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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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SIXTH EDITION

EDITOR  
JOHN P JANKA

LAW BUSINESS RESEARCH

# THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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Sixth Edition

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# EDITOR'S PREFACE

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

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

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

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

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

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

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

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

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

**John P Janka**

Latham & Watkins LLP

Washington, DC

October 2015

# LIST OF ABBREVIATIONS

3G	Third-generation (mobile wireless technology)
4G	Fourth-generation (mobile wireless technology)
5G	Fifth-generation (mobile wireless technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services

*List of Abbreviations*

---

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

*List of Abbreviations*

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



## Chapter 28

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# UNITED KINGDOM

*Omar Shah and Gail Crawford*<sup>1</sup>

### I OVERVIEW

The establishment of the Office of Communications (Ofcom) and the entry into force of the Communications Act 2003 (Act) fundamentally altered the UK communications landscape. The Act mirrored the technological neutrality of the EU regulatory framework (i.e., that all transmission networks and the provision of services should be covered by a single regulatory framework). It also reflected the EU's desire to progressively eliminate *ex ante* sector-specific regulation in the largely liberalised communications markets. In addition, the creation of Ofcom saw the consolidation of a patchwork of five previously distinct regulators with authority over telecommunications and broadcasting into a single unified regulator. Following the enactment of the Postal Services Bill, Ofcom also took over the duties of Postcomm in regulating the postal sector and, in particular, the incumbent postal operator, Royal Mail, which was privatised by way of a majority of shares being floated on the London Stock Exchange on 15 October 2013. Ofcom's current priorities are set out in its 2015–16 Annual Plan.<sup>2</sup> They include promoting effective competition and informed choices for consumers through the Strategic Review of Digital Communications and introducing greater consumer protections through clearer pricing structures.

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1 Omar Shah and Gail Crawford are partners at Latham & Watkins LLP. The authors would like to acknowledge the kind assistance of their colleagues Frances Stocks, Andrea Stout, Julia Samso, Calum Docherty, David Zhou and Jagveen Tyndall in the preparation of this chapter.

2 [www.ofcom.org.uk/content/about/annual-reports-plans/ann-plans/Annual\\_Plan\\_Statement.pdf](http://www.ofcom.org.uk/content/about/annual-reports-plans/ann-plans/Annual_Plan_Statement.pdf).

## II REGULATION

### i The regulators

Ofcom is the independent communications regulator in the UK. The Department for Culture, Media and Sports (DCMS) remains responsible for certain high-level policy formulation and the promulgation of legislation (a role performed by the Department for Business, Innovation and Skills before 2011), but most key policy initiatives are constructed and pursued by Ofcom. Ofcom has largely delegated its duties for radio and TV advertising to the Advertising Standards Authority (ASA), and a number of new regulatory bodies have been established within the ASA (such as the Broadcast Committee of Advertising Practice). On 1 November 2014, Ofcom renewed its 10-year contract with the ASA until 2024,<sup>3</sup> with only minor changes from the previous contract. The changes were mainly intended to recognise established practices agreed between Ofcom and the ASA since the initial implementation of the co-regulatory system.

Ofcom's principal duty is 'to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition'. This is embodied in Ofcom's strategic purposes, which were first developed in 2011 and were renewed for 2015/2016 in Ofcom's annual plan. These strategic purposes are as follows:

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

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

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

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

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

Ofcom's specific statutory duties fall into six main areas:

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

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

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

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

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

5 Available at [http://stakeholders.ofcom.org.uk/binaries/consultations/dcr\\_discussion/summary/digital-comms-review.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/summary/digital-comms-review.pdf).

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

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

In addition, the Body of European Regulations in Electronic Communications (BEREC), formed after the adoption of Regulation (EC) 1211/2009,<sup>6</sup> is now playing an increasingly significant role at a European level. The BEREC replaces the European Regulators Group, and acts as an exclusive forum and vehicle for cooperation between national regulatory authorities (NRAs) and between NRAs and the European Commission (Commission).

The prevailing regulatory regime in the UK is contained primarily in the Act, which entered into force on 25 July 2003. Broadcasting is regulated under a separate part of the Act, in conjunction with the Broadcasting Acts of 1990 and 1996. Other domestic legislation also affects this area, in particular:

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

Following the review of the European Framework for Electronic Communications Regulation (Revised Framework),<sup>7</sup> the government adopted the Electronic Communications and Wireless Telegraph Regulations 2011 on 4 May 2011, which amended the Act, the Wireless Telegraphy Act and other primary and secondary

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

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

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

The wholesale review of the European data protection regime continues following the release in 2012 of a draft general data protection regulation<sup>10</sup> (Draft Data Protection Regulation), and subsequent responses and opinions at a European level. The Draft Data Protection Regulation proposes significant changes to the current European framework, and would be directly applicable in each European Member State without the need for implementing legislation. The Draft Data Protection Regulation was approved by the European Parliament on 12 March 2014, and in October 2014, some agreement was reached regarding the 'risk-based approach' that the Regulation would adopt. This approach would allow data controllers increased flexibility in addressing their approach to compliance within the context of various businesses. The draft is expected to be finalised at meetings scheduled for December 2015.

In May 2011, the DCMS also launched a review of communications regulation intended to lead to a new communications regulatory framework to be in place by 2015. It focused on three key aspects: growth innovation and deregulation; a communications infrastructure that provides the foundations for growth; and creating the right environment in which the content industry may thrive. In June 2012, the DCMS announced that, following responses to its May 2011 review, it had concluded that a complete overhaul of the legislation was not required, but it recognised the need to update the regulatory framework to ensure that it is fit for the digital age. To inform the development of the regulatory framework, the government held a range of seminars to obtain industry and public opinion on topics including driving investment in TV content, competition in the content market, the consumer perspective, maximising the value of spectrum and supporting growth in the radio sector. It was originally anticipated that the DCMS would publish a white paper in the early part of 2013 with a communications bill to follow shortly thereafter. In July 2013, the DCMS published a policy paper titled 'Connectivity, content and consumers – Britain's digital platform for growth' (Strategy Paper).<sup>11</sup> In line with the government's view that a large-scale overhaul of the existing legislation is

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

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

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

11 [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/225783/Connectivity\\_Content\\_and\\_Consumers\\_2013.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225783/Connectivity_Content_and_Consumers_2013.pdf).

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

- a* a consumer rights bill introducing a new category of digital content in consumer law, together with a set of statutory rights for the quality standards that this content should meet, and the remedies available to consumers when digital content does not meet these standards;
- b* changes to improve spectrum management and amendments to the Wireless Telegraphy Act 2006;
- c* amending the Electronic Communications Code (ECC) to make it easier for communications companies to use land for broadband infrastructure; and
- d* scaling back Ofcom's duty to review public service broadcasting (PSB) at least every five years and draft PSB reports.

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

The DCMS issued its spectrum management strategy in March 2014, recognising the need for, *inter alia*:

- a* a uniform system for the valuation of spectrum to set licence fees;
- b* the government to work together with Ofcom to encourage efficient use of spectrum, in particular in the release of spectrum, the transfer of spectrum and the assignment of spectrum to new users;
- c* encouragement of innovation; and
- d* a strategy to address increased demands on spectrum that will evolve from the growth of the 'Internet of Things', machine-to-machine communication and 5G.

