The Technology, Media and Telecommunications Review

Sixth Edition

Editor
John P Janka

Law Business Research

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EDITOR'S PREFACE

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

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

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

A global focus exists on making radio spectrum available for a host of new demands, such as the developing 'Internet of Things,' broadband service to aeroplanes and vessels, and the as yet undefined, next-generation wireless technology referred to as '5G'. This process involves 'refarming' existing bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs. In many cases, an important first step will occur at the World Radiocommunication Conference in November 2015, in Geneva, Switzerland, where countries from around the world will participate in a process that sets the stage for these new applications. No doubt, this conference will lead to changes in long-standing radio spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

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

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

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

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

John P Janka
Latham & Watkins LLP
Washington, DC
October 2015

LIST OF ABBREVIATIONS

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

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

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

Chapter 1

COMPETITION LAW OVERVIEW

Abbott B Lipsky, Jr and John D Colahan[1]

I COMPETITION LAW OVERVIEW

This chapter provides an overview of antitrust and competition laws (competition law). While competition law was primarily (although not exclusively) an American phenomenon for most of the 20th century, competition law is now actively enforced in more than 120 jurisdictions, encompassing all the major economies of the world. Competition law has thus become relevant to the vast majority of global business activity and significant business enterprises. While the numerous competition laws and their enforcement modalities vary widely, this chapter attempts to provide a broad overview of their most basic and recognisable features, and thereby to suggest how competition law is likely to interact with the telecommunications, internet and media sectors in any particular jurisdiction. This chapter also identifies significant competition law developments involving the telecoms, internet and media sectors in the past year.

II FUNDAMENTAL CHARACTERISTICS OF COMPETITION LAW

Competition law is usually understood as a system of legal limitations applicable to the marketplace conduct of firms. The principal common objective of such laws is to maintain a freely competitive marketplace, allowing efficiently run businesses the opportunity to enter and expand, ultimately stimulating innovation and providing a constantly evolving array of quality products responsive to changing demand, offered at reasonable prices and other terms. Some jurisdictions imbue their competition laws with one or more other considerations and objectives, such as single-market integration (European Union), national economic development (China) and promoting wider ownership by historically disadvantaged persons (South Africa).

1 Abbott B Lipsky, Jr and John D Colahan are partners at Latham & Watkins LLP.

While competition law evolved primarily as a form of economic legislation applicable to the general run of private-sector firms, other types of entities (such as trade associations and state-owned enterprises) are also subject to competition law in many jurisdictions. Specialised institutions such as labour unions, agricultural cooperatives and consumer organisations are often exempted from competition law in whole or in part, or are regulated by other rules and institutions. As described in Section IV, *infra*, where industries subject to sector-specific regulation are involved – as the telecoms, internet and media industries frequently are – significant and complex questions often arise involving the allocation of jurisdiction between competition law and the particular regulatory schemes.

III THE MAIN PROHIBITIONS OF COMPETITION LAW

Competition law is potentially applicable to an enormous range of marketplace conduct. Although the following generalisation is not universally true (indeed few assertions about competition law are), the range of conduct typically subject to antitrust law is often conveniently characterised into one of the following three categories: concerted conduct, structural business transactions and abuse of dominance (or 'monopolisation' in US parlance).

i Concerted conduct

Sometimes also referred to as 'restraints of trade' or 'restrictive agreements', competition law typically prohibits or otherwise limits certain agreements between or among distinct entities. There are generally two main elements to the definition of improper concerted conduct: an agreement between or among distinct parties or entities that affects or is intended to affect the parties' marketplace conduct; and a harmful or potentially harmful effect on marketplace competition. The competition law view of 'agreement' is extremely broad; it usually includes both formal and informal understandings, either written or unwritten, or in general any 'meeting of minds' in a common course of conduct or other scheme, however manifested. In some jurisdictions, such as the EU, there is an additional concept of a 'concerted practice' that adds to the breadth of the concerted conduct prohibition.

Horizontal agreements

The classic example of an illegal restraint of trade is an agreement among competitors to observe a common minimum price. Absent other forms of cooperation that might contribute to improvements in economic performance (e.g., joint investment in new research or production facilities, introduction of a new product, cost-sharing, risk-sharing or the like), such an agreement would typically be regarded as a serious violation of competition law. Agreements between or among competitors are generally referred to as 'horizontal' agreements, to denote that the parties are participants at the same level of trade – such as manufacturing, distribution or retailing. Horizontal agreements that limit competition without any other cooperative feature capable of lowering prices, enhancing innovation, improving productivity or providing some other identifiable economic benefit (as distinct from merely advancing the parties' own economic self-interest) are usually regarded as serious law violations, generally referred to as 'naked horizontal restraints' or 'cartel conduct'. In the same category, one would typically find agreements to allocate markets (by customer, product, territory or channel of distribution) or to pool revenues or capacity.

