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The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2016

9th Edition

A practical cross-border insight into telecoms, media and internet laws and regulations

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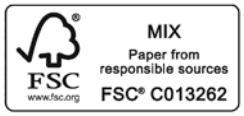

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

One general chapter. This chapter provides an overview of the EU Regulatory Framework for electronic communications and services in the EU Member States.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 37 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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Chapter 1

An Overview of the EU Regulatory Framework

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1 Introduction

The EU Regulatory Framework for electronic communications networks and services (the "Regulatory Framework") is the basis for all national telecommunications laws in the EU Member States. The Regulatory Framework provides general and technology neutral rules applying to all electronic communications networks and services covering fixed and wireless telecoms, data transmission and broadcasting transmission. It contains provisions for the structure and functioning of national telecommunications providers, and it also sets out the framework for both general rules applying to all providers of electronic communications networks and services and particular rules which may only be imposed by national regulatory authorities ("NRAs") on operators with significant market power ("SMP"). The Regulatory Framework only relates to the provision of electronic communications networks and services, and does not cover the content of these services.

One of the main objectives of the Regulatory Framework is to align the sectoral regulation of the electronic communications market with general competition principles. As a consequence, the Regulatory Framework adopts the principle that *ex ante* regulation should only be imposed where there is ineffective competition, i.e. in markets where there are one or more undertakings with SMP and where competition law remedies are not sufficient enough to address the problem.

2003 Regulatory Package

The Regulatory Framework consists principally of four key directives:

- a Directive on a common regulatory framework for electronic communication networks and services (the "Framework Directive") [see endnote 1];
- a Directive on the authorisation of electronic communications networks and services (the "Authorisation Directive") [see endnote 2];
- a Directive on access to, and interconnection of, electronic communications networks and associated facilities (the "Access Directive") [see endnote 3]; and
- a Directive on universal service and users' rights (the "Universal Service Directive") [see endnote 4].

This framework is supplemented by the Commission's Radio Spectrum Decision [see endnote 5], the Privacy and Data Protection Directive [see endnote 6], and the Commission Directive on Competition in the market for electronic communications networks and services [see endnote 7]. These main documents are accompanied by various supporting Regulations, Decisions and Recommendations of the Commission.

2009 Revisions

The general structure of the Regulatory Framework entered into force in July 2003. Following a lengthy political process, which started in 2006, on 19 December 2009, two Directives entered into force which update and amend the Regulatory Framework (the "2009 Revisions"):

- the Better Regulation Directive amends the Framework, Authorisation and Access Directive [see endnote 8]; and
- the Citizens' Rights Directive amends the Universal Service and the Privacy and Data Protection Directive [see endnote 9].

EU Member States transposed these amendments into domestic law (the majority by 25 May 2011, being the transposition deadline), with five Member States (Belgium, The Netherlands, Poland, Portugal and Slovenia) completing implementation following the issuing of legal proceedings.

The new Regulatory Framework also established a new pan-European regulatory institution, the Body of European Regulators for Electronic Communications ("BEREC") [see endnote 10]. In addition to the Regulatory Framework, the European Commission in 2010 published an action plan, a strategy called Digital Agenda for Europe, the purpose of which is to "*deliver sustainable economic and social benefits from a digital single market based on fast and ultra fast internet and interoperable applications*" [see endnote 11].

A Connected Continent – Reform of Electronic Communications Regulation

Following a call for a single EU market at the 2013 European Spring Council, in September 2013 the European Commission unveiled a proposal for a regulation on measures to create a European single market for electronic communications. The package, widely known as the "Connected Continent" package, proposed reforms including:

1. The introduction of a single EU authorisation across all EU Member States.
2. Abolishing roaming charges on incoming calls, earlier than the current Regulation on roaming would have, and providing incentives to reduce roaming on other charges.
3. Introducing greater and more harmonised rights for consumers and end users.

4. Harmonising and coordinating spectrum allocation.
5. Harmonising virtual access to fixed networks.
6. Legislating for net neutrality.

Since its introduction, the Connected Continent proposals have been making their way through the Parliamentary process. Over time, and in part due to overlap with the proposals for a Digital Single Market (see section below), these proposals have focused on the topics of roaming and an open internet. On 15 July 2015, the European Parliament ("EP") Committee on Industry, Research and Energy ("ITRE") endorsed the 30 June 2015 informal trialogue agreement on roaming and the open internet [see endnote 12]. The text of the draft trialogue agreement now has to be formally approved by the European Parliament and the Council. It is currently envisaged that the new regulation will enter into force on 30 April 2016, and the net neutrality provisions will apply immediately [see sections 7 and 8].