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

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

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

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12 Available at [www.gov.uk/government/consultations/digital-communications-infrastructure-strategy-consultation](http://www.gov.uk/government/consultations/digital-communications-infrastructure-strategy-consultation).

18 March 2015.<sup>13</sup> Overlapping with the government's 2015 budget, the government has made commitments in relation to broadband infrastructure, in particular superfast broadband, connectivity in rural areas and the delivery of mobile broadband connectivity. As part of its focus on ensuring that the UK becomes a 'leading digital nation', the government has set up a Ministerial Digital Taskforce to develop networks, including infrastructure.

The DCMS published a consultation on 26 March 2015<sup>14</sup> on three areas of broadcasting regulation: the defence against copyright infringement in Section 73 of the Copyright, Designs and Patents Act 1988; the must offer/must carry provisions applicable to PSBs and electronic communications networks (ECNs) respectively in the Communications Act 2003; and the rule on electronic programme guide prominence. The consultation closed on 30 June 2015.

With regard to the ECC, in December 2014 the government proposed to introduce a new code. This proposal was subsequently withdrawn in January 2015 following representations from stakeholders on the practical application of the proposed revised code. The government agreed to consult further. The DCMS launched a consultation on 26 February 2015<sup>15</sup> (which closed on 30 April 2015) on reforming the ECC, welcoming submissions in particular on:

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

## ii Regulated activities

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

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

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13 Available at [www.gov.uk/government/publications/the-digital-communications-infrastructure-strategy/the-digital-communications-infrastructure-strategy](http://www.gov.uk/government/publications/the-digital-communications-infrastructure-strategy/the-digital-communications-infrastructure-strategy).

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

15 Available at [www.gov.uk/government/consultations/consultation-on-reforming-the-electronic-communications-code](http://www.gov.uk/government/consultations/consultation-on-reforming-the-electronic-communications-code).

finding of significant market power (SMP) of an ECN operator or an ECS provider in a relevant economic market.

Mobile and satellite services require licences under the Wireless Telegraphy Act 2006 to authorise the use of the operators' radio transmission equipment and earth stations on specified frequencies. Under the Act, Ofcom should adopt decisions on the rights of use for radio frequencies allocated for specific purposes within the national frequency plan within six weeks and, in any other case, as soon as possible after receipt of the application. Since 30 April 2014,<sup>16</sup> radio transmission equipment and earth stations mounted on mobile platforms (ESOMPs) on aircraft have been exempt from licensing requirements when operating within the 1800MHz or 2100MHz bands, provided they comply with European Telecommunications Standards Institute requirements.<sup>17</sup> From 27 June 2014, pursuant to the Wireless Telegraphy (Exemption and Amendment) Regulations 2014,<sup>18</sup> land-based transmission equipment and ESOMPs are exempt from licensing requirements across all frequencies, provided they comply with certain technical specifications.<sup>19</sup>

### iii Ownership and market access restrictions

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

In the context of media regulation, although the Act and the Broadcasting Acts impose restrictions on the persons that may own or control broadcasters, there are no longer any rules that prohibit those not established or resident in the EEA from holding broadcasting licences. At the end of 2011, Ofcom was asked by the Secretary of State to report on measuring media plurality in light of the proposed acquisition of British Sky Broadcasting Group Plc (BSkyB) by News Corporation. In 2012, Ofcom submitted two reports to the Secretary of State advising on approaches to measure media plurality. Ofcom gave evidence and provided advice to the Leveson Inquiry, including advice on models of media regulation. In February 2014, the House of Lords Select Committee on Communications produced a report into media plurality, including advice on the scope and flexibility of any assessment of media plurality.<sup>20</sup> The report includes a recommendation that Ofcom should conduct a review of media plurality every four or five years, that there be a higher threshold for intervention and that there be a reform of the system for reviewing mergers in the media sector. The DCMS produced a Media Ownership and Plurality Consultation Report on 6 August 2014 setting out

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

17 Available at [www.etsi.org/standards/list-of-harmonized-standards](http://www.etsi.org/standards/list-of-harmonized-standards).

18 SI 2014/1484.

19 Available at: [http://stakeholders.ofcom.org.uk/binaries/spectrum/spectrum-policy-area/spectrum-management/research-guidelines-tech-info/interface-requirements/IR\\_2093.pdf](http://stakeholders.ofcom.org.uk/binaries/spectrum/spectrum-policy-area/spectrum-management/research-guidelines-tech-info/interface-requirements/IR_2093.pdf).

20 [www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf](http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf).



a framework to assess media plurality and commissioning Ofcom to develop a suitable set of indicators.<sup>21</sup> Following on from this, Ofcom published a consultation proposing a framework for media plurality on 11 March 2015.<sup>22</sup> The proposed framework builds on the advice Ofcom gave to the Secretary of State in 2012. The consultation in particular makes the following points, which Ofcom has either developed or affirmed since 2012:

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

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

#### **iv Transfers of control and assignments**

The UK operates a voluntary merger control regime (i.e., there is no requirement to seek clearance prior to completing a merger in the UK, although the Competition and Markets Authority (CMA) takes a proactive approach in monitoring transactions it may wish to review and has powers to impose comprehensive ‘hold separates’ if such a review is launched).<sup>23</sup>

The administrative body currently responsible for UK merger control is the CMA, which was established on 1 April 2014 by merging the function of the former Office of Fair Trading and the former Competition Commission in accordance with the Enterprise and Regulatory Reform Act 2013. The CMA consults Ofcom when considering transactions in the broadcast, telecommunications and newspaper publishing markets.<sup>24</sup>

The Secretary of State also retains powers under the Enterprise Act to intervene in certain merger cases, which include those that involve ‘public interest considerations’.

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21 [www.gov.uk/government/publications/media-ownership-plurality-consultation-report](http://www.gov.uk/government/publications/media-ownership-plurality-consultation-report).

22 [http://stakeholders.ofcom.gov.uk/binaries/consultations/media-plurality-framework/summary/Media\\_plurality\\_measurement\\_framework.pdf](http://stakeholders.ofcom.gov.uk/binaries/consultations/media-plurality-framework/summary/Media_plurality_measurement_framework.pdf)

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

24 The CMA and OFCOM have signed a memorandum of understanding in respect of their concurrent competition powers in the electronic communications, broadcasting and postal sectors. This is available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/320900/MoU\\_CMA\\_and\\_OFCOM.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320900/MoU_CMA_and_OFCOM.pdf).

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

### **III TELECOMMUNICATIONS AND INTERNET ACCESS**

#### **i Internet and internet protocol regulation**

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

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

Following various market reviews, Ofcom has imposed conditions on access to the internet on BT and KCOM (formerly Kingston Communications) where it found that these had SMP. As part of these conditions, both companies must make regulatory financial statements. Since April 2014, BT has been required to increase the amount, and improve the clarity, of information in these statements. Conversely, KCOM's reporting requirements have been reduced.<sup>25</sup>

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

In June 2010, Ofcom published a consultation paper to open the debate on what, if any, regulatory intervention should be required in connection with internet traffic management. Following this consultation, Ofcom announced in November 2011 that market forces should be sufficient to address issues in relation to internet traffic management, but Ofcom will consider using its powers to impose

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25 'Changes to BT and KCOM's regulatory and financial report 2013/14 update', available at [http://stakeholders.ofcom.org.uk/binaries/consultations/btkcomreporting/statement/BT\\_KCOM\\_1314\\_Statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/btkcomreporting/statement/BT_KCOM_1314_Statement.pdf).

minimum quality of service levels if innovation is under threat from traffic management. In September 2013, Ofcom published a consumer guide on traffic management to help consumers make an informed choice when deciding which ISP they want to use. This information was provided to address an ‘awareness gap’ regarding the application of traffic management. The lack of consumer awareness, and a commitment to educating consumers, was noted in Ofcom’s annual plan for 2014/2015. In this plan, Ofcom reiterated its view from 2011 that market forces should be sufficient to address traffic management issues.