By contrast, where competitors collaborate to invest in new capacity, introduce new products or methods of distribution, or engage in other similar initiatives, competition law generally allows agreed competitive constraints to be placed on the parties if they are no broader than appropriate to support the economically beneficial objectives of the collaboration. A classic example would involve parties that jointly invest in new production capacity in order to provide a new product or to offer existing products in a new geographic area, while requiring that each party refrain from engaging in independent competition with the new venture. In this example, the justification for the competitive restriction is that the investment might not otherwise be sustainable and therefore might not occur without the restriction. There are many variations on this basic theme among the competition laws of the world. For example, some jurisdictions require such restraints to be no broader than what is strictly necessary to achieve the beneficial purpose, and even then such restraints are allowed only when the benefits of the collaboration are likely to be shared with ultimate consumers.

Numerous other types of horizontal agreement are considered under competition law, with their legality depending on a wide variety of factors including the nature of the industry and its products, the number and size distribution of competitors, and the likely effects (both beneficial and restrictive) of the collaboration and any accompanying restrictions. Technical standard-setting, joint procurement, benchmarking and other forms of information exchange are some common examples of horizontal collaboration assessed under competition law, with their legality depending on the details of the arrangement, the parties and the affected markets.

Vertical agreements

Competition law also governs agreements between parties that are not competitors, but that have a relationship of buyer–seller, manufacturer–distributor, distributor–retailer, licensor–licensee, franchisor–franchisee and the like. Such agreements are commonly known as 'vertical' relationships to reflect that the parties are engaged in economic activities at sequential levels of commerce (in the continuous progression from raw materials to the provision of the product to the ultimate consumer), as distinct from competitive or 'horizontal' activities at the same level. In general, competitive restrictions arising between parties in vertical relationships are judged with less scepticism than horizontal agreements, for the competitive risks of such agreements are generally less significant, such agreements are encountered universally throughout the economy, and experience has shown that vertical agreements and associated restrictions on the parties' freedom of action are manifestly necessary to permit commerce to function. Typical vertical agreements that include restraints on competition include distribution agreements in which the supplier limits the distributor to a specific geographic territory or class of trade, franchising relationships (involving the limitation of the franchisee to certain brands and methods of business), and field-of-use, territorial, customer or other restrictions on licensees by the owner-licensor of a patent, copyright, trademark or other item of intellectual property.

Notwithstanding the general acceptance of many competitive limitations in vertical agreements, some jurisdictions still regard certain categories of vertical restraints with the hostility that is more typically reserved for cartel conduct. Most notably, this includes minimum vertical price agreements. Such restraints have had a controversial and turbulent history under US competition law. They were once categorically banned (for a brief time along with all other vertical restraints), but are now subject to a 'rule of reason' or balancing test under federal law. Minimum vertical price restraints are still banned, however, under the laws of China, the European Union and its Member States and in many (if not most) other jurisdictions around the world – including (despite the liberalised standard of federal law) a number of individual US states. The EU also observes a strict prohibition on vertical agreements that limit active sales across the national boundaries of the EU Member States.

ii Structural transactions

Substantive standards

Some agreements involve more than short-term, partial economic relationships among fundamentally independent firms. When one firm acquires a substantial or majority ownership interest in another (e.g., through a purchase of shares), or when one firm sells assets representing an entire operating business unit to another independent firm, competition law recognises the different character of the transaction, and applies a different set of rules and presumptions as well as a different set of procedures. Such transactions are known by many names, including mergers, acquisitions, concentrations and control transactions. This chapter uses the term 'structural transaction' to attempt to capture the essential nature of the arrangements that are generally accorded this distinct treatment. The essential feature is that such transactions create material and relatively long-lived changes in the structure or control of business organisations (e.g., ownership, management, the range of product lines).

The substantive legal standards applied to structural transactions continue to evolve, and even today, nearly a century after the United States first adopted a law addressed specifically to such transactions, these rules remain subject to change and controversy. The first period of active competition law challenges to structural transactions in the US, commencing with an important statutory amendment in 1950, led to the 'structuralist' approach. This featured a narrow focus on how transactions affected the number and size distribution of firms (market concentration), and by the 1960s the Supreme Court had consistently condemned mergers based on the attainment of even a very modest market share (less than 5 per cent in the most extreme cases) by the combining firms. Soon thereafter, however, both the Court and the enforcement agencies began to introduce a variety of analytical considerations that would allow a richer and more nuanced assessment of structural transactions.