The other parts of the original Commission proposal for a Connected Continent regulation were previously left out of the negotiating mandate by common decision of the European Council. It is envisaged that these will be addressed as part of the proposals for a Digital Single Market.

Regulation of Content

Regulation of content is something that is largely left within the remit of each individual Member State, rather than being imposed at a European level. However, Europe-wide legislation does exist to ensure that a content provider based in one EU State is not subject to unnecessary burdens in making that content available in other Member States.

In particular, under the Audiovisual Media Services Directive ("AVMS Directive") [see endnote 13], a structure is established which provides that, so long as a content provider is regulated in their "home" EU Member State (and there are a series of criteria to determine which Member State a content provider should call home), no other Member State may apply incremental content regulation. In return, there are two sets of minimum content rules which every Member State must apply – one relating to linear (i.e. traditional TV) content and one relating to TV-like video-on-demand services. Member States are free to impose stricter regulations on their home content services, but can only intervene with content services from elsewhere for serious child protection reasons.

The minimum rules relate to:

- For both linear and non-linear services:
  - Protection against hate speech.
  - Separation of editorial and advertising and prohibition on surreptitious advertising.
  - Controls on product placement.
- For non-linear services only:
  - Protection of minors.
  - General obligations to promote European works.
- For linear services only:
  - Provisions guaranteeing universal coverage to important sporting events and providing for news access.
  - Quotas on European works and works from independent producers.
  - Controls on the volume of TV advertising and certain content restrictions.
  - Protection of minors.
  - Right to reply.

There are also provisions dealing with collaboration between national regulators in the case of cross-border services.

Proposals for a Digital Single Market

On 22 to 24 May 2014, elections were held in the European Union for a new European Parliament. Jean Claude Juncker (former Prime Minister of Luxembourg) was appointed President of the European Commission, with President Juncker officially taking office on 1 November 2014.

President Juncker identified the creation of a connected digital single market as a top priority for the new European Commission, including it in the top ten priority areas in the 2015 Commission Work Programme. On 6 May 2015 the European Commission unveiled its plans to create a Digital Single Market ("DSM") in Europe. Building on the strategy and objectives underpinning the Digital Agenda for Europe strategy and the Connected Continent proposals, the objective of the European Commission was stated to be the creation of a market "*in which free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and high level of consumer and personal data protection, irrespective of their nationality or place of residence*" [see endnote 14].

The DSM strategy aims to:

- Ensure better access for consumers and business to digital goods and services across Europe by removing barriers that hold back cross-border e-commerce.
- Create the right conditions, environment and a level playing field for digital networks and content services to flourish by creating the right conditions for infrastructure investment.
- Maximise the growth potential of the digital economy by investing in ICT infrastructures, technologies and research and innovation.

Expressing the view that the Connected Continent proposals would not solve all of the issues associated with the current Regulatory Framework, a key pillar of the DSM strategy is a proposed overhaul of the 2009 Revisions, dealing with those matters left out of the Connected Continent negotiating mandate. This overhaul, which is scheduled to commence in 2016 according to the published timeline for DSM, includes:

- Tackling regulatory fragmentation across the EU.
- Further harmonisation of radio spectrum.
- Ensuring a level playing field for operators that provide competing services.
- Incentivising investment in high-speed broadband networks to make sure that end-users benefit from competitive, affordable and high-quality connectivity.
- Enhancing regulatory consistency, particularly on spectrum management.

The DSM strategy also addresses content regulation and signals a review of the AVMS Directive. In particular, questions are under consideration about: reducing the burdens on linear broadcasters to bring their regulatory obligations closer to those of non-linear services; weakening the "country of origin" approach in order to protect cultural diversity; and widening the net of regulation to cover businesses that are currently unregulated as either they are based outside the EU or they are not "TV-like video-on-demand" services within the purview of the existing regulation. This review has already commenced but will continue into 2016.

2 Details of the Regulatory Framework

Clearly there is a lot of change envisaged in the forthcoming years in respect of the Regulatory Framework. The current provisions are set out below, but it is expected that all of the Directives that form part of this Directive will go through significant amendment in the course of the next 12 to 24 months.

2.1 The Framework Directive

The Framework Directive [see endnote 1] concerns the structural and procedural elements of the Regulatory Framework. It covers the establishment, objectives and procedures of NRAs. As a general principle, NRAs must be legally distinct and functionally independent from all operators on the market. In addition to the general obligation on NRAs to promote competition in the provision of electronic communications networks, services and associated facilities and services, the Framework Directive also sets out their other objectives in areas including: management of radio frequencies; numbering and addressing; rights of way; and facility sharing.