In a statement of November 2010 setting out its views on net neutrality, the coalition government announced that it does not propose to legislate further to regulate traffic management, although it stressed the importance of maintaining an open internet in which all users could access any legal content, ensuring that ISPs’ traffic management policies are transparent to consumers, and allowing ISPs to manage their networks to ensure a good service, which will in turn encourage investment and innovation. There have been no formal statements by the government in relation to regulation of traffic management since 2010.

In March 2011, the Broadband Stakeholders’ Group (BSG) published a voluntary industry code of practice on traffic management transparency for broadband services introducing transparency requirements on ISPs’ traffic management practices. Subsequently, in July 2012, major ISPs published the Open Internet Code of Practice, which commits ISPs to providing full and open internet access. This includes a commitment not to use traffic management practices to target or degrade services offered by competitors. The Code also establishes a new process that allows content providers to protest against discrimination by ISPs and refer unresolved cases to the BSG. The Code was updated in May 2013 to clarify that signatories would not be infringing the Code if they deployed content filtering. In January 2015, the BSG announced that all of the UK’s leading ISPs had now signed up to the Code. In August 2015, the BSG announced that it has commissioned a review into, *inter alia*, the Open Internet Code of Practice.

The net neutrality debate also continues at EU level. In April 2011, the Commission published its Communication on the open internet and net neutrality. In November 2011, the European Parliament adopted a resolution on net neutrality in Europe calling upon the Commission to monitor the development of internet traffic management practices in particular. In July 2012, the Commission issued a consultation on specific aspects of net neutrality including transparency, traffic management and switching. In June 2013, the EU Commissioner for Digital Agenda, Neelie Kroes, announced plans to legislate net neutrality on an EU level. The initiative to standardise transparency for customers, in particular with respect to costs and contractual provisions, set out rules for switching providers and regulates how ISPs are permitted to offer access at various speeds to different customers was introduced to the European Parliament in September 2013.<sup>26</sup> A final version of the proposal passed a second reading in the European

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26 Proposal [2013] COD 0309.

Parliament in July 2015.<sup>27</sup> MEPs are due to vote on the matter in October 2015. If approved by both the European Parliament and the European Council, the regulation is predicted to enter into force on 30 April 2016.

## ii Universal service

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

In September 2008 and March 2010, the Commission launched a consultation on whether broadband services should be included within the scope of the universal service. The Commission's Europe 2020 Strategy of March 2010 included aiming for broadband access for all by 2013, and access for all to internet speeds of 30Mb/s or above by 2020. An October 2013 report of the Commission announced that the 2013 basic target had been met, although high-speed broadband coverage remains low.<sup>28</sup> To support the Digital Agenda for Europe, the EU Parliament and the Council passed a Directive<sup>29</sup> in May 2014 aiming to cut the costs of the high speed rollout. By 1 July 2016, Member States must apply measures to, *inter alia*, better coordinate civil works, provide greater access to, and information regarding, infrastructure, and reduce the time taken to grant permits required to lay down networks.

The coalition government supported the former Labour government's policy of universal access to broadband at a speed of 2Mb/s. Even though the target was initially set for 2012, in July 2010, the Secretary of State for the DCMS publicly stated that it would be 2015 before every home in the UK had at least a 2Mb/s broadband connection. The coalition government stated that it expected the private sector to lead the necessary investment, but it confirmed in the spending review of October 2010 that it was committed to investing £530 million until 2015 to help deliver superfast broadband to more rural and hard-to-reach areas. The coalition government received EU state aid clearance in November 2012 for its National Broadband Scheme.<sup>30</sup> Subsequently, rural local authorities started to sign contracts with broadband network developers. A further £300 million will be available by 2017 as part of the TV licence fee settlement. In November 2014, the DCMS published guidance on its plans to improve the UK's

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27 Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No. 1211/2009 and (EU) No. 531/2012 – Analysis of the final compromise text with a view to agreement. Available at <http://data.consilium.europa.eu/doc/document/ST-10409-2015-REV-1/en/pdf>.

28 [http://europa.eu/rapid/press-release\\_IP-13-968\\_en.htm](http://europa.eu/rapid/press-release_IP-13-968_en.htm).

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

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

broadband network, in particular making high-speed broadband available in rural communities.<sup>31</sup>

In September 2012, as part of a scheme to create ‘super-connected cities’, the government announced £144 million in investment across 10 of the UK’s largest cities to help provide them with superfast broadband: London, Belfast, Cardiff, Edinburgh, Birmingham, Bristol, Leeds, Bradford, Manchester and Newcastle received £94 million between them, while smaller cities will share a £50 million fund. The scheme was extended to Aberdeen, Brighton and Hove, Cambridge, Coventry, Derby, Londonderry, Newport, Oxford and Perth in December 2012. However, following legal challenges by two of the UK’s biggest networks, the government withdrew the state-aid application relating to the super-connected cities. Consequently, public funds for the super-connected cities scheme had to be withdrawn in July 2013, before the DCMS diverted the allocated sums to a scheme that allowed SMEs to apply for vouchers to install faster internet connections in August 2013.<sup>32</sup> As part of the government’s 2014 autumn statement, this scheme was extended by 12 months to March 2016 with a further £40 million of funding. The plan to install wireless access points across the super-connected cities, however, was re-emphasised in July 2013. In January 2014, the DCMS announced a £10 million fund for a pilot programme to extend superfast broadband to hard-to-reach areas. In February 2014, a further £12 million was allocated to provide superfast broadband to Wales. Both funds opened for bids in March 2014. An August 2014 report from the DCMS confirmed that the rollout of superfast broadband to 95 per cent of UK homes and businesses remains on track for completion by 2017, and that it intends to focus on extending the rollout to the final 5 per cent. This progress was confirmed in the government’s digital communications infrastructure strategy, published in March 2015. As part of the Commission’s state aid clearance decision, the UK committed to undertake an *ex post facto* evaluation of the National Broadband Scheme. This was published by Oxera in March 2015.<sup>33</sup> The Commission’s state aid clearance decision expired on 30 June 2015. The government has sought an extension from the Commission to the current National Broadband Scheme on materially the same terms.

The development of superfast broadband will require the rollout of fibre-optic cable throughout the UK telecommunications network infrastructure. In June 2014, Ofcom published its follow-up conclusions to a December 2010 review of the wholesale broadband access market setting out remedies to promote competition and investment in current and superfast broadband services. In June 2015, Ofcom published a report setting out its assessment and recommendations on the provision and availability of

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31 Available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/376430/Broadband\\_Delivery\\_Framework\\_Summary.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/376430/Broadband_Delivery_Framework_Summary.pdf).

