressly requested that filtering not be used. Under the Act, commencing in April 2010, manufacturers of devices with internet connectivity (other than mobile phones) became required to pre-install filtering software or otherwise facilitate the use of third-party filtering software or services. Initially, the Act did not impose any filtering-related requirement on mobile phone use outside the mobile network (e.g., on Wi-Fi) partly because only 1.5 per cent of juveniles owned smartphones in 2010. However, as of 2017, 63.2 per cent of juveniles owned smartphones, and only 44 per cent of those juvenile smartphone users utilised filtering software. This means that a large population of juveniles could have been exposed, or at least had access, to inappropriate content in an unfiltered manner. In June 2017, the Act was amended to include smartphones within the scope of mobile network service providers' obligations to filter internet content and manufacturers' obligations to pre-install filtering software. The amended Act also requires mobile network service providers (i.e., MNOs and MVNOs) to confirm whether each new subscriber is a juvenile, and if so, to explain filtering to such juvenile and activate filtering. The amended Act became effective in February 2018.

Cybercrime

In Japan, cybercrime has long been an area of public concern. In recent years, law enforcement has focused its efforts on combating cybercrime related to computer hacking through the unauthorised use of IDs and passwords, and other attacks on security holes; the distribution of computer viruses, and the input of data and unauthorised commands that can cause damage to computers and data; and other types of crimes facilitated through the internet, such as drug trafficking, prostitution, fraudulent internet auctions and child pornography.

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

To combat increasing cybersecurity threats, the Basic Act on Cybersecurity was enacted in November 2014. The Act prescribes the concept of cybersecurity and defines the roles and responsibilities of the government. In January 2015, the Cybersecurity Strategic

Headquarters (Headquarters) and National Center of Incident Readiness and Strategy for Cybersecurity were established to facilitate programme planning, policy formulation and overall coordination for cross-cutting cybersecurity measures.

With respect to government authorities' ability to monitor the content of telecommunications, law enforcement authorities were previously only permitted to utilise wiretapping during criminal investigations of organised crime for murder, drug-related crimes, arms possession or stowaway smuggling by obtaining a wiretap warrant pursuant to the Act for Wiretapping for Criminal Investigation (Wiretapping Law). However, in April 2016, the Wiretapping Law was amended to permit wiretapping to be used in criminal investigations underlying a broader scope of organised crimes, including those involving the use of explosive materials, kidnapping, fraud, theft and child pornography.

The MIC has expressed particular concerns that IoT devices are vulnerable to malware that could render them 'zombies' subject to manipulation by a cyber-attacker. The MIC has stressed that, to implement countermeasures against cyberattacks, it is essential to have specific information relating to the servers used for cyberattacks and infected networks. However, it was difficult for telecommunications business operators to share such information with one another in light of legal obligations to protect the secrecy of communications under the Telecommunications Business Act. In May 2018, the Telecommunications Business Act was amended with the goal of establishing a legal framework to permit the sharing of information among telecommunications business operators for cybersecurity purposes. Under the amended Telecommunications Business Act, a third-party organisation designated by the MIC will act as a hub through which the relevant information will be shared among telecommunications business operators without violating the secrecy of communications. In January 2019, the MIC designated ICT-ISAC Japan, a cybersecurity research organisation, to act as the third-party for these purposes. In addition, the Act on National Institute of Information and Communications Technology (NICT) has been amended to authorise the NICT to assess networks and identify those lacking appropriate password configurations. The NICT will identify the specific networks and convey the particular network-specific information to telecommunications business operators via a designated third-party organisation so that they can warn network owners of any password configuration deficiencies. The NICT began operating in February 2019 under the project name 'NOTICE' (i.e., the National Operation Towards IoT Clean Environment). Following these cybersecurity developments, the Telecommunication Business Act was correspondingly amended in April 2019 to add new data security requirements to the technological specification requirement for IoT terminal equipment.

IV SPECTRUM POLICY

i Development

The need for access to the radio spectrum has steadily increased with the proliferation of new technologies utilising wireless data transmission. The number of licensed wireless stations and devices increased from 3.8 million in 1985 (a majority of which were attributable to amateur radio stations and handheld two-way radios) to 266 million as of March 2020 (99 per cent of which were attributable to mobile devices).

The MIC holds broad discretion to determine how the radio spectrum is allocated in Japan and describes its decision-making process as open and collaborative – including consultations with the public, scholars and industry experts. However, the MIC's decision-making has been

criticised by some as arbitrary and opaque. This has led to some calls for the implementation of spectrum auctions as a fairer method of allocation. Despite such criticism, the MIC has yet to establish a system that provides transparency over spectrum policy and spectrum allocation decisions. While there was some movement toward implementing a spectrum auction system, and a bill that would have implemented such system was submitted to the legislature in March 2012, the bill lost momentum following a December 2012 change in the controlling political party in Japan, and the bill has since been rejected.

Many critics point to the MIC's issuance, in December 2014, of 3.5GHz 120MHz bandwidth spectrum licences to each of NTT DOCOMO, KDDI and SoftBank as prime examples of its discretionary authority when allocating spectrum. This was the first spectrum allocation since the MIC amended its policy restricting submissions of multiple licence applications from companies that operate their spectrum as a group. Prior to the amendment, companies that held more than one-third of the voting rights of another company were restricted from submitting licence applications together with such affiliate companies. However, to reduce multiple applications by de facto group companies and facilitate greater entry into the spectrum market, the MIC expanded this restriction on multiple licence applications by group companies to take into consideration additional factors in determining what companies constitute a group, including their non-voting capital structures, decision-making authority and the business relationships between companies. Due to this amended restriction, Y!Mobile, a company in which SoftBank held an ownership stake but that had not previously been considered a SoftBank group company, was now considered a member of SoftBank's group and unable to submit a spectrum allocation application, which resulted in applications being accepted from NTT DOCOMO, KDDI and SoftBank only.

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

In November 2017, the MIC announced the allocation of 1.7GHz 80MHz bandwidth and 3.4GHz 80MHz bandwidth. Each of NTT DOCOMO, KDDI and SoftBank applied for allocation of 60–120MHz bandwidth. In this round, Rakuten Mobile, a major online shopping platform operator that has the largest MVNO market share, applied to become the fourth MNO. Pursuant to the MIC's policy in favour of new entrants, Rakuten Mobile obtained 1.7GHz 40MHz bandwidth and announced the launch of its MNO services. Each of NTT DOCOMO, KDDI and SoftBank also obtained 40MHz bandwidth.