In 1982, the US Department of Justice (DoJ) adopted Merger Guidelines that set a basic framework for analysis that has since been followed globally, although with important extensions and amendments over the intervening 30-plus years of enforcement experience. The principal creative contribution of the 1982 Guidelines was to centre the agency's legal judgment of structural transactions on economic analysis of key market and product characteristics and the identification of indicia of probable future competitive effects, rather than on changes in market concentration as such. The main elements of the analysis include definition of relevant markets in economic terms and assessment of supply expansion possibilities (including the potential for new entry). Changes in the number and size distribution of firms continue to be considered as part of the analysis (with decreasing importance over time in the case of subsequent versions of the Guidelines in the US: in 1984, 1992 and 2010), but it is difficult to characterise their precise significance to the ultimate judgment made by agencies and courts. The relevance and proper weight to be accorded to efficiencies that arise from structural transactions (cost reductions, synergies from the combination of firms with complementary assets, personnel or product lines) also continue to be controversial and difficult to assess.

More broadly, modern economically based merger analysis tends to examine the likelihood of two distinct forms of potential competitive harm: unilateral effects – namely, the risk that a business combination may allow the combined firm to raise prices (or reduce output, limit product quality or innovation, or impose other cognate adverse effects) unilaterally; and coordinated effects – the risk that a business combination will enhance the likelihood that remaining competitors would act collusively or would tend to raise prices or take equivalent competitively adverse actions without collusion but through the natural impact of their recognised interdependence. Most modern competition laws permit structural transactions to be assessed under either theory.

Unique procedures applied to structural transactions

Structural transactions are typically judged using a unique set of procedures, reflecting the reality that once consummated, it is potentially very costly and extremely disruptive to undo such a transaction. In 1976, the United States became the first nation to require 'pre-merger notification' to allow competition law assessments of structural transactions prior to consummation. If a transaction meets certain thresholds (involving the size of the transaction and, in many cases, the size of the parties by revenue or assets), the parties must file forms (containing a variety of financial and competitive information) with the federal antitrust agencies and wait for a prescribed period (30 calendar days) before consummating the deal. The agencies may extend the waiting period by requesting additional information, thereby allowing closer investigation of the competitive effects of the transaction.

This pattern of requiring pre-merger notification and waiting is now incorporated in the competition laws applicable to structural transactions in scores of jurisdictions around the world – perhaps as many as 100. Although still technically voluntary in a few key jurisdictions (Australia, New Zealand, Singapore, the United Kingdom), mandatory pre-merger notification is now the global norm for review of structural transactions.

The distinction between concerted conduct and structural transactions

Some transactions can be difficult to classify as concerted conduct or as a structural transaction. By definition all structural transactions involve concerted conduct, but the question is whether a specific transaction merits treatment under the specialised procedures and assessment standards reserved for structural transactions. Ideally, the structural transaction review standards and pre-merger review procedures are reserved for transactions with relatively permanent effects on firm structure, ownership or scope of operation, but there are questions of degree, and so some line-drawing can be required. There is scope for differences of treatment as among different jurisdictions.

For example, when the European Union first adopted its Merger Control Regulation (MCR), it defined the set of transactions to be governed by this scheme as 'concentrations', involving a change in the control of an undertaking, including situations in which a business entity formerly under the control of a single owner might enter into arrangements with another party, giving rise to joint control of the entity. This raised the question of whether the shift in control would be considered a 'concentration' and subject to prior notification and approval, or whether the agreement giving rise to the shift in control would be judged like other forms of concerted conduct. The EU accordingly defined the notion of a 'concentrative joint venture', meaning a form of collaboration that involved creation of an entity endowed with its own competitive resources (e.g., production facilities) that make it capable of operating as an autonomous market participant (distinct from the venture's owners). Such ventures were required to submit to review under the same standards and procedures applicable to outright acquisitions (assuming the applicable turnover thresholds were met). Such concentrative ventures were distinguished from mere 'cooperative' joint ventures, which do not involve the creation of an entity with the degree of independent economic substance and competitive autonomy thought necessary to merit review under the MCR. The latter type of venture continued to be regarded as nothing more than a form of agreement between otherwise independent parties, which therefore remains to be considered under the typical 'concerted conduct' standards of EU law. (At the time of writing, however, the EU is considering the adoption of a mandatory prior notification regime for the acquisition of non-controlling minority interests.) Most other jurisdictions must confront this same type of classification issue, and a variety of solutions have been adopted.