32 See the DCMS’s consultation on the Connection Vouchers Scheme, 25 June 2013. Available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/239182/BDUK\\_vouchers.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239182/BDUK_vouchers.pdf)

33 Available at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428381/The\\_UK\\_s\\_National\\_Broadband\\_Scheme\\_-\\_an\\_independent\\_evaluation.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428381/The_UK_s_National_Broadband_Scheme_-_an_independent_evaluation.pdf).

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

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

In connection with this, Ofcom imposed specific conditions on BT and KCOM in certain areas where they enjoy SMP so as to allow alternative operators to compete in the retail broadband market.<sup>35</sup> These include an obligation to provide general and non-discriminatory network access to BT and KCOM's wholesale broadband products to alternative operators on a reasonable request; an obligation to maintain separate accounts between the services to alternative operators and its own retail division as well as other related transparency obligations; and a charge control on BT to ensure that charges for its broadband wholesale products are based on the costs of provision. Network access obligations included virtual access to new fibre lines laid by BT (through its access service division, Openreach), allowing alternative operators to combine their own electronics with physical infrastructure rented from BT. Furthermore, in June 2015, Ofcom proposed a charge control on the wholesale prices BT charges for products using leased telecoms lines, which provide vital high-speed links for businesses and providers of superfast broadband and mobile services.<sup>36</sup>

### iii Restrictions on the provision of service

The Digital Economy Act 2010 empowers the Secretary of State to impose obligations on ISPs to limit the internet access of subscribers who engage in online copyright infringement. Under the Digital Economy Act 2010, Ofcom has proposed a code of practice (in the absence of a code put forward by the industry) governing the 'initial obligations', which require ISPs to send notifications to their subscribers following receipt of reports of copyright infringement from copyright owners. ISPs must also record the number of reports made against their subscribers and provide copyright owners, on request, with an anonymised list that enables the copyright owner to see which of the reports it has made are linked to the same subscriber (also known as the copyright

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

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

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

infringement list). Despite the Court of Appeal's dismissal of an appeal against the Digital Economy Act 2010 by BT and TalkTalk in March 2012, there are still arguments as to whether the information to be collected by ISPs on copyright offenders might infringe data protection legislation and which costs are to be borne by ISPs. A second draft of the Code of Practice that will implement the Act was published in June 2012. This version, and legislation on cost sharing, have to be approved by both Houses of Parliament and then subjected to EU scrutiny before coming into effect. In June 2012, Ofcom had expected that the first notification letters would be sent out in early 2014. Due to delays in implementing legislation, Ofcom announced in May 2013 that the first letters will not be sent out until the latter half of 2015. The government has not revealed a timetable detailing how this will be achieved. In September 2013, to accelerate the process, music and film companies tried to convince ISPs to sign up to a voluntary code of practice that would also require them to create a database of repeat offenders. In July 2014, the DCMS announced a scheme named 'Creative Content UK' spearheaded by ISPs and media industry leaders and supported by a government contribution of £3.5 million, to raise awareness of copyright infringement and warn internet users whose accounts are used to illegally access and share copyright material. In addition to this educational function, the scheme also introduced the Voluntary Copyright Alert Programme (VCAP), under which educational warning letters will be sent to those suspected of online piracy. In addition to voluntary involvement in this scheme, ISPs' responsibilities include blocking access to websites that provided unauthorised links to content protected by copyright, following two recent court decisions: a decision of the Court of Justice of the European Union (CJEU) in February 2014,<sup>37</sup> which held that providing a hyperlink to material protected by copyright can constitute a communication to the public of that material, was followed days later by UK High Court decision that required six UK ISPs to block access to websites providing hyperlinks to copyrighted content.<sup>38</sup>

#### iv Security

##### *Privacy and consumer protection*

In the UK, consumers' personal data is primarily protected by the Data Protection Act 1998 (DPA), which implements the EU Data Protection Directive (Data Protection Directive),<sup>39</sup> and by the Privacy and Electronic Communications (EC Directive) Regulations 2003 as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (e-Privacy Regulations), which implement the EU Directive on Privacy and Electronic Communication,<sup>40</sup> as amended by EU Directive 2009/136/EC (e-Privacy Directive).

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

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

39 Directive 95/46/EC.

40 Directive 2002/58/EC.

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

- a* providing one or more listed conditions, such as that the individual has consented or that the processing is necessary for the purposes of fulfilling a contract, that must be met to ensure personal data is processed fairly and lawfully;
- b* the requirement that data can generally only be processed for the purpose for which it was obtained, must be kept accurate and up to date and for no longer than is necessary, and must not be excessive;
- c* the requirement that data be kept secure (i.e., be protected against unlawful processing and against accidental loss, destruction or damage);
- d* the restriction that data cannot be transferred to countries outside the EEA unless certain conditions are met, such as through the Safe Harbor Framework, whereby personal data can be transferred to US entities that have undertaken a process of self-assessment to determine that it meets an 'adequate' standard of privacy protection; and
- e* personal data must be processed in accordance with the rights of the data subject under the DPA, including that the individual has a right to access the personal data held about them, and a right in certain circumstances to have inaccurate personal data rectified or destroyed, among various other rights. The restrictions in the DPA may affect the ability of a business to disclose information that includes personal data to third parties, including public bodies, unless certain conditions are met.

The e-Privacy Regulations introduced further rules for the electronic communications sector, including controls on unsolicited direct marketing, restrictions on the use of cookies, and rules on the use of traffic and location data.

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

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



- The key changes under the Draft Regulation include:
- a* the form of the new rules as a regulation, rather than a directive, which will be directly applicable in every Member State;
  - b* the removal of the requirement to notify or register data-processing activities with the national regulator;
  - c* the introduction of an extraterritorial effect, resulting in the regulation applying not only to organisations established within the EEA, but also to organisations established outside the EEA but offering goods or services to, or monitoring the behaviour of, individuals in the EEA (although it remains unclear how this will operate in practice);
  - d* a tightening of the requirements for valid consent, with the effect that consent will only be deemed to be valid if it is freely given, specific, informed and explicit;
  - e* a stricter approach to the export of data outside the EEA, resulting from the general standards of data protection being raised throughout the Draft Regulation as a whole;
  - f* the introduction of mandatory data breach notification requirements (including notification within strict time periods to both the national regulators and to data subjects affected by the breach);
  - g* the introduction of a right to be forgotten and a right to data portability;
  - h* maximum fines of 5 per cent of an organisation's annual global turnover for breaches; and
  - i* a new definition, termed 'genetic data', which includes data relating to characteristics obtained during foetal development, now categorised as 'sensitive personal data'.

Various interested parties have published recommendations with the aim to shape the discussions in the Trilogue. In June 2015, the Article 29 Working Party published letters<sup>41</sup> addressed to the members of the Trilogue that included recommendations to extend the territorial scope of the Draft Regulation to non-EU data processors, and to redefine 'personal data' to include IP addresses and other online identifiers. Later that same month, the European Data Protection Supervisor, Giovanni Buttarelli, published an opinion<sup>42</sup> featuring various additional recommendations and a corresponding mobile app whereby participants may view the proposals from each member of the Trilogue side by side to assist with the negotiations.