In May 2019, the Radio Act was amended to expedite the implementation of 5G services. Meanwhile, the MIC completed the first round of 5G spectrum allocation, which was awarded to NTT DOCOMO, KDDI, Softbank and Rakuten Mobile in 2019 on the condition that 5G services shall be rolled out on a nationwide basis within two years. For the purpose of expediting 5G spreading, the MIC also started granting subsidies to corporations for of the installation of optical fibre. These four major providers have launched 5G telecommunication services in 2020, but the coverage differs from carrier to carrier – as noted above, Rakuten's 5G network currently only covers around 20 locales. The MIC seeks to make the spectrum currently used for 4G also available for 5G, and is making efforts to

establish a framework to do so. Also, separate from its goal of nationwide 5G coverage, the MIC has started to grant 'Local 5G' spectrum authorisations. The first round of Local 5G authorisation was granted to 13 organisations (including Fujitsu, Tokyo University, etc.). Local 5G is intended to be used only within a narrow and limited area such as the grantee's specific building or land.

ii Flexible spectrum use

Originally, the Radio Act required the MIC to grant bandwidth licences that specified the specific purpose for which the bandwidth could be used. This inflexibility was criticised as an obstacle to the efficient use of bandwidth. The Radio Act was amended in 2010 to facilitate the flexible use of spectrum and allowed the MIC to grant licences covering multiple uses. For example, a terminal on a train can now be licensed for transmission of data for operation of the train (use for operation of public services) and voice data over a pay phone equipped in the train (use for telecommunication). As of 2016, the MIC had granted 1,500 licences permitting multiple uses, and the MIC expects that the number of such licenses will continue to increase.

iii Broadband and next-generation mobile spectrum use

The MIC annually reviews spectrum usage and revises a spectrum allocation plan to reflect spectrum needs for new technologies and services.

By 2015, LTE networks operated by NTT DOCOMO, KDDI and SoftBank achieved 99 per cent coverage of the national population. LTE is technically categorised as 3.9G, even though the International Telecommunication Union permitted it to be commercially referred to as 4G. In March 2015, NTT DOCOMO was the first among the major Japanese mobile service providers to launch its LTE-advanced next-generation mobile communication service, called PREMIUM 4G, which uses carrier aggregation technology and is technically categorised as 4G. PREMIUM 4G's maximum transmission speed reached 788Mb per second in limited areas. KDDI (au) and Softbank, the other major mobile phone companies in Japan, have also begun implementing the same service.

The government is now focusing on 5G, which will enable data transmission speeds of up to 10Gb per second. As described above, 5G spectrum was allocated to NTT DOCOMO, KDDI, Softbank, and Rakuten Mobile in 2019. These four providers have launched the 5G telecommunication service in 2020 with varying scopes of coverage as of the time of this writing.

The MIC monitors the development of new technologies and their need for spectrum. For example, the MIC has facilitated the development of intelligent transport systems through its spectrum policy by allocating appropriate bandwidth among each of vehicle information and communication systems, electronic toll collection systems and car-mounted radars. In June 2019, the MIC issued a roadmap to establish a 'connected car society', including a plan to begin use of automatic driving systems in a limited geographic area during 2020.

iv Spectrum auctions and fees

The MIC imposes spectrum usage fees on broadcasters, mobile phone carriers and other businesses that use radio spectrum, as provided for in the Radio Act. The formulae used to establish the usage fees have been criticised as unfairly favouring broadcasters at the expense of mobile service providers. Until 2005, fees were determined, in the case of broadcasters, on a per-broadcaster basis, and in the case of mobile phone carriers, by the number of base stations

and mobile devices connected to the respective network. Notwithstanding a series of changes in 2005, 2011 and 2014, the formulae continued to favour broadcasters, satellite operators and other vested rights holders. No changes have been made to the usage fee formulae even after a further change in 2017 involving the formation of the Council of Spectrum Policy 2020, which discussed potential changes to the usage fee formulae but eventually concluded that no change should be made. The total amount of spectrum fees the MIC imposed for the fiscal year ending March 2015 was approximately ¥74.7 billion (up from ¥68 billion in 2010), 74 per cent of which was paid by mobile phone carriers and only 8.9 per cent of which was paid by broadcasters, which has raised concerns since the bandwidth of spectrum occupied by mobile phone carriers is actually narrower than that occupied by broadcasters. This gap existed because the discounted usage fees applying to broadcasters were less than those applying to mobile phone carriers on the grounds that broadcasting is of a public nature. In light of the 99.9 per cent mobile phone penetration rate, the MIC announced a plan in May 2018 to discount usage fees imposed on mobile phone carriers to match those imposed on broadcasters. The MIC planned to submit the relevant amendment to the Telecommunications Business Act to the legislature in 2019. The amendment to the Radio Act resulted in an increase to spectrum fees for 5G services and IoT, which applies to both mobile phone carriers and broadcasters.

While spectrum fees are purportedly charged to cover spectrum administration costs, such as monitoring illegal spectrum use, the MIC has been criticised for using the fees to pay for miscellaneous expenses that appear to have little connection to spectrum administration. In August 2010, an MIC committee charged with exploring spectrum usage fee reform announced a policy to strengthen the link between the amount of spectrum usage fees charged to licence holders and the bandwidth of spectrum they occupy, and to more efficiently use the spectrum usage fees collected. In May 2011, a bill to amend the Radio Act to implement the revised spectrum usage fee scheme was passed.

An action plan published in November 2010 by the MIC committee charged with studying spectrum allocation recommended that the MIC consider the introduction of spectrum auctions as a way to allocate spectrum licences more efficiently and transparently. However, the plan also warned that the transition would raise questions of fairness between existing licensees who did not pay for their licences at auction, and future licensees who would bear this additional auction-related cost. The committee also raised related concerns that the cost of auction fees could ultimately be passed along to consumers by way of increased service fees.

From March 2011 to December 2011, the MIC held 15 meetings led by scholars for the purpose of considering the implementation of spectrum auctions, and in March 2012 a bill was submitted to amend the Radio Act to include spectrum auctions. The amended Act would have established a mechanism through which the MIC could conduct auctions to grant licences to applicants offering the highest bid price. The spectrum auction was envisaged to be first used for the licensing of the 3.5GHz band, which was planned to be used for 4G mobile phones starting in 2014. However, discussions regarding the bill were put on hold in anticipation of a change in the controlling political party from the Democratic Party of Japan (DPJ) to the Liberal Democratic Party (LDP), which took place in December 2012. In January 2013, the Minister of Internal Affairs and Communications under the then LDP Prime Minister Abe announced that the LDP government would not resubmit the bill for spectrum auctions. The DPJ subsequently resubmitted the bill, but it was voted down. However, the DPJ was able to obtain the LDP's consent to adopt a non-binding resolution

by a committee of the legislature acknowledging that spectrum auctions have benefits and detriments and should be reviewed through public hearings. Efforts to implement spectrum auctions as a method to provide greater transparency into the MIC's spectrum allocation process have effectively returned to square one. The MIC formed a study group in November 2017 to improve the effectiveness of spectrum use. In August 2018, the study group issued a report focusing on reform of the spectrum allocation system. This report discusses the feasibility of an auction system. It does not advocate a pure auction system under which only the offered amount is decisive, though it does recommend to using the offered amount as one of elements for spectrum allocation.

Following the issuance of this report, the Radio Act was amended in May 2019 to adopt what some commentators refer to as a 'partial auction' system, whereby the MIC will consider the amount of special fees offered by the applicant based on their own valuation of the spectrum. The applicant's offer alone is not a decisive element, but it does serve as an element in the MIC's consideration.

V MEDIA

i Restrictions on the provision of service

While freedom of broadcasting is an underlying premise of the Broadcast Act, the Act includes certain content requirements, including:

- a* an obligation to be politically impartial;
- b* a prohibition on reporting 'manipulated facts';
- c* an obligation to present diverse opinions on controversial issues; and
- d* an obligation to provide closed captioning, audio commentary or other forms of aid for the hearing-impaired and visually impaired where possible.