The Framework Directive also sets out how NRAs should define the relevant national communications markets and analyse whether there are any operators with SMP on those markets. Article 14(2) of the Framework Directive provides that "*an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers*".

In the event of finding that there are undertakings with SMP in relevant markets, NRAs must propose appropriate regulatory remedies to ensure that effective competition is restored. In such cases, NRAs have the option to use the remedies permitted under the Universal Service Directive and the Access Directive, ranging from simple transparency obligations, to highly complex access and intrusive cost-orientation obligations.

In order to ensure transparency and consistency throughout the Community, NRAs must notify their findings and proposed measures to the Commission, BEREC and other NRAs prior to implementation, in accordance with Article 7 of the Framework Directive and the Commission's Recommendation on Notifications, Time Limits and Consultations [see endnote 15]. The Commission has the power to *veto* the NRA's market definition or determination of providers with SMP. The 2009 Revisions provide that if the Commission, in close cooperation with BEREC, considers that a draft remedy notified by a national regulator would create a barrier to the single market, the Commission may issue a recommendation to the national regulator to amend or withdraw its planned remedy. The national regulator is, however, not bound by this recommendation, but may also uphold the planned remedy. The new rules also enable the Commission to adopt further harmonisation measures in the form of recommendations or (binding) decisions if divergences in the regulatory approaches of national regulators, including to remedies, persist across the EU in the longer term, e.g. on broadband access conditions or on mobile termination rates.

The Better Regulation Directive also makes several other amendments to the Framework Directive. Of note is the new Article 8a, which obliges Member States to co-operate closely with each other and the Commission in the strategic planning and co-ordination of radio spectrum policy in the European Community. For these purposes, the Commission may submit legislative proposals to establish multi-annual radio spectrum policy objectives. Furthermore, the 2009 Revisions also contain provisions in relation to risk sharing and cooperation in respect of the build-up of new infrastructures and transmission facilities, and to the introduction of spectrum trading in the EU. The DSM strategy intends to build further on these spectrum proposals.

- *Recommendation on relevant products and service markets*

In accordance with Article 15 of the Framework Directive, the Commission adopted a Recommendation on Relevant Markets in 2003 [see endnote 16], which was revised in 2007 [see endnote 17], and again in 2014 [see endnote 21]. The purpose of the Recommendation is to identify the product and service markets (at wholesale and retail level) where the Commission recognises that *ex ante* regulation may be warranted because the market is not yet effectively competitive. NRAs must take account of the Recommendation and guidelines for market analysis and the assessment of SMP when defining relevant markets and assessing the extent to which such relevant national markets are effectively competitive. The Recommendation seeks to ensure that the same markets are subject to review and/or regulation in all Member States, and to give notice to industry participants of the markets in which *ex ante* regulation is likely to continue to be applied. The Recommendation sets out the cumulative criteria that should be used by NRAs when identifying markets susceptible to *ex ante* regulation, those criteria being:

- the presence of high and non-transitory entry barriers (whether of a structural, legal or regulatory nature);
- the structure of the market not tending towards the emergence of effective competition; and
- the application of competition law alone, not adequately addressing the market failure(s) concerned.

NRAs can intervene in markets not listed in the Recommendation, but they must ensure that such a market is defined on the basis of competition principles under the Commission Notice on the definition of relevant market for the purposes of Community competition law [see endnote 18], that it is consistent with the Commission's Guidelines on market analysis and the assessment of SMP [see endnote 19] and that it satisfies the cumulative criteria set out in the Recommendation. The identification, analysis and regulation of a market not listed in the Recommendation is subject to the procedure under Article 7 of the Framework Directive (outlined above). In this context, the ERG Report on the transition from sector-specific regulation to competition law [see endnote 20] gives some guidelines on the way NRAs should tackle the period comprised between the decision of withdrawal of obligations and the transition to a pure application of competition law.

On 9 October 2014, the European Commission adopted a revised Recommendation, which took immediate effect, on relevant product and service markets that are susceptible to *ex ante* regulation. The Recommendation identifies only four wholesale markets (one divided into two parts) which the Commission considers to be susceptible for *ex ante* regulation (this is reduced from the seven markets identified in 2007 and now, no retail market is included). These markets are:

1. Market 1: wholesale call termination on individual public telephone networks provided at a fixed location.
2. Market 2: wholesale voice call termination on individual mobile networks.
3. Market 3: This is divided into two parts:
   (a) wholesale local access provided at a fixed location; and
   (b) wholesale central access provided at a fixed location for mass-market products.

4. Market 4: wholesale high-quality access provided at a fixed location.

The same cumulative criteria as set out above will continue to apply, as with the previous Recommendation [see endnote 21].