The future of the Safe Harbor Framework also remains unclear following a resolution passed by the European Parliament that calls for the suspension of the Safe Harbor Framework, stating that it does not adequately protect European citizens.<sup>43</sup>

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41 Available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2015/20150617\\_appendix\\_core\\_issues\\_plenary.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2015/20150617_appendix_core_issues_plenary.pdf).

42 Available at [https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Reform\\_package](https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/Reform_package).

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

As the Safe Harbor Framework was not negotiated by the European Parliament, the resolution will not have immediate effect, as any changes must be renegotiated with the Commission itself, which is currently reviewing the terms of the Safe Harbor Framework. The *Schrems v. Data Protection Commissioner*<sup>44</sup> case brought before the CJEU highlighted the inadequacies of the Safe Harbor Framework; see Section VI, *infra*, for more details.

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

The ICO continues its increasing focus on enforcement generally, and on the use of monetary penalties (of up to £500,000 at any one time) in particular. According to the ICO's Annual Report of 2014/15,<sup>45</sup> civil penalties relating to marketing calls and texts have totalled £386,000. Similar fines issued for instances of data loss total £692,500, while 12 organisations and their directors have accrued penalties of over £12,000 for failing to register with the ICO or to respond to its information notices. Finally, the first fixed penalty of £1,000 was presented to Vodafone for failing to report a security breach within 24 hours. The vast majority of civil monetary penalty notices are issued against the health and local government sectors, including a total of over £1 million in penalties issued against various NHS bodies. The largest fine imposed by the ICO on a private business to date is the £440,000 civil monetary penalty notices issued under both the e-Privacy Regulations and the DPA against Tetras Telecoms, following a spam text message scam whereby Tetras Telecoms obtained personal details from individuals and sold them on as sales leads to third parties.

The most common ground for large fines and enforcement action is loss of data and other major data security breaches. The ICO takes a serious view of the loss of unencrypted data. In February 2015, Staysure.co.uk Limited, an online holiday insurance company, was fined £175,000 after its customer records were hacked. The Serious Fraud Office and The Money Shop have each been fined £180,000 for the accidental distribution of case evidence and the loss of computer equipment containing customer details, respectively. Where financial institutions are involved, the ICO often works in conjunction with the Financial Conduct Authority (previously the FSA). For example, Zurich was fined a record £2.3 million by the FSA in August 2010 for loss of an unencrypted back-up tape.

Individual data subjects have the right under the DPA to notify a data controller to cease or not to begin processing their personal data for the purposes of direct marketing. Under the e-Privacy Regulations, an organisation must obtain prior consent before sending a marketing message by automated call, fax, e-mail, SMS text message, video message or picture message to an individual subscriber. There is a limited exemption for marketing by electronic mail (both e-mail and SMS) that allows businesses to send electronic mail to existing customers provided that they are marketing their own goods

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

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

or services; such goods and services are similar to those that were being purchased when the contact information was provided; and the customer is given a simple opportunity to opt-out free of charge at the time the details were initially collected and in all subsequent messages. The same maximum fine (of £500,000) also applies to breaches of the e-Privacy Regulations.

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

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

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

In practice, steps have been taken by most reputable UK websites to comply with these consent requirements, ranging from banner notices with tick boxes, boxes that require an active step to make them disappear to one-time banners or pop-overs giving brief information and allowing the user to take steps to disable the site's cookies if they wish to do so before continuing to use the site.<sup>46</sup> Between January and March 2015, the ICO received 39 reports regarding breach of cookies rules via their website, down from 65 that were received in the same period in 2014. The total number of reports received from 2014 to 2015 was 164, down from 278 received between 2013 and 2014.<sup>47</sup> The ICO's current approach is to focus on sites that are not doing enough to raise awareness of cookies, or obtain their users' consent, particularly those most visited sites in the UK.<sup>48</sup>

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

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

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

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

48 See ICO website – Enforcement Actions – Cookies.

adversely affect the personal data or privacy of a customer, that customer must also be promptly notified.

*Data retention, interception and disclosure of communications data*

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

Public telecommunications service providers who provide (or intend to provide) services to more than 10,000 users may be required to maintain interception capabilities on receipt of a notice from the Secretary of State (interception capability notice).<sup>49</sup> In certain circumstances, contributions will be made towards the costs of implementing intercept capabilities or responding to warrants. There is a similar prohibition on the disclosure of communications data (e.g., subscriber, traffic and location data); however, no warrant is needed to allow disclosure. Disclosure can be made on request by a far wider range of public bodies, and the grounds on which requests can be made are far broader, including that the request is in the interests of public safety, for the purpose of protecting public health, or for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department. RIPA was amended in July 2014 by DRIPA; however, as set out in more detail in Section VI, *infra*, in July 2015, the English High Court ruled that DRIPA is incompatible with the EU Charter of Fundamental Rights, and its provisions are scheduled for repeal by the end of December 2016.

*Protection for children*

Currently, there is no legislation in England that is specifically and expressly targeted at protecting children online in the UK. The Article 29 Data Protection Working Party opinion on the protection of children's data states that businesses dealing with children's data should give regard to what is in the best interests of the children and the child's right to privacy.<sup>50</sup> Under the DPA, in order to fulfil the principle that children's data is processed 'fairly', stronger safeguards should be in place, and age-appropriate language is required for privacy notices to ensure that children's lack of maturity or understanding is not exploited.

The ICO<sup>51</sup> has indicated, in relation to the collection of personal data from children online, that consent of a parent or guardian will normally be necessary to collect

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

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

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

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

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

- a* disclosure of the child's name and address to a third party, for example as part of the terms and conditions of a competition entry;
- b* use of a child's contact details for marketing purposes;
- c* publication of a child's image on a website that anyone can see;
- d* making a child's contact details publicly available; or
- e* the collection of personal data about third parties (e.g., where a child is asked to provide information about his or her family members or friends).

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

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

The Child Exploitation and Online Protection Centre (CEOP) works to prevent exploitation of children online; it is made up of a large number of specialists who work alongside police officers to locate and track possible and registered offenders. CEOP was previously affiliated with the Serious Organised Crime Agency; however, following its abolishment under the Crime and Courts Act 2013, the Centre became part of the National Crime Agency (NCA).<sup>54</sup> CEOP also offers training, education and public awareness in relation to child safety online.

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52 ICO website – News and Events.

53 Ibid.

54 Crime and Courts Act 2013.

Website and software operators may apply for the Kitemark for Child Safety Online. This has been developed through collaboration between the BSI (the UK's national standards body), the Home Office, Ofcom, and representatives from ISPs and application developers. The BSI will test internet access control products, services, tools and other systems for their ability to block certain categories of websites (e.g., sexually explicit, violent or racist activity).

### *Cybersecurity*

Cyberattacks are becoming increasingly problematic in the global financial and regulatory landscape. The Government Communication Headquarters stated that more than 80 per cent of UK companies reported a security breach in 2014. More worryingly, PricewaterhouseCoopers reported that the total amount of global incidents escalated to 42.8 million in 2015, a 48 per cent increase from 2013.<sup>55</sup>

The Computer Misuse Act 2000 (as amended by the Police and Justice Act 2006) sets out a number of provisions that make hacking and any other forms of unauthorised access, as well as denial of service attacks and the distribution of viruses and other malicious codes, criminal offences. Further offences exist where an individual supplies 'tools' to commit the above-mentioned activities.