iii Unilateral dominant-firm conduct

The third and final basic category of business conduct typically subject to competition law is unilateral dominant-firm conduct. Such conduct is referred to as 'monopolisation' in the US, and as 'abuse of dominance' in the EU and many other competition law systems. The EU also has a concept of 'joint dominance' that can capture more than one undertaking. Unlike concerted conduct and structural transactions, this category is generally reserved for unilateral (single-firm) conduct. This category, founded on antipathy to the perceived tendencies of monopolies or dominant firms toward improper aggrandisement at the expense of competitors, customers and consumers, poses its own difficult legal, economic and other policy questions. Although the US statutory prohibition on unlawful monopolisation has been in place since 1890, drawing the line between proper and improper behaviour for a market-dominating firm continues to present important complexities, and has been characterised by sharp and continuing controversy. The more recent cognate – abuse of dominance – adopted in the EU and many other jurisdictions presents equal issues and challenges.

Most competition laws apply single-firm conduct standards only to firms that have a substantial degree of market power or monopoly power as those terms are understood by economists. Some important jurisdictions, however (e.g., Germany, Japan), also apply special standards of conduct to firms in a 'superior bargaining position', even without proof that they possess monopoly power in any orthodox economic sense.

Assuming a firm meets the standard for application of unilateral-conduct rules, competition law attempts to supply rules to identify which types of conduct are impermissible. The US Supreme Court has provided a general definition of monopolisation by contrasting the 'willful acquisition or maintenance' of monopoly power with 'growth or development as a consequence of a superior product, business acumen, or historic accident'. A metaphor often used to suggest the same distinction involves a race between competing runners: contestants are permitted and encouraged to use all the speed and strength at their command, but they may not do anything that impedes the efforts of others. Unfortunately, the utility of these standards as methods to assess specific types of marketplace conduct is often very limited.

The offence of predatory pricing – the concept of which is recognised by all the major competition law systems of the world – provides a classic example. Low prices are considered one of the principal objectives of free-market competition, but do the fundamental objectives of competition law require that there be a lower limit on a monopolist's price? Does a low price threaten to drive out or discipline other competitors so that customers and consumers may be exploited by higher prices charged by the monopolist in the long run? Again, all major competition law systems recognise this possibility, but they differ substantially in defining the elements of predatory pricing as a competition law offence. The US requires proof of 'below-cost' pricing (the specific standard of cost is yet to be defined authoritatively), plus a reasonable expectation that the monopolist can recoup profits sacrificed during the period of below-cost pricing with higher profits made possible by the exclusionary or disciplinary effects later on. The EU, like a number of other jurisdictions, does not require proof of a possibility of recoupment under its 'abuse of dominance' principles.

Of particular relevance to the telecoms, media and internet fields – industries often subject to sectoral regulation – is a distinction between exclusionary and exploitative conduct. In the US, only exclusionary conduct is considered potentially subject to unilateral-conduct rules; a monopolist in the US may charge as high a price as it determines at its own discretion. It has even been suggested that supra-competitive profits serve the beneficial functions of providing rewards for superior business performance and luring additional entrants into the affected market. However, in the EU and other like-minded jurisdictions, an 'exploitative' or excessively high price (although rare) may in theory be condemned under the law. In the US, attempting to limit monopoly pricing is regarded as a regulatory function, generally unsuited for the judicial system and appropriate (if at all) for sectoral regulators. From early days in the US, remedies proposed for acts of monopolisation have often been rejected on the grounds that they would unduly interfere with the jurisdiction of sectoral regulators assigned to ensure 'just and reasonable' prices and other terms of trade. The US choice to disregard monopoly exploitation as such (that is, so long as it is not exclusionary) has not carried the day in the EU and other 'abuse of dominance' jurisdictions, which remain open to challenges of 'exploitative' forms of abuse.

Of particular relevance to the telecommunications sector is whether a 'price squeeze' or 'margin squeeze' may be a form of unlawful abuse or monopolising conduct. This is the practice whereby an operator with substantial market power that competes at both the wholesale level (e.g., providing elements of a landline telecommunications network) and the retail level (using its network to provide specific telecommunications services to ultimate customers) collects wholesale charges so high – and simultaneously charges retail prices so low – that retail competitors have no opportunity (or only severely limited opportunities) to compete with the network operator at retail. Whether such conduct is subject to competition law liability and, if so, what elements of proof are required to establish such liability, are both controversial questions. Consideration of these issues may be influenced by whether the wholesale or retail charges are subject to regulation, such that regulatory remedies for such conduct are possible even where competition law remedies may not be.