Main broadcasting licence holders are also required to provide a balance of entertainment, news and educational programming.

ii Internet-delivered video content

The internet and dedicated networks are widely used to deliver video content. Internet television services available in Japan vary widely, from simultaneous transmission of terrestrial and satellite television broadcasts, to exclusive IPTV channels with programming provided by domestic and foreign third-party programme providers, to VOD services. The methods of video delivery vary from free video-sharing sites (such as YouTube), to membership-based video-sharing sites (such as Nikoniko Douga), to partially fee-based video delivery sites (such as Gya!) and to full fee-based video delivery sites (such as Hulu and Netflix). Many traditional television stations (i.e., Nippon Hoso Kyokai (NHK), a public broadcaster formed under the Broadcasting Act, and commercial television broadcasters) also offer VOD services, and are streaming broadcast programmes through personal computers and smartphones. A survey published in February 2019 indicated that there were 17.5 million fee-based video delivery service users in 2018, and the number was expected to increase to 23.6 million by 2021.

The Supreme Court has ruled that services that record and forward Japanese television programmes and those that provide real-time streaming of Japanese TV programmes via the internet breach the originating television station's copyright. Therefore, third-party recording or streaming of Japanese television programmes without a licence constitutes a breach of Japanese copyright law.

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

VI THE YEAR IN REVIEW

Throughout 2019 and 2020, Japan has continued to show its commitment to further improving its telecommunications infrastructure and developing new telecommunications and media technologies to be implemented in future years.

In particular, the MIC is heavily stressing the importance of 5G technology in connection with its Society 5.0 initiative. This focus is illustrated by the prominence of 5G-related topics in the MIC’s latest annual White Paper in 2020. Society 5.0 will be a digital data-driven society, and the MIC is fully aware of the need to strongly facilitate the utilisation of data in Japan. According to the MIC’s international comparative survey, Japanese companies have been the least proactive in using digital data for business purposes, while Japanese data subjects have been the most reluctant to provide personal data (in each case, of the surveyed countries). The Personal Information Bank regime may be a potential way to tackle these problems.

VII CONCLUSIONS AND OUTLOOK

The Japanese government is pursuing a number strategies to digitise government services, such as making government data available online, rolling out the My Number card system to make certain services accessible online or more conveniently and creating the Digital Agency to consolidate digitisation efforts. The effectiveness of such efforts has varied, but the efforts are expected to continue given the government’s announced commitment to digitise Japanese governmental services.

The government has also taken steps to expand market access and competition in the Japanese telecommunications industry by making it easier to enforce regulations equally between Japanese service providers and non-Japanese service providers, and adding regulations to eliminate or regulate anticompetitive business practices like SIM card locking and automatic customer contract renewals.

Lastly, further steps have been taken to address media piracy in Japan, including amendments to the Copyright Act that subject operators of piracy sites to criminal penalties and expand the categories protected by the Copyright Act.

In sum, the development of media and telecommunications policies and technology in Japan has seen a resurgence over the past several years, and further significant progress is likely in the near future.

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UNITED STATES

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I OVERVIEW

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

II REGULATION

i The regulators

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

The Federal Communications Commission

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

The National Telecommunications and Information Administration

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

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The Department of Commerce

The United States Department of Commerce (DOC) has oversight of remote sensing satellites and certain export issues related to space technology. The DOC is developing an increased role with respect to facilitating the commercialisation of space, including spectrum-related matters.

State and local regulators

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

The Federal Trade Commission

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

Other executive branch agencies

Other executive branch agencies play an important but less direct role in the regulation of traditional telecommunications, broadband internet access and media. First, these agencies often provide input as the FCC explores substantive issues and implements regulations through its rulemaking and licensing processes, occasionally engaging in public disagreements with the FCC over such matters. In addition, executive branch agencies with national security and law enforcement responsibilities typically are consulted (or may otherwise provide input) in connection with proposed transactions or other applications or petitions for authority that would result in legally cognisable non-US ownership of FCC-regulated businesses. Notably, on 4 April 2020, the President signed an executive order establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Sector (the Committee), a group of agencies composed of the DOJ and the US Departments of Defence and Homeland Security, and advised by various other government agencies and departments, formalising the informal group previously referred to as Team Telecom. Applications and petitions filed with the FCC involving foreign ownership that are referred to the Committee typically are subject to additional information requests in connection with the Committee's review, and because the FCC typically will not grant such applications until the Committee has 'signed off', the Committee effectively has the power to delay, if not block, a transaction or

the grant of authority until its concerns are addressed. Transactions involving FCC-regulated businesses (like other US businesses) are also subject to potential review by the Committee on Foreign Investment in the United States (CFIUS), a multi-agency group with the statutory authority to review proposed investments in US businesses from non-US sources. Because CFIUS can recommend that the President block or impose significant conditions on such transactions even after they have closed if they have not been 'cleared' by CFIUS, parties often file with CFIUS on a 'voluntary' basis prior to closing.

ii Sources of federal telecommunications and media law and policy

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

The Communications Act

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

Ancillary authority

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

Forbearance authority

Section 10(a) of the Communications Act enables the FCC to 'forbear' from applying any provision of the Act to a Title II 'telecommunications' carrier or service (but not other types of providers or services) if the FCC determines that enforcement of such provision is not necessary to ensure just, reasonable and non-discriminatory rates, terms and conditions of service; enforcement of such provision is not necessary for the protection of consumers; and forbearance from applying such provision is consistent with the public interest. The FCC has used this authority to free telecommunications carriers from restrictive common carrier regulations, particularly where the relevant market sector is competitive. The FCC also used this authority in early 2015 in connection with its reclassification of broadband internet access service as a 'telecommunications service' (discussed in greater detail below).

FCC regulations and orders

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

Judge-made law

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

iii Regulated activities

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

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

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

iv Ownership and market access restrictions

Foreign ownership restrictions

Sections 310(a) and (b) of the Communications Act restrict foreign ownership of common carrier, aeronautical and broadcast spectrum licences, and of US entities holding those licences. These statutory sections provide that foreign individuals and entities may not directly hold more than 20 per cent of the equity or voting interests in an entity that holds one of these types of FCC licences. Higher levels of indirect foreign ownership of a licensee are permissible where such ownership is held through US entities. More specifically, where the FCC licensee is owned and controlled directly by another US company, the 20 per cent limit effectively increases to 25 per cent, and the FCC may allow foreign ownership in excess of 25 per cent at or above the US parent company level where it determines that allowing such ownership would serve the 'public interest'. In addition, as the result of a forbearance order issued in 2012 (which effectively overrides certain arcane language in the text of the Communications Act), the FCC will now permit higher levels of indirect foreign ownership in common carriers held through a non-controlling US company where the FCC concludes that such ownership would serve the 'public interest'. Often, the FCC has permitted up to 100 per cent indirect foreign ownership of common carriers. The FCC has found that higher levels of foreign ownership from WTO Member States presumptively serve the 'public interest'.