The government has consolidated its focus on cybersecurity through the establishment of the National Cyber Security Programme with a dedicated pool of funds stretching to £860 million over five years until 2016.<sup>56</sup> Following the passage of the Crime and Courts Act 2013, the government brought the National Cyber Crime Unit (NCCU) under the remit of the NCA. The NCCU brings together cybercrime response operations and uses information on cybersecurity threats collected from the private sector via the Cyber-Security Information Sharing Partnership (known as CISP). A recent policy paper<sup>57</sup> reported that 81 per cent of large corporations and 60 per cent of small businesses reported a cyber breach in 2014. To address this, the government has begun offering cybersecurity advice directly to businesses through publications such as the '10 Steps to Cyber Security', and by establishing an information-sharing partnership whereby the government and industry can exchange information about cybersecurity threats. To reduce the risk of cyberattacks, the government established the Computer Emergency Response Team in March 2014<sup>58</sup> to take a lead in administering the UK's response to national cybersecurity incidents.

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

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

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

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

58 [www.gov.uk/government/news/uk-launches-first-national-cert](http://www.gov.uk/government/news/uk-launches-first-national-cert).

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

## IV SPECTRUM POLICY

### i Development

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

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

### ii Flexible spectrum use

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

Spectrum trading was introduced in the UK for the first time in 2004, and is permitted under the Wireless Telegraphy Act 2006 and associated regulations. Broadly, the trading of spectrum is subject to a multi-stage process that, *inter alia*, requires a decision by Ofcom about whether to consent to the trade. On 22 September 2009, Ofcom published a consultation document on proposals to streamline the spectrum

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<sup>59</sup> European Parliament legislative resolution of 13 March 2014 on the proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security access across the Union.

trading process to make the spectrum market more dynamic and efficient. In 2011, following the consultation process, Ofcom concluded that it should proceed to simplify the transfer process, in particular by removing the need to obtain its consent for proposed trades in most cases. In December 2010, the government also directed Ofcom to make tradable spectrum used for mobile telecommunications, which it implemented in 2011, including permitting 2G spectrum to be used for the provision of 3G services by amending current licences. The changes, set out in the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 are directed at making more efficient use of the available spectrum, and improvements in mobile services to meet the demand for faster and more reliable services for consumers. Under the regulations, the licensee can transfer all or part of the rights and obligations under its licence. A partial transfer, or 'spectrum leasing', can be limited to a range of frequencies or to a particular area. Ofcom also plans to simplify the process for time-limited transfers in line with the revised Framework Directive.

In July 2013, Ofcom lifted the restrictions on spectrum currently licensed for 2G to allow the provision of 3G and 4G services and the trading of spectrum. Ofcom also amended the terms of current 3G licences so that the licences become indefinite as well as allowing users to trade spectrum. In return, users will pay an annual fee from 2021, when the licences in their current form are due to expire. Ofcom consulted on its fee proposals in October 2013, and made further proposals in response in August 2014. These August 2014 proposals, which were the subject of a consultation that closed in September 2014, use the bids received in the auction of the 800MHz and 2.6GHz spectrum in February 2013 as the relevant basis to establish the market value of the 3G bands and thus set the annual fees for current 3G licences. In December 2014, the government signed a statement of commitment with the UK MNOs (EE, H3G, Telefónica and Vodafone) in which each MNO agreed to implement 90 per cent geographic voice coverage throughout the UK by no later than 31 December 2017. That commitment has been given legal effect through the variation of each of the MNOs' 900MHz and 1800MHz licences. Further to this, in April 2015 Ofcom published a provisional decision on the level of the annual fees for current 3G licences while simultaneously launching a further consultation on the impact of the geographic coverage obligation on the annual fee.<sup>60</sup> In September 2013, the Ministry of Defence announced that Ofcom would be made responsible for the award of 190MHz of spectrum across current military bands, 2.3GHz and 3.4GHz, for civil use. In November 2014, Ofcom issued a consultation on the auction of this spectrum.<sup>61</sup> In May 2015, Ofcom published its decision and a further consultation.<sup>62</sup> The statement element of the document sets out Ofcom's decisions on a number of issues, including the auction design and process, the coexistence of new uses

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

61 Available at [http://stakeholders.ofcom.org.uk/binaries/consultations/2.3-3.4-ghz-auction-design/summary/2\\_3\\_and\\_3\\_4\\_GHz\\_award.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/2.3-3.4-ghz-auction-design/summary/2_3_and_3_4_GHz_award.pdf).

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



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

In April 2014, Ofcom published its spectrum management strategy setting out the approach to and priorities for spectrum management over the next 10 years.<sup>63</sup> The strategy noted in particular the increasing use of wireless services across the UK and the need to meet the increased demands with which the spectrum is faced. Ofcom proposed that it use a combination of market forces and regulations to support its strategic goals, which includes increasing quality of radio frequency performance, providing greater information on spectrum use, repurposing some spectrum bands and providing for shared access to spectrum. As part of this, in May 2014 Ofcom published a consultation on the future use of the 700MHz band, considering particularly whether the band should be made available for mobile broadband use. In a statement published in November 2014, Ofcom decided to make the 700MHz band available for mobile data use.<sup>64</sup> Ofcom has stated that it plans to hold an auction for the 700MHz band up to two years before the spectrum starts to become available.

### **iii Broadband and next-generation mobile spectrum use**

In August 2012, Ofcom published its decision to allow Everything Everywhere (formed by the merger of Orange UK and T-Mobile UK in 2010) to vary its 1.8GHz 2G spectrum licences to allow the use of 4G (LTE and WiMax) technologies. Hutchison 3G also benefited from the licence variation as the buyer of a portion of Everything Everywhere's 1.8GHz band, which the company was required to divest until the end of 2013 as a result of its merger in 2010. A legal challenge, which was expected to be brought by O2 (Telefónica) and Vodafone against Ofcom's decision, was avoided when Ofcom gave assurances that it would bring the release of new spectrum forward to September 2013. Acknowledging that its decision might give an advantage to Everything Everywhere, Ofcom did not want to delay the release of 4G services to customers in the UK any further, and Everything Everywhere launched its 4G services in October 2012. Ofcom is currently working to identify potential spectrum for future mobile services, including 5G mobile networks. Ofcom issued a call for information on spectrum above 6GHz in January 2015, which ended in February 2015.<sup>65</sup>

By retuning television services that used the 800MHz spectrum, further 4G services were rolled out on these bands from August 2013, increasing the capacity of

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

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

65 Laying the foundations for next generation mobile services, update on bands above 6GHz, Ofcom, 20 April 2015. Available at [http://stakeholders.ofcom.org.uk/binaries/consultations/above-6ghz/5G\\_CFI\\_Update\\_and\\_Next\\_Steps.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/above-6ghz/5G_CFI_Update_and_Next_Steps.pdf).

the existing 3G network by more than 200 per cent to meet the growing demand from consumers.

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

#### iv White space

Following an earlier consultation, 2011 saw Ofcom set out the use of free spectrum, or 'white space', made available from the UK's switch from analogue to digital TV and radio, for applications such as mobile broadband (particularly in rural areas) and enhanced Wi-Fi. Ofcom has estimated that the bandwidth available is equivalent to the spectrum available to current 3G services. The UK is the first country in Europe to progress its plans. A white space device will search for spectrum that is available and check a third-party database to find out what radio frequencies are available to ensure that it does not interfere with existing licensed users of the spectrum. New white space radios use frequencies that are allocated for certain uses elsewhere but are empty locally. Flawless management of spectrum is required to avoid interferences.