2.2 The Authorisation Directive

The key objective of the Authorisation Directive [see endnote 2] is to harmonise and simplify authorisation rules and conditions throughout the EU. Pursuant to the Authorisation Directive, the provision of communications networks or services (with the exception of the use of radio frequency) may only be subject to a general authorisation, for which the party concerned may be required to submit a notification, but must not be required to obtain an explicit decision or other administrative act from NRAs. Information required in any notification must be limited simply to what is necessary for the identification of the provider, a short description of the network or service and an estimated date for launching the service.

The conditions that may be attached to general authorisations, rights of use for frequencies and rights of use for numbers are listed exhaustively in an annex to the Authorisation Directive. Specific additional obligations, which may be imposed pursuant to the Access Directive and the Universal Service Directive, must be set out separately by the NRA, together with the criteria and procedures for imposing such obligations. Conditions imposed must be objectively justified in relation to the network or service concerned, as well as being non-discriminatory, proportionate and transparent.

Member States have the right to impose administrative charges on undertakings providing electronic communications services and networks, but these must only cover the administrative costs incurred in the management, control and enforcement of the general authorisation scheme. Member States may also impose fees for the right to install facilities on, over or under public land that reflect the need to make optimum use of that land. The Directive recognises that it will not be possible, under a system of general authorisation, to attribute administrative costs to individual undertakings in the form of licence fees, and therefore identifies turnover-related administrative charges as a possible fair, simple and transparent alternative.

The amendments to the Authorisation Directive by the 2009 Revisions [see endnote 8] align the Authorisation Directive to the new policy for spectrum, create an efficient procedure for companies needing rights of use to provide pan-European services and ensure a smooth transition to the introduction of spectrum trading in the EU. It is intended that the spectrum policy provisions in the Authorisation Directive will be amended as a result of DSM.

2.3 The Access Directive

The Access Directive [see endnote 3] regulates the rights and obligations of network operators to access each others' networks and to interconnect with each other. Furthermore, the Directive also governs the rights of service providers to access third parties' networks. Broadly, Member States must ensure that there are no restrictions preventing negotiations taking place between operators regarding the technical and commercial arrangements for access and/or interconnection.

As a general rule, all operators of public communications networks have the right and obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services. In support of this obligation, NRAs can require undertakings that control access to interconnect their networks where this is necessary to ensure end-to-end connectivity. All such obligations and associated conditions must be objective, transparent, proportionate and non-discriminatory.

Apart from the provisions applying to all network providers, the Access Directive also contains the *ex ante* obligations which NRAs may impose on operators with SMP. Potential remedies include:

- transparency (e.g. pricing policy, terms and conditions for access or interconnection or interoperability, technical interfaces);
- non-discrimination (where market analysis indicates that discriminatory behaviour by the operator concerned could lead to a distortion of competition);
- accounting separation in order to make wholesale prices and internal cross transfers within a vertically integrated company transparent;
- access to, and use of, specific network elements and/or associated services or facilities; and
- price controls and cost accounting, particularly for cost-orientation of prices for interconnection and/or access.

These options are effectively a regulatory "toolbox" from which NRAs may pick whichever measures are appropriate and adequate to regulate the market failure identified in the market definition and analysis process mentioned above.

One of the key amendments to the Access Directive by the 2009 Revisions [see endnote 8] is the introduction of a functional separation remedy that may be imposed by NRAs, subject to the approval of the European Commission. In addition, the revised Access Directive also contains particular information requirements in the case an operator with SMP intends to undergo a voluntary separation (such as transferring assets to a separate legal entity or establishing a separate business entity to provide all retail providers with fully equivalent access products).

2.4 Universal Service Directive

In contrast to the Access Directive, which covers the relations between electronic communications providers on a wholesale basis, the Universal Service Directive [see endnote 4] concerns the relationship between electronic communications providers and end-customers. One of the main goals of the Directive is to set out obligations for Member States to ensure end-users have access to a "universal" service (i.e. good quality publicly available services) and a range of associated services, such as directory enquiries, public payphones, measures for disabled end-users and quality of service. The Directive enables NRAs to provide for a minimum set of services of specified quality to be offered on an affordable basis to all users independent of geographical location and, where such services are provided at prices or on other terms and conditions which are not set on a commercial basis, to ensure the most efficient and appropriate approach to providing these services.

If no undertaking active on the respective market offers such services on a voluntary basis, Member States may designate one or more undertakings to provide one or more, or all, of the minimum set of services pursuant to this Directive. In designating undertakings, Member States must use an efficient, objective, transparent and non-discriminatory mechanism, which can also address itself to determining the net cost of meeting the universal service obligations.