Historically, the FCC generally has not waived the 25 per cent limit with respect to broadcast licensees. However, in late 2013, the FCC indicated that in order to facilitate foreign investment, it would consider such waivers on a case-by-case basis, taking into account any concerns raised by other executive branch agencies with respect to national security, trade policy and law enforcement. In May 2015, the FCC granted such a waiver to Pandora Radio LLC to allow Pandora to buy a radio station, and sustained that waiver against a legal challenge that was resolved in September 2015. In late 2016, the FCC extended to broadcast licensees the same standardised, streamlined rules and procedures that common carrier wireless licensees have been using to seek approval for foreign ownership, with appropriate broadcast-specific modifications. The FCC also established a methodology through which a publicly traded common carrier or broadcast licensee or controlling US parent could reliably ascertain its foreign ownership levels. The FCC has granted several requests seeking approval of foreign ownership in excess of the 25 per cent statutory limit.

Even transactions and applications that are consistent with the foreign ownership limits described above may be scrutinised, and effectively blocked, as a result of a review by the Committee (i.e., the successor to Team Telecom) or CFIUS (as described above). Beginning in 2019, the FCC, in consultation with the executive branch agencies that now constitute the Committee, has denied an application for authority to provide international telecommunications services (which are not subject to foreign ownership restrictions in Section 310 of the Communications Act) and has commenced reviews of previous grants of such authority based on national security and law enforcement concerns. Specifically, the FCC denied a long-pending application by China Mobile USA for authority to provide international telecommunications services in the US, finding that its ownership and control by the Chinese government raised substantial national security and law enforcement risks that could not be resolved through mitigation measures. Following on that action, the FCC commenced reviews of previously granted authority issued to China Telecom Americas, China Unicom Americas, Pacific Networks, and ComNet – each of which is ultimately

subject to the ownership and control of the Chinese government – at the recommendation of the executive branch agencies to revoke these authorisations based on similar national security concerns.

Further, over the course of 2019 and 2020, the federal government imposed various restrictions on Chinese communications technology companies – most notably Huawei and ZTE – that it has determined pose national security threats to the United States. For instance, since May 2019, the DOC has effectively prohibited American companies from transacting with Huawei, ZTE, and other Chinese firms that could provide the Chinese government the means to intercept or disrupt the communications of American citizens and the US government. Moreover, in June 2020, the FCC formally designated Huawei and ZTE as national security threats, forbidding federal universal service support from being used to purchase equipment or services from either company.

Market access

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

Multiple or cross-ownership

With the exception of its broadcast licences, the FCC generally does not limit the number of spectrum licences that may be held by or 'attributed' to (i.e., deemed to be held by) a single individual or entity. However, in evaluating the likely competitive effects of significant wireless transactions, the FCC has utilised a 'spectrum screen' to identify local markets that merit closer scrutiny by looking at the total amount of spectrum that would be controlled by one individual or entity, and the FCC has initiated a proceeding to re-examine its use and definition of such spectrum screens. The FCC has also imposed certain limitations on the ability of authorised parties of one type to hold licences or authorisations of another type. For example, the FCC's rules prohibit cable service providers from holding an attributable interest in the incumbent local exchange carrier serving the same market, and vice versa. The FCC has explicit limits on the number of broadcast stations (radio and TV) an individual or entity can own in a given local market, as well as the percentage of households nationwide that can be covered by television stations attributable to a single individual or entity. Historically, the FCC limited cross-ownership of radio and television stations, as well as cross-ownership of broadcast stations and newspapers. In November 2017, the FCC eliminated these restrictions. However, after the United States Court of Appeals for the Third Circuit found that the FCC had failed to consider the consequences of such deregulation on diversity in media ownership, the FCC reinstated the cross-ownership restrictions in December 2019. In doing so, the FCC made clear that it was simply complying with the Third Circuit's ruling and expressly reserved its right to seek review of the appeals court's decision by the US Supreme Court, which it did in April 2020.

v Transfers of control and assignments

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

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

The past year has seen relatively few major telecommunications and media transactions. Notably, however, T-Mobile US, Inc (the nation’s third-largest wireless carrier) and Sprint Corp (the nation’s fourth-largest wireless carrier) closed their merger in April 2020. Although the transaction already had been approved by the DOJ (in July 2019) and by the FCC in (October 2019), attorneys general of a number of states and the District of Columbia nevertheless challenged the transaction in the United States District Court for the Southern District of New York. Following a trial that spanned several weeks in December 2019 and January 2020, the court ruled against the states, paving the way for the companies to consummate the transaction, which had been pending since April 2018. Pursuant to a condition of the DOJ’s approval of the merger, in July 2020, DISH Network Corp acquired Boost Mobile (Sprint’s prepaid service business unit) in order to facilitate the direct-broadcast satellite (DBS) provider’s entry into the wireless market. In August 2020, the Sprint brand was discontinued, and ‘new’ T-Mobile currently is in the process of integrating the operations of the two carriers.

Although approved by the FCC in 2016, Charter Communications, Inc’s acquisition of Time Warner Cable, Inc and Bright House Networks, LLC recently became the subject of renewed activity. In June 2020, Charter urged the FCC to terminate conditions imposed in connection with the transaction that prohibit the company from imposing data caps and usage-based pricing and require it to provide non-discriminatory, fee-free interconnection to certain entities. Then, two months later, the United States Court of Appeals for the District of Columbia Circuit vacated the interconnection condition noted above as part of a separate legal challenge to the FCC’s approval of the transaction. While the court’s decision effectively mooted Charter’s petition insofar as it sought relief from the interconnection requirement,

the company's request that the FCC sunset the restriction on data caps and usage-based pricing is still pending, and Charter remains subject to certain other conditions, including broadband buildout commitments.

vi Enforcement

Violations of the Communications Act, the FCC's implementing rules, orders and policies, and specific licence terms and conditions can result in enforcement proceedings before the FCC, and potentially before the DOJ. The FCC has explained that it intends to investigate and respond quickly to potentially unlawful conduct to ensure, among other things:

- a* that consumers are protected;
- b* the integrity of the universal service support mechanism is preserved;
- c* robust competition;
- d* responsible use of the public airwaves; and
- e* strict compliance with public safety-related rules.

Violations of FCC requirements can result in a variety of sanctions, ranging from fines and forfeitures, to consent decrees designed to ensure corrective action; in egregious cases, criminal enforcement is possible. In recent years, the FCC has issued several multimillion-dollar fines, as well as a number of fines of several hundred thousand dollars each. The cited infractions include deceptive consumer practices, failure to contribute to universal service funds, misuse of universal service support or other violations of universal service funding rules, unauthorised operation of radio facilities, selling illegal equipment, violating the FCC's ownership rules and providing materially incorrect information to the FCC.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol transmission

Before 2015, the United States used a relatively light touch with respect to the regulation of internet service providers (ISPs) and broadband internet access providers (BIAPs), relying largely on market forces instead of prescriptive regulation. By many accounts, this 'hands-off' approach contributed to the rapid growth of the US internet-based sector. Subsequent activity at the FCC – including, in particular, the agency's imposition of net neutrality regulations and reclassification of retail broadband internet access services – suggested that it would play a more active role in the regulation of internet-based services. However, more recently the pendulum has swung in the other direction, with the FCC returning to a lighter touch with respect to internet access services (e.g., with respect to 'net neutrality' regulation).