Ofcom has released a statement that certain white space devices that operate automatically and without manual configuration are licence-exempt, on the condition that they do not interfere with existing users.<sup>66</sup> In February 2015, Ofcom published a consultation on proposals for authorising other types of white space devices on a licensed basis.<sup>67</sup> This followed a pilot for innovative white space equipment that began in December 2013; none of the white space devices tested during the pilot demonstrated that they were capable of operating without some degree of manual configuration. The consultation closed in April 2015, and a statement is expected to be published in late 2015. The final version of the ETSI Harmonised European Standard for white space devices<sup>68</sup> has been published and delivered to the European Commission. In February 2015, Ofcom published a statement allowing the commercial use and deployment of white space broadband technology, harnessing the unused parts of the radio spectrum in the 470MHz to 790MHz frequency band.<sup>69</sup>

#### v Spectrum auctions

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

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

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

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

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

the newly released spectrum. Consequently, all major mobile networks in the UK started to provide 4G services from September 2013 in addition to Everything Everywhere.

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

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

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

#### **vi Emergency services bandwidth prioritisation**

The Universal Services Directive, a further part of the Telecoms Reform Package, introduces several extended obligations in relation to access to national emergency numbers and the single European emergency call number (112). Prior to the Universal Services Directive, obligations to provide free and uninterrupted access to national and European emergency numbers applied to providers of publicly available telephone services only. Under this Directive, however, these obligations are extended to all undertakings that provide to end-users 'an electronic communication service for originating national calls to a number or numbers in a national telephone numbering plan'; the UK has mirrored this wording in its revisions to General Condition 4 under the Act. Such electronic communication service providers are therefore required to ensure that a user can access both the 112 and 999 emergency call numbers at no charge (and without the use of any cards or coins) and, to the extent technically feasible, make caller location information for such emergency calls (meaning information indicating the geographical position of the terminal equipment of the caller) available to the relevant emergency response organisations. In a January 2015 report entitled 'Citizens and communications services', Ofcom stated that it was monitoring the effectiveness of steps by the industry to improve emergency caller location information on mobile calls.<sup>70</sup>

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

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<sup>70</sup> Available at [http://stakeholders.ofcom.org.uk/binaries/research/cross-media/Citizens\\_Report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cross-media/Citizens_Report.pdf).

## V MEDIA

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

### i Restrictions on the provision of service

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

### ii Superfast broadband

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

It is estimated that faster broadband will not only improve profits for UK businesses, but will create an additional 56,000 jobs in the UK by 2024. The work involved in the current rollout is expected to provide a £1.5 billion boost to local economies, and by 2024 it is hoped that the government's current investments in faster broadband will be boosting rural economies by £275 million every month, or around £9 million every day.<sup>71</sup> As of February 2015, nearly one in three broadband connections is now superfast.<sup>72</sup>

### iii Internet-delivered video content

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

#### *Web 2.0*

Web 2.0 is characterised as facilitating communication, information sharing, interoperability and collaboration for users of the internet. Users are empowered and

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

72 Ofcom Press Release, 26 February 2015.

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

On 26 June 2012, Ofcom issued a consultation on the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order (Sharing of Costs Order), which was laid before Parliament. The consultation, which closed in September 2012, addressed how Ofcom should calculate the level of charges that participating copyright owners will have to pay to Ofcom for the costs of setting up and running a scheme for reporting online copyright infringement under an ‘initial obligations code’ for ISPs. However, in February 2013, the Sharing of Costs Order was withdrawn over concerns that it may not comply with the Treasury’s Managing Public Money guidelines. In response to a freedom of information request, Ofcom disclosed that it had spent £1.8 million on taking action against online copyright infringements in accordance with the Digital Economy Act in 2011 and 2012. Following the Treasury’s announcement, the DCMS stated in May 2013 that technical changes to the draft Sharing of Costs Order were required. There has been no update at the time of writing.

In a Select Committee Report published in September 2013, the Committee criticised the delay in the implementation of the Digital Economy Act and urged the government to set a clear timetable for resolving the impasse. However, the process is expected to be delayed, as it requires notification to the Commission.<sup>73</sup> The government has welcomed work by the industry to develop a voluntary-led process.

In 2015, as part of the DCMS’s ‘Creative Content UK’, the VCAP is expected to begin following years of discussions between ISPs and the creative industries. It is a voluntary agreement between copyright owners and ISPs whereby owners will send evidence of copyright infringement to ISPs, who will respond by sending up to four letters of warning to their subscribers. There is currently no plan of punitive action, but it is presumed that the letters will assist copyright owners in the event there is illegal action.

### *IPTV*

IPTV typically describes a platform that allows users to stream television content using the internet or mobile telephone networks. The key benefit of IPTV is that it allows a user to interact with the content because data can flow both ways in an IP network.

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73 Select Committee Report – Supporting the Creative Economy.

IPTV is growing rapidly in the UK and this growth is predicted to continue, particularly in light of the new spectrum being made available as a result of the digital switchover.

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

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

According to Ofcom's Communications Market 2014 report, UK adults spend on average four hours and 17 minutes per day viewing audiovisual content through a variety of media – 10 per cent of this is spent viewing online content (5 per cent of on-demand catch up services such as BBC iPlayer or 4oD, 3 per cent on downloaded or streamed services such as Amazon Prime Video or Netflix, and 2 per cent on short video clips).<sup>74</sup> Trend data shows that visits to BBC iPlayer and ITV Player decreased significantly; however, Ofcom attributes this decline to people accessing catch-up TV content through other devices other than through their PCs, such as smartphones, tablets and internet-enabled devices.

#### iv Mobile services

In its annual report for 2013/2014, Ofcom details how it worked with the government to minimise disruption to the digital terrestrial TV (DTT) services by securing the early release of DTT broadcasting frequencies for use of the 4G network.<sup>75</sup> Four operators (EE, Hutchinson 3G, Telefónica O2 and Vodafone) are now offering 4G mobile services, and more than 5 million consumers are enjoying the benefits offered by superfast broadband. Services are currently available across over 80 per cent of the UK. Ofcom aims to make these services available to at least to 98 per cent of the population (by one operator) indoors and even more outdoors, by the end of 2017 at the latest.

In July 2014, the Supreme Court handed down a decision in BT's favour with respect to termination charges. Ofcom had exercised its dispute resolution powers after complaints from mobile operators T-Mobile, Vodafone, O2 and Orange, in response to BT's proposed changes to the termination rates it charges for 080, 0845 and 0870. Ofcom

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74 Ofcom – The Communications Market 2014.

75 Ofcom Annual Report and Accounts 2013/2014.

found that the proposals were not fair and reasonable. This decision was overturned by a decision of the Competition Appeals Tribunal (CAT) in August 2011, which was in turn overturned by the Court of Appeal in July 2013. The Supreme Court found that BT's proposed changes to its termination charges were not unfair or unreasonable, and Ofcom's decision was based merely on an opinion that the changes may have a distortive impact on competition.