IV ENFORCEMENT

The impact of competition law is shaped not only by the substantive standards applied to specific forms of business conduct, but also by a broad range of other provisions and arrangements that comprise the overall enforcement environment. Some of these are part of the overarching legal regime in the particular jurisdiction, while others are specialised or unique to competition law. Among considerations that determine the make-up of the enforcement environment, the following are among the more obvious:

a the basic institutions empowered to take up and resolve competition matters (administrative agencies, prosecutors, courts, appellate tribunals, etc.);

b methods of investigation used to obtain evidence (demands for documents, testimony or tangible items, entry and inspection of premises, etc.);

c proceedings to weigh evidence, assess liability, and to prescribe and enforce remedies (trials, administrative hearings), including private-party standing to seek relief for competition law violations; and

d remedies applicable to individuals and businesses that violate competition law (such as criminal penalties, civil or administrative fines, civil damages, injunctions including divestiture or limits on the conduct of business, etc.).

This section gives some sense of the power and diversity of antitrust enforcement mechanisms encountered in the global competition law enforcement system.

i The US system – an antitrust superpower and microcosm of enforcement

The US remains the jurisdiction with the longest and strongest record of competition-law enforcement (although recent enforcement enthusiasm in other jurisdictions may challenge the US system in some respects). The US system is formidable and intricate and must be reckoned with by any firm whose affairs touch US commerce. For present purposes the US also constitutes a microcosm of enforcement institutions, procedures and remedies for competition matters found in other jurisdictions. Although many new forms of enforcement have emerged outside the US, a description of the US system can at least suggest the power and variety of competition law mechanisms encountered around the world.

Two federal agencies are charged with enforcement responsibility: the antitrust division of the DoJ (the cabinet department in the executive branch holding the portfolio for legal affairs) and the Federal Trade Commission (FTC). The FTC is a five-member, supposedly independent regulatory agency controlled by a complex array of connections to Congress (which oversees the FTC's legislative authority and its budget, and acts as gatekeeper for the presidential nominations of the Commissioners), the President (who nominates the Commissioners for Senate approval and designates the Chair) and the federal courts (which review FTC decisions).

The DoJ has exclusive federal authority to employ criminal-law procedures, such as convening grand juries and procuring indictments in competition matters. Antitrust violations, when prosecuted criminally, are serious felonies under federal law. Convicted individuals may be imprisoned for up to 10 years and subjected to substantial fines. With increasing frequency in recent years, corporate fines in criminal antitrust matters have extended into the hundreds of millions of dollars. Lengthy periods of actual imprisonment have become the norm for convicted individuals – a pattern that is gaining increasing acceptance in other jurisdictions.

The DoJ may also bring civil actions to enjoin violations. While cartel cases are always pursued as criminal matters, civil proceedings are the norm for all other types of cases (involving conduct whose legality must be established by careful examination of industry and product characteristics as well as the specific risks and benefits of the challenged practices). The main arena for resolving contested merger cases is injunctive proceedings that the DoJ is authorised to bring before federal district courts. Similarly, monopolisation cases brought by the Department are generally pursued as civil matters through the district courts.

The DoJ has no authority to determine guilt or innocence, or to assess remedies in any case, whether civil or criminal. To affect private-sector behaviour, the Department must obtain and file indictments or file complaints in court and obtain convictions or determinations of liability, and then must convince the court to impose an appropriate remedy. In reality, however, the majority of merger matters are settled by consent decree rather than by judgment following trial, and other types of cases are often disposed of by consent as well. Courts play a limited role in approving such settlements, and resort to the court is sometimes required for decree enforcement, but the practice of working out settlements is almost entirely within the control of the Department and the parties accused of unlawful conduct. Criminal matters are also frequently settled by plea agreements, where the court has a more substantial role in assessing remedies.

The FTC lacks criminal-enforcement authority, which generally leads it to defer to the DoJ in cartel matters. However it has a broad administrative mandate and a variety of unique enforcement tools not available to the DoJ. On merger matters, the two agencies divide responsibility on a case-by-case basis through informal agreement, and to an extent the FTC generally proceeds in a way similar to the DoJ, seeking injunctive relief in federal district court when a merger case is contested. However, the FTC employs administrative law judges who are authorised to conduct adjudicative hearings to rule on Commission complaints. The Commission may adopt decisions made by the administrative law judge following the hearing, or undertake a *de novo* review of the matter.

The Commission is required to file an administrative complaint on its own docket before it may seek injunctive relief in court, but it may proceed to adjudicate its complaint regardless of the outcome in court. Orders issued by the Commission in its own adjudications are subject to review by a federal court of appeals. The Commission may proceed similarly on other competition law matters, including monopolisation and other single-firm conduct cases. (The FTC also has additional cards to play: its organic statute authorises proceedings to prevent 'unfair methods of competition' as well as deceptive acts and practices. Deception is primarily a consumer-protection matter not further addressed herein.) Moreover, apart from its pursuit of orders through administrative proceedings in specific matters, the Commission also has authority to investigate and report on firms and industries whose activities affect commerce.