The covid-19 pandemic – and Americans' attendant reliance on broadband connectivity for distance learning, remote work and telehealth – has reinvigorated ongoing efforts to ensure the availability of reliable and affordable internet access across the United States. In March 2020, the FCC introduced the Keep Americans Connected Pledge, pursuant to which more than 800 service providers agreed not to disconnect consumers and small business customers for non-payment and to waive such customers' late fees incurred, in each case due to the crisis. A number of states (including Delaware, Indiana and Maryland) went further, issuing executive orders or enacting emergency legislation mandating that service providers take such steps. Congress enacted the Coronavirus Aid, Relief and Economic Security (CARES) Act, which among other things provided funds to states to support connectivity for schools, teachers and students to facilitate distance learning, and allocated US\$200 million for the

FCC to distribute to healthcare providers offering connected care services to their patients in response to the pandemic. Policymakers' focus on establishing and maintaining robust connectivity precipitated by the covid-19 pandemic likely will inform future policy debates concerning universal service and the appropriate regulatory treatment of broadband internet access service.

ii Universal service

The Communications Act directs the FCC to take steps to facilitate the universal availability of essential telecommunications services through, *inter alia*, the use of a federal universal service fund (USF). The USF supports various programmes that seek to promote the availability of quality telecommunications services at just, reasonable and affordable rates on a nationwide basis to high-cost areas, low-income individuals, schools, libraries and rural healthcare facilities. The USF is funded through revenue-based contributions from providers of interstate and international telecommunications and interconnected VoIP services, as well as certain other providers of 'telecommunications'. The contribution factor (essentially, that rate at which interstate and international revenues are assessed for USF contribution purposes) varies during the course of the year, and has fluctuated between approximately 19 and 27 per cent of covered revenues for most of 2020. Universal service programmes and contribution obligations are administered by the Universal Service Administrative Company, a legally independent entity that is subject to the FCC's oversight.

The National Broadband Plan adopted in 2010 recommended that the FCC modify universal service subsidy programmes, which historically focused on voice telecommunications, to target broadband expansion into areas where the FCC asserts BIAPs would not find it economically viable to provide broadband service in the absence of this type of financial support. Consistent with this recommendation, the FCC established the Connect America Fund (CAF) to support the deployment of broadband infrastructure to areas that are currently 'unserved', and to phase out legacy universal service support mechanisms in the process. Under the FCC's implementing rules, certain wireline incumbents called 'price cap carriers' enjoy significant funding preferences through, *inter alia*, a 'right of first refusal' in connection with available funding. As a result, a much smaller pool of support is available to competitive providers. The FCC, which is currently implementing Phase II of the CAF programme, held a reverse-auction in 2018 to distribute funding in areas where price-cap incumbents declined preferential funding. In the auction, more than 103 bidders were awarded more than US\$1.49 billion of support to offer service to more than 700,000 locations in 45 states over the next decade. In 2019, the FCC began disbursing funds to the reverse-auction's winning bidders, a process that has continued into 2020. In addition, the FCC is implementing CAF rules for 'rate of return' incumbent carriers. These changes are being coupled with changes to the existing – and exceedingly complex – 'intercarrier compensation' scheme by which local and long-distance service providers pay or receive compensation for traffic that is handed off to each other's networks.

In January 2020, the FCC established the new Rural Digital Opportunity Fund (RDOF) that it had proposed the previous year. Modelled after the CAF programme, the RDOF will provide US\$20.4 billion over a 10-year period to support deployment of broadband service with minimum speeds of 25/3Mbps in rural areas, with the goal of improving connectivity for millions of Americans. At the time of writing, the first of two RDOF auctions, through which the FCC will provisionally award approximately US\$16 billion in support to winning bidders, is scheduled for August 2020; the second RDOF

auction, through which the remainder of the fund will be distributed, will be held at a later date. The FCC also is continuing to develop other mechanisms and seek additional funding to extend broadband service to the most remote and hardest to serve locations in the United States.

The FCC also has a 'Lifeline' programme, which uses a portion of the USF to subsidise the costs of certain supported telecommunications services so that they can be purchased by individuals who otherwise would be unable to afford them. Broadband is included in the list of supported services, providing low-income consumers a means of obtaining internet access at reduced rates. Minimum standards exist for supported voice and broadband services in order for a service to qualify for the Lifeline subsidy. In November 2017, the FCC proposed modifications to Lifeline that would, among other changes, limit the ability of resellers (service providers that lease, rather than own, network capacity) to participate in the programme. Opponents challenged the new rules in the United States Court of Appeals for the District of Columbia Circuit, which, in February 2019, rejected these recent changes and remanded the matter to the FCC for reconsideration.

iii Restrictions on the provision of service

Common carriage

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

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

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

Because the classification of a service is of critical importance in determining the regulations applicable to that service, the reclassification of a service can have significant consequences. The FCC's treatment of internet access services provides a vivid illustration of this fact. Broadband internet access services require, inter alia, the transmission of data between an end user and an ISP, and any number of other individuals or entities. For years,

the FCC viewed this transmission capability as a ‘telecommunications service’, and required BIAPs to offer it to competitors on a stand-alone, common carrier basis. However, in a series of orders issued during the 2000s, the FCC reclassified broadband internet access services as ‘information services’ functionally integrated with a ‘telecommunications’ component, such that BIAPs are no longer required to make the transmission capability available to competitors (unless that capability is offered to the public voluntarily on a non-integrated, stand-alone basis).

The classification of broadband internet access service has remained an area of significant regulatory interest. In February 2015, the FCC reclassified retail broadband internet access service as a ‘telecommunications service’ as part of the FCC’s ‘net neutrality’ proceeding. This action was taken for the stated purpose of creating a clearer jurisdictional basis for the imposition of net neutrality rules on BIAPs, though it also automatically subjected BIAPs to various common carrier provisions appearing in Title II of the Communications Act, including privacy-related obligations. However, in January 2018, the FCC restored its prior classification of broadband internet access service as an ‘information service’, in conjunction with the FCC’s repeal of certain of those net neutrality rules, and in doing so also relieved BIAPs of Title II’s privacy obligations and other common carrier requirements. Appeals of the FCC’s 2015 decision accordingly became moot, though the 2018 order was appealed to the United States Court of Appeals for the District of Columbia Circuit. In October 2019, the DC Circuit upheld the majority of the FCC’s 2018 order, including its classification of broadband internet access service as an ‘information service’ exempt from the requirements imposed on common carriers under Title II. After the DC Circuit denied various petitions for rehearing in early 2020, the parties ultimately declined to seek review by the US Supreme Court, thereby solidifying broadband internet access service’s ‘information service’ classification for the time being.

Price regulation

The Communications Act gives the FCC the authority to regulate the rates charged by common carriers in connection with the telecommunications services they provide, and ensure that those rates are ‘just and reasonable’. Prior to the passage of the Telecommunications Act of 1996, rate regulation was accomplished through the filing of tariffs with the FCC and state PUCs. More recently, the FCC has eliminated much of its tariffing regime and instead relied upon market competition (backed by a complaint mechanism) to ensure that rates are ‘just and reasonable’.