## VI THE YEAR IN REVIEW

### i Sky – wholesale broadcasting rights

The Court of Appeal in February 2014 referred back to the CAT a dispute regarding Sky's actions in respect of its wholesale broadcasting rights. Ofcom published findings in March 2010 regarding the operation of the pay-TV market, and concluded that Sky had market dominance in the wholesale and retail market for premium movies and sports channels. As a consequence of this decision, Ofcom required that Sky Sports 1 and Sky Sports 2 be offered to other broadcasters at a price below or equal to a price set by Ofcom (known as 'wholesale must offer' (WMO)). The imposition of the WMO triggered an appeal by Sky to the CAT, which found in Sky's favour in March 2013. BT was granted permission to appeal against this ruling. In February 2014, the Court of Appeal found that the CAT had failed to consider whether Sky's use of discounted 'rate card prices' and other discounts referable to Sky's penetration rates had affected the ability of new entrants, particularly BT, to compete with Sky in the premium broadcasting market. As a consequence, in the February 2014 judgment, the Court of Appeal remitted the decision back to the CAT for reconsideration. In the interim, Ofcom has decided to review the WMO; Ofcom issued consultations in December 2014<sup>76</sup> and subsequently in July 2015<sup>77</sup> on this matter. Ofcom is separately considering a complaint from BT regarding Sky's alleged abuse of its dominant position in respect of the supply to BT's YouView platform of Sky Sports 1 and 2. In October 2014, the Supreme Court refused an application by Sky for permission to appeal against the Court of Appeal's judgment in February 2014. In May 2015, the CAT handed down a ruling on the constitution of the panel to hear the matters remitted by the CAT. This was followed by an order in June 2015 issued by the CAT denying BT permission to appeal against the May 2015 ruling.

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

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

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

services to MNOs in the UK. The CMA also noted that the merger might also have an impact on other markets, such as the retail mobile market in the UK. On 17 July 2015, the CMA published its issues statement setting out its proposed approach to assessing market definition and the counterfactual. It also identifies 10 theories of harm: four raising horizontal unilateral effects, four raising vertical effects, one raising co-ordinated effects and one raising conglomerate effects. The statutory deadline for the CMA to adopt its decision is 23 November 2015.<sup>78</sup>

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

## ii Right to be forgotten

In May 2014, the CJEU delivered a judgment following its consideration of Google's right to freedom of expression under the ECHR in contrast to an individual's fundamental right to privacy and protection of personal data under the EU's Charter of Fundamental Rights, and found that the balance was tipped in favour of an individual's right to privacy. This brought into existence a 'right to be forgotten' ahead of its legislative adoption in the still-pending Data Protection Regulation. On 30 July 2014, the European Union Committee of the House of Lords published a review of the CJEU decision in a report titled 'EU Data Protection law: a 'right to be forgotten'' in which it criticised the judgment as 'unworkable' and burdensome on ISPs.<sup>79</sup>

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

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

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78 [www.gov.uk/cma-cases/bt-ee-merger-inquiry](http://www.gov.uk/cma-cases/bt-ee-merger-inquiry).

79 [www.publications.parliament.uk/pa/ld/201415/idselect/ideucom/40/4002.htm](http://www.publications.parliament.uk/pa/ld/201415/idselect/ideucom/40/4002.htm).

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



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

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

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

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

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

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

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

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

82 Press release available at [http://europa.eu/rapid/press-release\\_MEMO-15-5612\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-15-5612_en.htm?locale=en).

iv DRIPA

DRIPA came into force on 17 July 2014, following a fast-tracked procedure that meant it passed through all stages of Parliament within four days (a process that often takes months or even years) on the basis that its enactment was required for continued national security. The Act addressed two key issues: the obligation to retain communications data by communications providers and the extraterritorial expansion of powers under RIPA.<sup>83</sup> DRIPA also clarified that interception capability notices under RIPA may be issued to telecommunications providers outside the UK in relation to conduct outside the UK.

The first part of DRIPA was implemented in response to the declaration of invalidity of Directive 2006/24/EC (Data Retention Directive) by the CJEU in April 2014, which found that it violated an individual's right to privacy and was disproportionate to its aims. Under the Data Retention Directive, public communications providers (e.g., providers of fixed-network telephony, mobile telephony and internet access, internet e-mail or internet telephony) had to retain traffic, subscriber and, where relevant, location data (but excluding content data) for a period of 12 months.<sup>84</sup> The decision in the UK to reintroduce data retention laws is in stark contrast to the rest of Europe, where Germany, the Czech Republic, Romania, Austria, Cyprus, Belgium, Ireland and Bulgaria have already deemed similar provisions unlawful.

The first part of DRIPA grants the Secretary of State the power to issue notices to telecommunications operators requiring them to retain communications traffic data (e.g., time of call and who it was made to, but not the content of communications) for a period of up to 12 months for the purposes of investigating crime or issues of national security. The latter part of DRIPA amends RIPA to clarify that interception warrants may now be served on telecommunications providers based outside the UK if they provide services to UK users, requiring them to provide data to the UK government or risk civil sanctions or criminal prosecution under RIPA, which could result in directors facing up to two years in prison for non-compliance.

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

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

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83 Data Retention and Investigatory Powers Act 2014.

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

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

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

## VII CONCLUSIONS AND OUTLOOK

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

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

## Appendix 1

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# ABOUT THE AUTHORS

### **JOHN D COLAHAN**

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

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

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

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

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Jean-Luc Juhan is a partner in the corporate department of the Paris office of Latham & Watkins.

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

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

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Mr Kwan specialises in civil and commercial litigation and arbitration proceedings. He has assisted in various civil matters such as shareholders disputes, contractual disputes and debt recovery actions.

He also has experience in a variety of regulatory matters, including licensing matters, financial and corporate regulations and investigation, as well as white-collar defence and investigations.

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

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

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Mr Powell's practice focuses on complex contentious regulatory, commercial litigation and arbitration matters, including contentious technology, media and telecommunications regulatory issues and disputes; financial and corporate regulation and investigation; antitrust and competition law; and contentious insolvency and business restructuring and reorganisation.

Mr Powell represents numerous multinational and local corporations in connection with a wide range of multi-jurisdictional and cross-border issues, including those operating in the telecommunications industry, and in relation to antitrust and competition issues and regulatory matters generally, with a particular focus on Hong Kong.

Mr Powell is one of only a few solicitor-advocates in Hong Kong, giving him full rights of audience before all the Hong Kong civil courts (including the newly instituted Competition Tribunal, which has been set up as a part of the judiciary). He is also a fellow of the Chartered Institute of Arbitrators, and a CEDR accredited mediator. He sits on the Hong Kong Law Society's competition committee, which focuses on reviewing and commenting upon competition-related issues within Hong Kong.

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Myria Saarinen is a partner in the Paris office of Latham & Watkins. She has extensive experience in IP and IT litigation, including internet and other technology-related disputes. She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes.

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

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

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Mr Taubman received his JD from New York University School of Law, a master's degree in public policy from Harvard University's Kennedy School of Government, and a BS from Cornell University's School of Industrial and Labor Relations.

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During her legal traineeship, she worked, *inter alia*, for the Ministry of Foreign Affairs, in the IP and unfair competition department of another major law firm, and in the legal department of a well-known online auction house. Subsequently, Dr Wunsch completed a master's degree (LLM) at the Technical University of Dresden and Queen Mary, University of London, specialising in intellectual property law.

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