While the authority of these two federal agencies is broad, this is only the beginning of the description of the US competition law enforcement arsenal. Any private party injured in its 'business or property' by an antitrust violation may bring suit in a federal district court to recover from the violator three times the amount of actual damages sustained. This places in the hands of every US firm and citizen the potential to become an enforcer of US antitrust law. A wide variety of other US legal practices encourages the pursuit of private federal antitrust litigation. Some are characteristics of the broader US legal system: extensive pretrial discovery and 'opt-out' class-actions that allow aggregation of thousands or even millions of claims for simultaneous determination. Others are unique to US competition law: mandatory trebling of private damages, one-way fee shifting in favour of plaintiffs (i.e., losing defendants pay successful plaintiffs' attorney's fees, but losing plaintiffs need pay nothing to defendants), joint and several liability (permitting the plaintiff complete discretion in allocating liability for damages among co-conspirators), estimation of the amount of damages through any means short of 'pure speculation', and the like. These features have helped to make antitrust cases one of the most prolific categories of litigation in the US legal system.

Finally, the states also have a significant role in US competition law enforcement. Every state has laws similar to the federal antitrust law (although not identical to the federal law in every respect), and can enforce those laws through its own courts. There is also considerable federal–state cooperation and other forms of interaction that can be significant in many types of cases. States (through their legal officers) often cooperate in federal investigations and join federal agencies in filing complaints (or file parallel but distinct complaints regarding the same subject matter). States have authority to enforce federal competition law through a variety of mechanisms, including *parens patriae* actions in which the state may sue on behalf of its citizens who may be injured by violations.

Indeed, many states have nullified certain federal doctrines that might otherwise reduce liability. The most significant of these are the state statutes that abrogate the federal-law principle that only direct purchasers may recover damages from an antitrust violator in a private treble-damages action. This has created an entire category of antitrust claims, including major class actions, known as 'indirect purchaser' suits. A number of states also continue to regard vertical minimum price agreements as *per se* violations, unlike federal law, which assesses such agreements according to the usual 'rule of reason' standard applied to all other vertical restraints and to horizontal restraints other than cartel offences.

ii The European system – a unique and leading example of the administrative enforcement model

The procedures, institutions, exemptions, remedies and other key features found among the competition laws of the world are far too diverse to allow even the briefest summary in a single chapter. With significant exceptions, most competition law enforcement outside the US employs administrative methods, presenting a sharp contrast with the US, where the judiciary has a pervasive influence on the law and, aside from FTC administrative adjudication, individual contested cases are typically resolved in the courts. Because the EU is in many respects as active as the US, and given the size of the EU economy and the vigour with which its competition rules are now enforced, a description of its procedural methods will illustrate some of the main characteristics of an administrative model of competition law enforcement. The reader is cautioned, however, that EU competition-law enforcement has a number of special characteristics that cannot easily be analogised to other jurisdictions.

EU competition rules are based on broad principles contained in the articles of one of the EU's basic constitutional documents, the Treaty on the Functioning of the European Union (TFEU). The various EU institutions have their own roles in elaborating and enforcing these articles. Through the various judgments of the European courts and adoption of regulations, directives, guidelines and other instruments, EU competition law comes to be applied to the three basic forms of business conduct (restrictive agreements, abuse of dominance and structural transactions, known in the EU as 'concentrations'). Moreover, there is an organic relationship between the EU Member States and the EU institutions in the field of competition law. Each EU Member State has its own competition law based broadly on the TFEU articles, and each (save Luxembourg) has its own enforcement agency. The main engine of EU competition law enforcement is the European Commission, the top-level executive body of the EU and 'guardian of the Treaties'. There is a coherence and relatively high degree of coordination evident in the manner in which competition law is applied throughout the EU, including at Member State level, arising from decades of interaction between Member States and the Commission and the primacy of EU law over national law. The competition agencies of the EU and its Member States are woven together in a 'European Competition Network', and a variety of mechanisms exist for referral of specific competition cases (in whole or in part) between the Member States and the EU, both at the agency enforcement level and between Member State courts and the EU court of final appeal, the Court of Justice.