In other respects, the FCC has taken steps toward the re-regulation of certain services that are critical inputs to broadband services. In 2016, the FCC found that certain incumbents were abusing their market power and charging unreasonably high rates for the broadband ‘special access’ services necessary for ‘business data service’ firms to function and serve their customers. The FCC subsequently proposed and adopted a new regulatory framework for such special access services in which individual geographic markets are classified as either ‘competitive’ or ‘non-competitive’, with the former subject to relatively lower levels of new regulation, and the latter subject to more onerous requirements and oversight. The new rules went into effect in August 2017 and were upheld in nearly all respects by the Eighth Circuit Court of Appeals in a ruling issued in August 2018.

The FCC also has taken a hands-on approach to the regulation of franchise fees that municipalities can charge CATV operators (which often offer broadband and voice services in addition to video service). By statute, such fees cannot exceed 5 per cent of the revenues

that a CATV operator derives from providing video service in the municipality. In August 2019, however, the FCC clarified that the value of 'in-kind exactions' (e.g., services that CATV operators may be asked to provide without charge to government buildings and schools) count towards the 5 per cent cap. A challenge to this decision brought by a number of municipalities is currently before the United States Court of Appeals for the Sixth Circuit, which refused to stay the FCC's August 2019 order pending the outcome of the appeal.

Net neutrality

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

The FCC's direct involvement with a net neutrality policy began in 2005 with the issuance of its Broadband Policy Statement. Although the FCC's authority under the Communications Act to regulate the internet was not clearly articulated, the Broadband Policy Statement expressed four principles that the FCC indicated were intended to preserve the 'open' nature of the internet for consumers, without discouraging broadband deployment by network operators. All subject to a service provider's right to engage in 'reasonable network management', the FCC stated that consumers are entitled to gain access to the lawful internet content of their choice; run applications and use services of their choice, subject to the needs of law enforcement; connect their choice of legal devices that do not harm the network; and benefit from competition among network providers, application and service providers and content providers.

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

The FCC then adopted new rules on broadband internet access services, applicable only to 'mass-market retail services'. Those rules required all broadband internet access service providers to disclose the network management practices, performance characteristics and terms and conditions of their services; prohibited fixed broadband internet access providers from blocking lawful content, applications, services or non-harmful devices; prohibited mobile wireless broadband internet access providers from blocking lawful websites or applications that compete with their voice or video telephony services; and prohibited fixed broadband internet access providers from unreasonably discriminating in transmitting lawful network traffic. In 2014, the US Court of Appeals for the District of Columbia Circuit vacated the FCC's 'anti-discrimination' and 'anti-blocking' rules, finding that they amounted to impermissible common carrier regulation of internet access services, since the FCC had classified those services as 'information services' not subject to Title II of the Communications Act (the Court upheld the FCC's disclosure requirements). However, the Court also

suggested that the FCC could adopt modified versions of these rules under Section 706 of the Telecommunications Act of 1996, which potentially grants the FCC relatively broad authority to promote the ‘virtuous circle’ of internet-related innovation.

In May 2014, the FCC launched a new rulemaking to explore whether new ‘net neutrality’ rules could be adopted pursuant to Section 706, or whether the FCC instead should regulate BIAPs as ‘Title II’ common carriers. In 2015, the FCC opted for the latter approach, reclassifying retail broadband internet access service as a ‘telecommunications service’ subject to Title II. At the same time, the FCC exercised its forbearance authority to free BIAPs from much of the regulation that otherwise would apply under Title II (such as tariffing obligations and mandatory federal universal service contributions). Notably, several core common carrier regulations continue to apply notwithstanding such forbearance, including statutory requirements that ‘charges’ and ‘practices’ be just, reasonable and not unreasonably discriminatory; requirements to maintain the privacy of customer information; and the right of consumers to seek damages and pursue complaints in courts for claimed violations by common carriers. Soon after the FCC’s ruling, a broad coalition of BIAPs and trade associations filed an appeal in the US Court of Appeals for the District of Columbia Circuit. That court upheld the FCC’s ruling in a decision issued in June 2016, and the US Supreme Court ultimately denied further review in November 2018.

In January 2018, the FCC revisited these issues yet again, this time restoring the classification of broadband internet access service as an ‘information service’ and repealing its 2015 bans on blocking, throttling and paid prioritisation as well as its general ‘internet conduct standard’. In place of these prophylactic rules, the FCC adopted a revised transparency rule requiring BIAPs to disclose any blocking, throttling or paid prioritisation on their networks. The FCC also entrusted the FTC with the task of bringing enforcement actions for ‘unfair and deceptive practices’ if BIAPs violate their own stated commitments not to engage in such conduct, and for ‘unfair methods of competition’ if BIAPs otherwise engage in anticompetitive conduct. An appeal of this order was brought by a group of public advocacy organisations, internet content providers and state attorneys general in the US Court of Appeals for the District of Columbia Circuit.

In an opinion issued in October 2019, the DC Circuit upheld the majority of the FCC’s 2018 order, including its classification of broadband internet access service as an ‘information service’. The court did, however, remand three discrete issues to the FCC for further review: the potential impacts of the order’s deregulatory reforms on public safety, pole attachments and BIAPs’ participation in the Lifeline programme. Consistent with the DC Circuit’s directive, the FCC solicited comments on these issues in February 2020.

In the aftermath of the 2018 order, several states have attempted to establish their own net neutrality requirements for BIAPs, in the form of either direct regulation (e.g., California’s SB-822) or conditions on government procurement contracts (e.g., Vermont’s EO 2-18 and S-289). The federal government and BIAPs sued to block California’s net neutrality law on pre-emption grounds in September 2018, leading to a concession by the state not to enforce the law while the appeal of the FCC’s 2018 order was pending. BIAPs brought a similar lawsuit in Vermont in October 2018, which also was stayed pending the resolution of the appeal. Although the DC Circuit vacated the 2018 order’s express pre-emption provision, it left room for such challenges to proceed based on conflict pre-emption principles. Because the court denied petitions for rehearing and the parties declined to seek review by the US

Supreme Court, the stays in these challenges to California's and Vermont's net neutrality regulations have been lifted; in California, the federal government and BIAPs have filed amended complaints and renewed motions for preliminary injunctions.

iv Security

US regulatory approach to emergency preparedness

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

- a* FCC rules now require all wireline and wireless telecommunications service providers to maintain on site a back-up power source (typically, a generator) capable of keeping networks functioning for a minimum number of hours. In addition, FCC rules require providers of fixed residential voice services (including interconnected VoIP) to offer customer premises equipment along with a backup power source.
- b* Under the Telecommunications Service Priority (TSP) programme, service providers must afford priority service to federal, state and local governments and other critical institutions.
- c* The FCC has adopted outage reporting rules that require network operators to notify the FCC of significant outages that may impact end-user communications, and recently extended these rules to VoIP providers.
- d* The FCC has established rules governing the Emergency Alert System (EAS), a national public warning system that requires broadcasters, CATV operators, satellite broadcasters and others to provide communications capability to the President to address the American public during a national emergency. The system may also be used by state and local authorities to deliver important emergency information, such as AMBER alerts and weather information targeted to specific areas.
- e* The FCC has established rules requiring deployment of enhanced 911 services with the aim of providing accurate and precise caller location data to facilitate a rapid and effective emergency response.