Further to these general provisions on universal service, the Directive also contains a list of obligations that NRAs may impose on operators with SMP, such as retail price cap measures, measures to control individual tariffs, or measures to orient tariffs rewards, costs or prices on comparable markets in order to protect end-user interests whilst promoting effective competition.

"Must carry" obligations may also be imposed on the transmission of specified radio and television broadcast channels and services, where the relevant network serves as the primary means of access to the services for a large number of users. "Must carry" obligations may only be imposed if necessary to meet general interest objectives and on the basis that the obligations are proportionate and transparent. Following amendments to this Directive, Member States will be obliged to review these "must carry" obligations on a regular basis.

Finally, the Universal Service Directive contains various consumer protection rules, including minimum requirements for customer contracts, minimum standards for number portability or directory services, pan-European emergency numbers or pan-European prefixes.

The 2009 Revisions also update the Universal Service Directive [see endnote 9], including amendments to the regulatory controls that can be imposed on undertakings with SMP in specific retail markets.

In order to facilitate the ability of end-users to switch between operators, the amended Directive also foresees that subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within one working day, and Member States will ensure appropriate sanctions are provided for under national rules, including an obligation to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf. Furthermore, the revised Directive contains various provisions on the necessary level of detail to be provided in contracts with end-customers, including:

- whether or not access to emergency services and caller location information is being provided;
- information on any other conditions limiting access to and/or use of services and applications;
- information on procedures put in place to measure and shape traffic and their likely impact on service quality; and
- the duration of the contract and the conditions for renewal and termination of services and of the contract.

Member States must also ensure that fixed and mobile network operators make caller location information available to authorities handling emergencies in response to all calls to the European emergency call number "112". This requirement allows the use of caller location data by the emergency services without the consent of the user concerned and is therefore an exception to the Privacy and Data Protection Directive, which generally requires that privacy and data protection rights of individuals should be fully respected and adequate technical and organisational security measures should be implemented for that purpose.

A separate Recommendation [see endnote 22] requires Member States to draw up detailed rules for public network operators with respect to calls made to the European emergency call number "112" and to provide adequate information to their citizens about the existence, benefit and use of the European emergency call number "112" service. The Recommendation encourages Member States to foster and support the development of services for emergency assistance, including handling procedures for forwarding location and other emergency or accident-related information to public safety answering points.

In March 2010, the Commission launched a public consultation on the universal service principles in e-communications, requesting the sector's opinion with regard to the concept of universal service, the role of universal service to achieve the objective of "broadband for all", and the universal service financing. While a wide range of views were expressed in the consultation, no consensus was reached regarding the future role of universal service obligation in furthering Europe's broadband objectives. The Commission came to the conclusion that at the moment including broadband access within the scope of universal service at EU level would not meet the second criterion in the Universal Service Directive, namely conveying a general net benefit to all European consumers [see endnote 23].

3 Establishment of the Body of European Regulators for Electronic Communications

Following the 2009 Revisions to the Regulatory Framework, a new European authority, BEREC, was established in January 2010 to act as an exclusive forum for co-operation among NRAs [see endnote 10]. BEREC is composed of a board of the heads of the 28 NRAs, with one of its key roles being to enable NRAs to harness their joint expertise. BEREC's role complements, at an EU level, the regulatory tasks performed at a national level by NRAs. As well as providing general information and advisory functions, BEREC's role involves:

- providing a framework for co-operation between NRAs;
- assisting NRAs in providing regulatory oversight of market definition, analysis and implementation of remedies;
- assisting in the definition of trans-national markets;
- advising on radio frequency harmonisation; and
- helping with the administration of numbering and numbering portability.

These duties will be expanded once the Regulatory Framework is fully implemented.

BEREC's actual power remains the subject of some debate. At present, the Commission and NRAs must take "utmost account" of any BEREC opinions and documents. BEREC is also entitled to advise the European Parliament and Council.

BEREC's activities include addressing issues such as next-generation access, network neutrality, universal service obligation, convergence, bundled offers, consumer switching, cross-border issues, equivalence for disabled users, functional separation, market definition for business services, broadband and roaming. A number of consultations, opinions, reports and other documents related to such regulatory issues were published, apart from the documentation related to organisational and procedural aspects.

An Office to support BEREC from an administrative and professional point of view has also been established. The Office is a Community body in its own right with legal personality and its own budget. It is composed of a Management Committee, an Administrative Manager and staff. On 24 February 2011, the Government of the Republic of Latvia, BEREC and the BEREC Office signed a Seat Agreement aimed at governing the location of the Office in Riga and the relationship between the parties [see endnote 24]. The Office started formal operations on 14 October 2011. It is responsible for:

- providing administrative and professional support to BEREC;
- collecting and exchanging information;
- publishing best regulatory practice to NRAs;
- establishing Expert Working Groups; and
- supporting the Chair of the Board of Regulators.