In specific cases, the European Commission proceeds through an administrative process. The EU has no criminal enforcement authority in the field of competition law, nor does it have jurisdiction over individuals. (These limitations do not bind the competition agencies of the Member States, where national law largely determines methods of proceeding, remedy, etc.) It operates solely by applying its competition law to 'undertakings', and it does so under the direct authority of the Commission itself. The EU has established a Directorate General for Competition that carries out the day-to-day functions of applying the competition rules, but all official actions are ultimately the responsibility of the full college of Commissioners (one of whom holds the competition portfolio). DG Comp, as it is called, exercises authority to begin an investigation *suo moto*, or upon a complaint. It may seek information from any party through written requests, and it frequently conducts unannounced inspections (colloquially but more-or-less accurately called 'dawn raids') at business premises (as well as on domestic premises and vehicles used for business purposes) to obtain documents and conduct on-the-spot interviews relevant to investigations of potential infringements. Obstruction of these powers can lead to serious fines.

Following investigation, the Commission digests the information available to it, including further information obtained through questionnaires and meetings, and determines whether to issue a statement of objections to any party believed to have committed an infringement. This document sets forth the allegations and describes evidence in support of the Commission's statement. Those to whom the statement of objections is addressed are granted access to review the Commission's investigative file (subject to some exceptions) so that they can understand and respond to the Commission's allegations. Parties are also entitled to request an oral hearing presided over by a hearing officer, where the Commission's staff details the allegations and the parties may present a response. Complaining parties often are also present and may make their own presentations. Members of the Advisory Committee (whose input is required prior to decision by the Commission), consisting of representatives of each Member State, are also present and may question the staff, the parties or the complainants. Other Commission services may also be represented at the hearing. No Commissioner or other decision-maker is present for such hearings, which are not regarded as an essential procedural step. At the hearing, there is an informal approach to the use of documents and testimony, as contrasted with judicial procedures where rules of evidence, rights of cross-examination and various other procedural protections must be observed. Parties can and do forgo the opportunity to have an oral hearing. Decisions of the Commission are subject to review by the EU General Court and then finally by the Court of Justice.

The administrative elements of EU procedure are widely emulated in various degrees of detail by many competition agencies throughout the world. As previously described, even the US has its FTC, which resembles the European Commission in some key respects (although there are sharp and significant contrasts to be observed as well). On the other hand, many jurisdictions prosecute certain varieties of competition law matters through the courts, or incorporate more elements of judicial procedure than are characteristic of the typical EC proceeding. Then, too, many other jurisdictions follow procedures that have no clear analogue in US or European practice.

In China, for example, competition law enforcement occurs under the broad authority of the State Council, the senior executive body of the government, and the Antimonopoly Commission, which includes a number of government agencies. Day-to-day enforcement responsibility is divided among the Antimonopoly Bureau of the Ministry of Commerce (for merger review only), the National Development and Reform Commission, the key general economic policy body of the central government (for price-related non-merger matters only) and the State Administration for Industry and Commerce, another large central-government agency charged with a variety of economic regulatory missions (for non-price-related non-merger matters only). Each Chinese agency has the authority to delegate its enforcement prerogatives to subordinate jurisdictions including provinces and municipalities, and a significant amount of enforcement in China seems to take place at these subordinate levels (although apparently in close coordination with the central government agencies). China also provides for private rights of action through the courts. Thus, the Chinese system emulates by degrees the US and EU systems, but it also has critical features that find no ready analogy in other systems of competition law.

As previously mentioned, it is not possible to summarise in this chapter the enormous diversity of enforcement modalities for competition law that may be found worldwide. The foregoing descriptions have been intended merely to suggest their potential range. Further information can be found in general publications such as the American Bar Association Section of Antitrust Law's Competition Laws Outside the United States (2011), or by reviewing material on the websites of the various competition agencies around the world, which are, for example, listed on the website of the International Competition Network (www.internationalcompetitionnetwork.org).

V COMPETITION LAW AND SECTORAL REGULATION

Another critical area that influences the application of competition law to the telecoms, internet and media sectors is the relationship between competition law and sectoral regulation. Competition law is usually thought of as a form of general economic legislation that governs business conduct among the broad run of firms throughout the economy of the jurisdiction in question. Of course, firms are always subject to other forms of regulation, but the focus here is on a particular model of regulation typically applied to firms in key sectors – generally including telecommunications, transportation and energy. Such regulation is primarily of an economic nature, involving the licensing of entry or exit by qualified operators, and controlling the prices, terms and conditions on which products and services are offered, in order to prevent operators from obtaining excessive profits where such profits are made possible by regulations that grant exclusive or limited operating rights and thus limit competition. Economic regulations often include limits on structural transactions involving regulated operators.