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

Congress has authorised the creation of a nationwide, interoperable, high-speed network dedicated to public safety applications. This network is being managed by FirstNet, an independent entity within the NTIA that is overseen by a board including representation

from the public safety community, wireless experts and current and former federal, state and local government officials. Notably, a significant portion of FirstNet operations is funded by the proceeds of spectrum auctions.

The Communications Assistance for Law Enforcement Act

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

Cybersecurity

US cybersecurity policy following the completion of the federal government’s Cyberspace Policy Review has sought to:

- a* create or enhance shared situational awareness of network vulnerabilities, threats and events and the ability to act quickly to reduce current vulnerabilities and prevent intrusions;
- b* enhance US counterintelligence capabilities and increase the security of the supply chain for key information technologies; and
- c* strengthen the future cybersecurity environment by expanding cyber education, coordinating and redirecting research and development efforts and working to define and develop strategies to deter hostile or malicious activity in cyberspace.

Consistent with these goals, the FCC has explained that one of its core objectives is ‘to strengthen the protection of critical communications infrastructure’. In advancing this objective, the FCC has focused on educating consumers and small businesses about the importance of cybersecurity, developing cybersecurity best practices in cooperation with industry leaders and facilitating the ability of small businesses to develop their own cybersecurity plans.

Online protections for children

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

Protection of personal data and privacy

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

Notably, while updated and comprehensive privacy legislation has stalled at the federal level, certain states have pressed forward with privacy requirements of their own. For example, following on the enactment of the California Consumer Privacy Act in 2018 – which imposes far-reaching privacy obligations on a wide range of businesses doing business in California, including broadband service providers and internet platforms – the California attorney general’s office issued regulations implementing the statute in June 2020.

The FCC has also tried to ensure that consumers can effectively block calls and text messages that they do not wish to receive, using authority provided by Congress in the Telephone Consumer Protection Act (TCPA). Among other things, in June 2015 the FCC attempted to strengthen restrictions on the practice of ‘robocalling’ using ‘automatic telephone dialling systems’ (i.e., ‘autodiallers’) by issuing a series of declaratory rulings. Among other things, the FCC ruled that a device is an impermissible autodialler if it had either the present ability or potential future ability to be used to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. Numerous parties sought review of this ruling in the US Court of Appeals for the District of Columbia Circuit, arguing, among other things, that the FCC’s action actually obfuscates matters and unreasonably expands the reach of the TCPA, because, for example, a smartphone could be classified as an impermissible autodialler simply because it could use an autodialling application. In March 2018, the court struck down the FCC’s autodialler ruling and other aspects of the 2015 order. Despite having opened a new proceeding to consider reforms to its implementation of the TCPA in light of the court’s ruling in May 2018, the FCC has yet to provide clarity on these issues. Over the course of late 2019 and early 2020, two challenges to the TCPA reached the US Supreme Court. Although it rejected a First Amendment challenge to the statute in July 2020, the Court is expected to resolve a longstanding dispute concerning the proper interpretation of the term ‘autodialler’ by mid-2021.

In tandem with the FCC’s efforts to clarify the scope of the TCPA, other regulatory and legislative steps have been taken to facilitate voice service providers’ identification and blocking of illegal and unwanted robocalls. For example, in June 2019, the FCC issued a declaratory ruling permitting voice service providers to offer call-blocking functionality to their subscribers on an ‘opt-out’ basis. Moreover, in December 2019, the US Congress passed the TRACED Act, which provides additional flexibility to service providers to block illegal and unwanted robocalls and imposes a June 2021 deadline for the implementation of SHAKEN/STIR, an end-to-end call authentication protocol aimed at curtailing unwanted ‘spoofed’ robocall traffic travelling on and among their networks. Pursuant to the TRACED

Act, in July 2020 the FCC established safe harbours (from liability for unintentional blocking of wanted calls) for service providers that employ certain ‘reasonable analytics’ to block robocalls and that decline to complete calls originated from upstream service providers deemed to be ‘bad actors’. In addition, although many of the nation’s largest carriers already have implemented SHAKEN/STIR, the FCC is actively working to ensure that all service providers deploy this technology as soon as possible.

IV SPECTRUM POLICY

i Flexible spectrum use

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

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

For example, to facilitate the development of secondary markets in spectrum usage rights involving terrestrial radiofrequency-based services, the FCC has adopted rules to facilitate two types of leasing arrangements: a ‘spectrum manager’ lease, in which a lessee is permitted to use spectrum subject to the oversight and control of the initial licensee; and a ‘de facto transfer’ lease, in which the lessee assumes many of the obligations of a licensee, and exercises control over its own spectrum operations. The FCC has also examined ways to facilitate unlicensed use of certain spectrum bands, provided that such use does not interfere with licensed operations (if any) in those bands. Among other things, the FCC has adopted rules permitting certain devices to operate on a secondary, unlicensed basis in unused broadcast television spectrum, also known as ‘white spaces’, and has sought to facilitate the ability of unlicensed Wi-Fi networks to share portions of the 5 and 6 GHz bands that previously were designated for other purposes.

ii Broadband and spectrum use

Federal law and policy has sought to encourage the growth of broadband networks, including through access to additional spectrum. More specifically, Congress has directed the FCC and the NTIA to make additional federal government spectrum available for commercial use. The FCC and the NTIA are also exploring ways that commercial users might share federal government spectrum.

The FCC has also identified existing commercial spectrum that could be reallocated and thus used more efficiently in support of broadband services. After Congress enacted legislation that allowed television broadcasters to ‘turn in’ some of the spectrum they use for their television channels in return for a portion of auction proceeds, the FCC conducted its

first ‘incentive auction’. The auction of the voluntarily returned broadcast channels for new mobile broadband use yielded US\$19.8 billion in revenue, including more than US\$7 billion for the government.

In addition, the FCC through its ‘spectrum frontiers’ proceeding, made spectrum above 24GHz available for ‘5G’ wireless mobile and other broadband services. Since the inception of this proceeding, the FCC made available over 6GHz of millimetre-wave spectrum for flexible wireless use, in the 24.25–24.45 and 24.75–25.25GHz bands (24GHz band), the 27.5–28.35GHz band (28GHz band), the 37–38.6GHz band (37GHz band), the 38.6–40GHz band (39GHz band), the 47.2–48.2GHz band (47GHz band), and the 50.4–51.4GHz band. The FCC also made available the 64–71GHz band for use by unlicensed devices. The FCC has begun auctioning off terrestrial usage rights for this spectrum; in January 2019, for instance, the FCC completed its auction of terrestrial rights to the 28GHz band, which raised over US\$700 million and resulted in the grant of new licences to dozens of winning bidders in October 2019. And in March 2020, the FCC completed an auction for spectrum in the upper 37, 39 and 47GHz bands, raising more than US\$7.5 billion (including nearly US\$4.5 billion for the government).