4 Competition Directive

The Competition Directive [see endnote 7] provides the background for the various other Directives of the Regulatory Framework by obliging Member States to remove exclusive and special rights for the provision of all electronic communications networks to the extent

that they have not already done so. It also obliges Member States to apply a general authorisation regime – which is further specified in the Authorisation Directive – and open up directory services within their national territory, including both the publication of directories and the directory enquiry services.

The Directive further requires Member States to abolish any regulatory prohibition or restriction on the offer of space segment capacity to any authorised satellite earth station network operator, and to ensure that dominant providers of electronic communications networks and publicly available telephone services operate their public electronic communications network and cable television network as separate legal entities.

5 Radio Spectrum Decision

The Radio Spectrum Decision [see endnote 5] entered into force on 24 April 2002. The key objective of the Decision is to provide a legal framework for the co-ordination of spectrum policy across the EU. To aid the Commission in pursuing the co-ordination of policy and its implementation, the Decision also established a Radio Spectrum Committee.

Since the Radio Spectrum Decision was adopted in 2002, the Commission has subsequently adopted a number of decisions, in accordance with the opinion of the Radio Spectrum Committee, in order to harmonise the conditions for the availability and efficient use of spectrum. Member States are required to keep the use of the relevant frequency bands under scrutiny and report their findings to the Commission to allow a regular and timely review of the decisions.

The allocation and management of radio spectrum is undertaken on a national basis. The Commission established the Radio Spectrum Policy Group ("RSPG") in order to provide a forum for discussing and co-ordinating the harmonisation of spectrum policy and allocation [see endnote 25]. The RSPG adopts non-binding opinions to assist and advise the Commission in its development of European spectrum policy and in harmonising the availability and use of spectrum across the internal market.

The European Commission's Radio Spectrum Policy Programme outlines at a strategic level how the use of spectrum can contribute to the most important political objectives of the European Union from 2011 to 2015. It was approved by the European Parliament and Council on 14 March 2012 [see endnote 26]. According to the programme, the European Commission will work together with all Members States until 2015 to support and achieve, among others, the following policy objectives:

- ensuring at least 1,200 MHz of suitable spectrum by 2015 to best meet the increasing demand for wireless data traffic. That figure includes spectrum already in use;
- allowing the possibility of trading rights of use of spectrum;
- fostering access to broadband at a speed of not less than 30 Mbps by 2020 for all Union citizens;
- fostering the accessibility of new consumer products and technologies;
- ensuring that the radio spectrum can be used to support a more efficient energy production and distribution in Europe;
- finding appropriate spectrum for wireless microphones and cameras ("PMSE"); and
- developing until 1 July 2013 a methodology for the analysis of technology trends, future needs and demand for spectrum in Union policy areas, in particular, for those services which could operate in the frequency range from 400 MHz to 6 GHz, in order to identify developing and potential significant uses of spectrum.

As set out above and how this Radio Spectrum Policy Programme will be influenced by the output of the Connected Continent and Digital Single Market proposals.

6 Privacy and Data Protection

6.1 Privacy and Data Protection Directive

The primary objective of the Privacy and Data Protection Directive [see endnote 6] is to harmonise national provisions regarding personal data throughout the EU. Cross-border flows of personal data, important to the fluidity of the internal market, could be hampered by different levels of protection of individual rights and freedoms in the different Member States and thus require harmonisation.

Every data subject is given the right of access to personally identifiable data relating to him/her, and a right to rectification of that data where it is shown to be inaccurate. In addition, individuals must be provided with information as to the purpose of processing and the identity of the data controller, so that they can exercise their right of access. In addition, the Directive provides that personal data and its processing must respect the following basic principles, namely that it be:

- processed fairly and lawfully;
- collected for specified, explicit and legitimate purposes and not further processed in any manner incompatible with that purpose or those purposes;
- adequate, relevant and not excessive in relation to its purposes;
- accurate and, where necessary, up-to-date;
- kept in a form permitting identification of data subjects for no longer than is necessary; and
- processed in accordance with the rights of the data subject under the Directive.

Compliance with these principles is the responsibility of the data controller (i.e. the person or entity which determines the purposes and means of processing of personal data). The above safeguards for the protection of access to personal data may only be restricted by Member States where necessary to safeguard national security, defence, public security, the prevention of criminal offences, economic or financial interests of a Member State, regulatory functions in certain cases and the protection of the data subject or the rights and freedoms of others.

Individuals who suffer damage as a result of unlawful processing operations or of any other acts incompatible with national provisions implementing this Directive are entitled to receive compensation from the data controller for the damage suffered.