In the broadest sense, sectoral regulation is an alternative to competition as a policy mechanism for assuring the provision of products or services at best prices and other terms for customers and consumers. There is broad scope for debate as to the wisdom of subjecting any particular sector to economic regulation, or relying upon a regime of competition subject primarily or exclusively to competition law enforcement. Indeed, hybrid regimes tend to be the norm in many sectors: certain telecommunications operators, for example, are allowed to conduct their activities free of regulatory intervention – but subject to competition law enforcement – if the operators in that particular sector have been determined by the specific sectoral regulator to be subject to effective competition. Moreover, telecommunications firms are frequently if not always subject to both competition law enforcement and sectoral regulation. There are circumstances, however, in which sectoral regulation may completely displace competition law.

Looking at the broader sweep of recent history, a distinct trend toward reliance on competition and less use of sectoral regulation has become evident in many developed jurisdictions. In the US, for example, virtually all telecommunications service was provided by a regulated monopolist (the Bell System) as recently as the 1970s. Impelled by changes in technology and shifting public assessment of the relative merits of regulation and competition, new operators were allowed in the long-distance telephony sector, and aggressive competition law enforcement began to pressure the Bell System to allow competing telecommunications equipment providers to offer their products, and to permit the competing long-distance operators to interconnect locally through Bell System affiliates. Despite Bell System efforts to defend its traditional monopoly by reference to longstanding practice and the rights granted by legislation and by the regulations of the Federal Communications Commission, ultimately the Bell System was compelled to pay significant antitrust damages to competing equipment suppliers and to a competing long-distance carrier. Eventually, the Bell System agreed to a massive spin-off of its local affiliates and certain other activities in order to settle the Justice Department's civil suit alleging monopolisation. Key to the allegations in both the government and private antitrust proceedings were the complainants' refutation of the Bell System's position that its conduct was properly based on legal rights provided in legislation and sectoral regulation.

A similar trend toward greater reliance on competition relative to sectoral regulation is evident in many other jurisdictions. The impressive proliferation of alternative communications technologies has tended to reinforce this evolution. Mobile and wireless communication, packet switching and the internet, optical transmission and switching, as well as the spectacular rise in the capabilities of communications devices of every description due to epochal improvements in the basic underlying technology of data processing and transmission, underlie this development. As competition becomes technically feasible, it invites greater reliance on competition subject to competition law and less reliance on command-and-control economic regulation.

Yet the progression from sectoral regulation to competition is hardly uniform. The EU presents an example of the complexities involved: most individual EU Member States had a legacy of PTT dominance in basic telephony and other communications methods of earlier times. Both operators and the sectoral regulators were organised along national lines, and the jurisdiction of the EU was largely absent in this highly regulated sector. The interests of the Member State, its PTT and its sectoral regulator were to some extent indistinct, and this confluence of interest did not necessarily favour rapid introduction of new operators and breakthrough technologies, which would have tended to undermine the position of incumbents. At the time of writing, the EU has just opened two public consultations – on broadband access and on the current telecommunications framework – representing continuing progress toward further integration of the EU telecoms market.

Similar evolution has occurred in many jurisdictions, with the characteristics and speed of such changes being highly dependent on a wide variety of local political and economic conditions, the historical development of the communications industry and its users, as well as the particular characteristics of the local legal and regulatory system. The importance of these efforts, as well as their diversity, is well illustrated by some of the most important recent developments in the telecom, internet and media industries of various key global jurisdictions.

As just discussed, the EU – with a PTT legacy focused on monopoly regulated at national level, with concomitant freedom from competition law constraints – is currently grappling with questions of whether to promote an integrated EU-wide market. This would include, for example, requirements for 'net neutrality', authorisations that would allow operators to participate on an EU-wide basis (rather than on national basis as at present) and abolition of roaming rates for mobile telephony within the EU.

Approval of mergers in the telecoms, internet and media sectors always provide governments with a ready point of leverage to control competition conditions and to seek other concessions from operators across a wide variety of policy portfolios. Mobile operators, for example, reportedly have been asked recently to accede to certain government security protocols that involve accessing communications ordinarily enjoying a presumption of privacy. The same appears to be the case for recent structural transactions involving telecoms equipment manufacturers, as well as for transactions involving Tier 1 internet backbone providers. At the time of writing, the EU has just opened two public consultations – on broadband access and on the current telecommunications framework – representing continuing progress toward further integration of the EU telecoms market.

Finally, numerous competition law issues continue to be raised with reference to firms active in the internet search business, with a number of jurisdictions scrutinising the practices of Google Inc. While the US FTC concluded a major investigation of Google with a consent resolution, the EU continues its own investigation of Google. Since the investiture of the new members of the European Commission in November 2014, the new Competition Commissioner announced that several active investigations of possible infringements of the competition rules by Google are under way.

Appendix 1

ABOUT THE AUTHORS

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

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

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

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

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

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

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

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

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Mr Powell 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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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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