The FCC also enabled the millimetre wave bands to be used for a variety of other uses, including satellite, fixed and federal government uses. The FCC targeted the 40–42GHz and 48.2–50.2GHz bands for expansion of fixed satellite service, and adjusted previously adopted earth station requirements in the 24GHz, 28GHz, 39GHz, and 47GHz bands, and authorised satellite use in the 50GHz band, to permit greater flexibility in the deployment of earth stations. The FCC also provided for expanded unlicensed use of the 57–71GHz band on-board aircraft.

Efforts also are underway to make more mid-band spectrum available for flexible wireless use, including 5G deployments. For instance, in July 2020, the FCC commenced an auction of licences in the 3.5GHz band. And following the DC Circuit’s June 2020 rejection of a challenge brought by small satellite operators to the FCC’s plan to repurpose the 3.7–4.2GHz band (which to date has been used primarily for satellite-based video distribution) for 5G, the FCC scheduled an auction of spectrum in the 3.7–3.98GHz portion of that band for December 2020. The FCC has a continuing inquiry into potential ways to facilitate more intensive use of the frequencies between 3.7GHz and 24GHz. The FCC also is exploring other underutilised spectrum to support 5G and other recent technologies, and this year commenced a proceeding to examine proposals to expand commercial use of the 71–76GHz, 81–86GHz, 92–94GHz and 94.1–95GHz bands.

With respect to broadband service on aircraft, as well as on ships and vehicles, the FCC adopted new rules to better enable satellite-delivered connectivity to passengers and crew. The FCC allowed so-called ‘earth stations in motion’ to operate in more satellite frequencies than before, in an effort to connect even more consumers in this fast-growing segment of the marketplace and provided more certainty be adopted a simplified, regulatory framework for licensing these spectrum uses.

There also have been a number of other new developments with respect to satellite spectrum policy. The DOC has expressed plans to simplify aspects of the existing commercial licensing regime and also to develop radio spectrum policies to serve the needs of the commercial industry. In addition, the President has issued a number of space policy directives, which require, among other things, that the federal government and industry collaborate to improve space safety and mitigate orbital debris and that the DOC and the Director of the Office of Science and Technology Policy at the White House provide to the President a

report on improving the global competitiveness of the US space sector. At the same time, the FCC continues to evaluate operators' proposals for non-geostationary orbit satellite deployments and, in March 2020, initiated a new processing round for such applications, and is considering proposals to establish rules for coexistence among these systems.

iii Spectrum auctions and fees

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

Historically, proceeds from all spectrum auctions have gone to the US treasury. Under the recently used incentive auction (described above), current licensees have the option to contribute spectrum rights in exchange for a portion of the proceeds from the auction of that spectrum.

V MEDIA

i Regulation of media distribution outlets generally

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

Regulation of content and content providers

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

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

Internet-based media platforms, including social media platforms, have long been shielded from liability by Section 230 of the Communications Act both for third-party (i.e., user-generated) content and for such platforms' good-faith exercise of editorial discretion to block or limit access to users' posts. In May 2020, however, the President issued an executive order articulating a narrow view of Section 230 immunity, and setting in motion a re-examination of the statute at the federal level, including at the FCC. Various groups have mounted legal challenges to the executive order.

Terrestrial broadcasting

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

Carriage of broadcast television programming by MVPDs and other parties

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

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

negotiations. Nevertheless, disputes between MVPDs and broadcasters continue, and the FCC occasionally is called upon to adjudicate claims of ‘bad faith’ retransmission consent negotiations.

In addition to the ‘retransmission consent’ requirements described above, any party that retransmits broadcast programming must comply with US copyright law. Federal law creates compulsory licences allowing ‘cable systems’ and other MVPDs to retransmit such programming without obtaining specific licences from every relevant copyright holder in the programming stream. Other types of services do not benefit from this compulsory licence and must respect relevant copyright, as the US Supreme Court confirmed in June 2014 when it released its decision in *American Broadcasting Cos v. Aereo, Inc*, which involved a service that leased each subscriber an individual remote antenna that allowed that subscriber to receive broadcast signals and retransmit that signal over the internet for near-live viewing. The Court concluded that Aereo’s retransmission of these signals constituted a ‘public performance’ of programming material that infringed on the rights of the copyright holders. The Aereo decision does not address how US copyright law could apply to other ‘retransmission’ services on a going-forward basis, and in particular does not fully resolve whether modest changes to the structure of an Aereo-like service (e.g., recording programming for later viewing instead of engaging in near-live retransmission) would change the outcome. Relatedly, a non-profit entity called Locast launched a service in 2018 that allows users to stream local broadcast television stations in exchange for voluntary donations, relying on an exception in the retransmission consent regime for governmental and non-profit entities seeking to retransmit signals with no desire for ‘commercial advantage’. In July 2019, a number of programmers and broadcasters filed suit against Locast, challenging its non-profit status and alleging violation of US copyright laws; Locast, for its part, has filed counterclaims alleging that the plaintiffs are misusing their copyrights and are engaged in anticompetitive behaviour. The dispute has not yet been resolved.

Subscription media

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

Although states and localities in their role as franchisors frequently impose requirements on CATV operators (including to extract ‘in kind’ benefits, as described above), their authority to regulate CATV is limited in many respects by the pre-emptive effect of the Communications Act and the FCC’s rules. The proper scope of states’ and localities’ authority over CATV operations is the subject of an ongoing lawsuit brought by Comcast and various programmers against the governor and attorney general of Maine, whose state legislature passed a law requiring all CATV operators in the state to provide all channels, and all programmes on all channels, on an ‘à la carte’ basis. The industry plaintiffs, which have challenged the state law on First Amendment and pre-emption grounds, successfully

obtained a preliminary injunction in the United States District Court for the District of Maine. The state defendants appealed, and the United States Court of Appeals for the First Circuit heard arguments in the case in September 2020.

ii Internet-delivered video content

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

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

iii Mobile services

Consumer demand for access to audio and video programming through mobile platforms is one of the primary drivers of increased demand for mobile broadband access generally. As noted above, the National Broadband Plan established a roadmap to free additional spectrum resources for such services, and the FCC brought these plans to fruition through the spectrum proceedings discussed above. The advent of these services, many of which would not use ‘broadcast’ spectrum, reflects increasing convergence in the communications industry, and has led to increased efforts to reconcile regulatory frameworks that treat similar services differently.

VI CONCLUSIONS AND OUTLOOK

The FCC continues to focus its regulatory efforts on broadband-related matters, and recent developments have carried on the recent trend toward deregulation of BIAPs at the federal level, though a number of states have begun testing the water on broadband regulation. The FCC has continued its efforts to free additional spectrum for wireless broadband operations, both on a licensed and unlicensed basis, to facilitate continued growth in broadband

markets. At the same time, the FCC has continued to explore ways to make broadband more accessible, including in areas of the country the FCC deems 'underserved' and to individuals who otherwise would lack the resources to pay for such access.

The FCC's previous efforts to impose substantive regulations on broadband internet access services remain controversial and have been rescinded in large part by the FCC itself. Attention has increasingly turned to federal legislative proposals to establish net neutrality requirements in some form. Whether any new requirements enacted by Congress or adopted by the FCC turn out to be less stringent or more stringent than earlier regulatory efforts likely will depend in large part on the outcome of the upcoming presidential election.

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ISBN 978-1-83862-508-5