Under this Directive, personal data may not be transferred out of the EU for processing unless the third country in question ensures an "adequate level of protection". The adequacy of protection is to be assessed in light of matters such as the nature of the data, the purpose and duration of the proposed processing operation, and the rules applicable in the third country in question.

In 2012, the Commission proposed a comprehensive reform of data protection rules in the form of draft General Data Protection Regulation ("GDPR") to replace the current Directive, and a new directive on processing data to prevent, investigate, detect or prosecute criminal offences or enforce criminal penalties [see endnote 27]. This is intended to further harmonise Member States' rules since, as a regulation, the GDPR will be directly effective, without the need for transposing legislation at national level. The GDPR is intended to strengthen individuals' rights by enhancing the

principles of the current Directive, and introducing new rights, for example a "right to be forgotten" and a "right to data portability". Independent national data protection authorities will be strengthened to better enforce the data protection rules and sanctions will be significantly increased with anti-trust style, turnover-based fines. The GDPR is also intended to simplify compliance for multi-national organisations by introducing "one-stop-shop" regulation by the regulator in the Member State where that organisation is head-quartered. At the time of writing, the GDPR is entering its final negotiation phase between the EU institutions, which aim to agree and adopt the Regulation by the end of 2015. If this timetable is achieved, the GDPR would take effect after a two-year lead-in period, i.e. by the end of 2017 or early 2018.

6.2 Directive on Privacy and Electronic Communications and Regulation on Data Breaches

The Directive on the processing of personal data and the protection of privacy in the electronic communications sector (PECD) amends and adds a layer of sector specific rules to the General Data Protection Directive in the area of electronic communications services [see endnote 28].

This Directive contains a range of provisions relating to:

- security of a network or communications service;
- confidentiality of the communications;
- processing and storage of traffic data and location data of a user; and
- particular services, e.g. itemised billing, caller-line identification, automatic forwarding or telephone directories.

The Directive also ensures protection for individuals in respect of their rights to prevent direct marketing by various technical means unless they have "opted-in" to such use.

The 2009 Revisions to this Directive [see endnote 9] contain a duty for providers of publicly available electronic communication services to adhere to mandatory notification requirements where end-users' personal data is breached (i.e. lost or compromised).

In addition, online behavioural advertising and the use of cookies are also addressed. The 2009 Revisions state that, when storing information or gaining access to information already stored in the user's equipment, the user's consent will be required. The user must have been clearly and comprehensively informed about the purposes of the processing (unless the storage or access is used to carry out the transmission of a communication or it is necessary to provide a service explicitly requested by the user). The European Commission has also encouraged the industry to adopt measures aimed at granting that behavioural advertising is carried out in a transparent manner and in compliance with privacy rules.

The European Commission has announced that it will reform the PECD once the negotiations on the GDPR are finalised [see endnote 29].

In August 2013, Commission Regulation 611/2013 on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC on privacy and electronic communications came into force [see endnote 30]. This Regulation sets out obligations on telecommunications operators and ISPs to notify national regulators and affected individuals when their customers' personal data is compromised. The objective is to ensure a homogenous system of notification of data breaches across the EU.

6.3 Data Retention Directive

In March 2006, the European Parliament and the Council adopted the Data Retention Directive, which amended Directive 2002/58 on privacy and electronic communications [see endnote 31]. The purpose of the Data Retention Directive was to harmonise Member States' provisions on obligations for electronic communications network operators and service providers to retain data generated or processed by them in order to ensure that the data is available for the purpose of investigation, detection and prosecution of serious crime. The Directive specified particular data that must be retained in the provision of fixed network telephony and mobile telephony, internet email, internet telephony and internet access for a period of at least six months, up to a limit of two years.

Member States were required to implement the majority of provisions necessary to comply with the Data Retention Directive into national law by 15 September 2007, but had the opportunity to postpone the obligation to retain communications data relating to internet access, internet telephony and internet email until 15 March 2009. The Directive was contested by some Member States from the beginning. The Constitutional Courts in Romania, Germany and the Czech Republic, however, annulled the implementation legislation as unconstitutional, so the legislation is not in place in these Member States.

More recently, on 8 April 2014, the European Court of Justice ruled that the Data Retention Directive 2006/24/EC interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data. The Directive was declared invalid [see endnote 32]. The European Commission stated in a first reaction that it "will now carefully assess the verdict and its impacts" [see endnote 33]. At the time of writing, it is still not clear whether the Commission will draft new legislation replacing the invalidated Directive. The latest public statement by the Commission is that it "will continue monitoring legislative developments at the national level". This statement was made in July 2015 in response to demands by various digital rights lobby groups for the Commission to investigate the data retention laws of at least six Member States which appear to be in breach of the Charter of Fundamental Rights, and require those states (by means of infringement procedures if necessary) to make those laws compliant with the Charter [see endnote 34].

6.4 Draft Directive on Network and Information Security

In 2013 the Commission submitted a Proposal for a Directive concerning measures to ensure a high common level of network and information security across the Union [see endnote 35]. At the time of writing, this Directive is reportedly close to adoption at EU level [see endnotes 35 and 36].

In order to complement Directive 2002/58 on privacy and electronic communications, which introduces obligations to those undertakings, the NIS Directive will introduce obligations on "market operators". At the time of writing, although the broad principles of the Directive have reportedly been agreed by the EU institutions [see endnote 37], the precise scope of a market operator is unclear. In the Commission's original proposal it is defined as: (a) a provider of information society services which enable the provision of other information society services (a non-exhaustive list of which is set out in Annex II, including e-commerce platforms, internet payment gateways, social networks, search engines, cloud computing services, application

stores); and (b) an operator of critical infrastructure that are essential for the maintenance of vital economic and societal activities in the fields of energy, transport, banking, stock exchanges and health (a non-exhaustive list of which is set out in Annex II). The inclusion of information society services has been controversial, and the Council's official press release announcing institutional agreement on the principles of the Directive in June 2015 stated that "It was agreed that digital service platforms would be treated in a different manner from essential services. The details will be discussed at a technical level" [see endnote 37]. At the time of writing, however, there is no further detail about how the NISD will apply to digital services.

Once adopted, the NIS Directive will: (a) lay down obligations for all Member States concerning the prevention, handling of and response to risks and incidents affecting networks and information systems; (b) create a cooperation mechanism between Member States in order to ensure a uniform application of this Directive within the Union and, where necessary, a coordinated and efficient handling of and response to risks and incidents affecting network and information systems; and (c) establish security requirements and breach notification requirements for market operators and public administrations.

7 Roaming Regulation

Under existing regulation with respect to roaming [see endnote 38] retail roaming caps are EUR 0.19 per minute of calls made, EUR 0.06 per SMS sent, and EUR 0.20 per MB of data (excluding VAT). From April 2016, these current retail caps will be replaced by a maximum surcharge to domestic prices of EUR 0.05 per minute of call made, EUR 0.02 per SMS sent, and EUR 0.05 per MB of data (excluding VAT).

On 30 June 2015, the European Commission announced that it, the European Parliament and Council had reached a political trialogue agreement on a proposed regulation in relation to roaming and the open internet (net neutrality). Under the terms of the proposed regulation, roaming charges will end from 15 June 2017, with the transitional arrangements starting from April 2016.

Roaming providers will be able to apply a fair use policy to prevent abusive use of roaming, which would include the use of roaming services for purposes other than periodic travel. The exact details of this fair use policy will be defined by the Commission and telecoms regulators over the coming months.

Safeguards will also be introduced to address the concern expressed by operators about recovery of costs. The draft agreement proposes that if operators can prove that they cannot recover their costs and that this affects domestic prices, national regulators are able to authorise them to impose minimal surcharges in exceptional circumstances to recover these costs, provided that such regulators will retain a *veto* right to amend or reject the surcharges if they are unfounded.

The text of the draft regulation now has to be formally approved by the European Parliament and the Council. It is currently envisaged that the new regulation will enter into force on 30 April 2016 [see endnote 12].

8 Net Neutrality

As a part of the 30 June 2015 trialogue agreement between the European Commission, Parliament and Council, agreement was also reached on proposed rules for the open internet (commonly referred to as net neutrality) [see endnote 38]. It has been agreed that new EU-wide open internet rules will be introduced under which providers must treat all traffic equally when providing internet access services. Internet access providers will still be able to use reasonable traffic management measures, for example, to ensure network security or combat child pornography. Agreements on services requiring a specific level of quality will also be allowed, although operators will have to ensure the general quality of internet access services.

Once the draft regulation is formally approved by the European Parliament and the Council, these net neutrality provisions will have immediate effect.

Endnotes

1. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, ([2002] O.J. L108/33).
2. Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, ([2002] O.J. L108/21).
3. Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, ([2002] O.J. L108/7).
4. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, ([2002] O.J. L108/51).
5. Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community, ([2002] O.J. L108/1).
6. Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, ([1995] O.J. L281/31).
7. Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, ([2002] O.J. L 249/21).
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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, ([2009] O.J. L337/11).
10. 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, ([2009] O.J. L337/1).
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13. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), ([2010] O.J. L95/1).
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16. Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21 of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, ([2002] O.J. C497).
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