Telecoms and Media

An overview of regulation in 48 jurisdictions worldwide

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United States

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Communications policy

1 Policy

Summarise the regulatory framework for the telecoms and media sector. What is the policymakers' procedure?

Both the substantive and procedural regulatory framework for United States telecommunications policy is found in the Communications Act of 1934 (amended many times, most notably in 1996) (the Communications Act). This established the Federal Communications Commission, which has principal authority to implement the provisions of the Communications Act.

As discussed in this chapter, the Communications Act gives the FCC jurisdiction to regulate or oversee many industries, including broadcast television, cable television, telecoms (both common and private carriers), wireless communications, domestic and international satellites, and equipment manufacturers. Importantly, the FCC is also statutorily mandated to promote the development of broadband infrastructure to reach all US consumers. The FCC's oversight includes spectrum management, which is an increasingly hot topic in the United States. The US Department of Commerce's National Telecommunications and Information Agency (NTIA) also plays a role in spectrum management.

The FCC has five commissioners, appointed by the president of the United States and subject to confirmation by the United States Senate, who serve seven-year terms. No more than three commissioners may be members of one political party. The president invariably selects a chairman from his own political party. Although the FCC is an independent regulatory agency, the confirmation, appropriations, and oversight functions of the United States Congress lead to a dynamic where Congressional Committees and individual members of Congress will often weigh in with their views on policy.

The FCC has a professional staff, organised into functional bureaus. The principal bureaus are the Media, Wireless, Wireline, International and Public Safety Bureaus. There are a number of non-bureau level offices, including the Office of Engineering and Technology; Office of General Counsel; and the International and Enforcement Bureau.

In addition to the federal role, individual states also have jurisdiction, often exercised through state public service commissions, over purely local and intrastate telecommunication services. The Communications Act also grants state and local governments authority over certain aspects of cable television service in particular circumstances.

2 Convergence

Has the telecoms-specific regulation been amended to take account of the convergence of telecoms, media and IT? Are there different legal definitions of 'telecoms' and 'media'?

The Communications Act is structured so the provisions that impact the providing of telecom services are found in title II of the statute, the provisions governing broadcast television is found in title III, and the provisions affecting cable television service are in title VI. There are different legal definitions of these services and concepts.

As a consequence, US regulation has been handicapped in dealing with the convergence and evolution of these forms of communications. This tension has been a matter of considerable controversy before the FCC, Congress and the courts.

The American Recovery and Reinvestment Act of 2009 directed the FCC to develop a National Broadband Plan to address specific key priorities, including job creation and economic development, health care, education, energy and the environment, public safety, and homeland security. The FCC has now published a National Broadband Plan, available at www.broadband.gov. The Plan intends to establish competition policies; ensure efficient allocation and use of government-owned and government-influenced assets, particularly spectrum; create incentives for universal availability and adoption of broadband; and update policies, set standards, and align incentives to maximise broadband use for national priorities. The Plan recommends six long-term goals over the next decade:

1. at least 100 million US homes should have affordable access to actual download speeds of at least 100 megabits per second and actual upload speeds of at least 50 megabits per second;
2. the US should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation;
3. every American should have affordable access to robust broadband service, and the means and skills to subscribe if they so choose;
4. every American community should have affordable access to at least 1 gigabit per second broadband service to anchor institutions such as schools, hospitals and government buildings;
5. every first responder should have access to a nationwide, wireless, interoperable broadband public safety network;
6. every American should be able to use broadband to track and manage their real-time energy consumption.

In the current political environment in the United States, the specifics of a National Broadband Plan and the tactics to implement it are highly contentious.

3 Broadcasting sector

Is broadcasting regulated separately from telecoms? If so, how?

As indicated above, the Communications Act is structured so that separate provisions apply to each of the services of broadcast television and cable television and of telecommunications and common carrier services. Different Bureaus are in charge of that regulation. However, ultimately the five commissioners themselves have ultimate authority over all the regulation involved.
Telecoms regulation – general

4 WTO Basic Telecommunications Agreement

Has your jurisdiction committed to the WTO Basic Telecommunications Agreement and, if so, with what exceptions?

Yes, the United States committed to the WTO Basic Telecommunications Agreement. It did take a most-favoured nation exemption for direct to home, direct broadcast satellite and digital audio radio services.

5 Public/private ownership

What proportion of any telecoms operator is owned by the state or private enterprise?

Virtually all telecoms operators in the United States are owned by publicly traded or privately held companies. The United States government does not own any telecoms operator. There are a few examples of regional or local carriers owned by local municipal or county government entities.

6 Foreign ownership

Do foreign ownership restrictions apply to authorisation to provide telecoms services?

Section 310 of the Communications Act restricts ownership of broadcast, common carrier and other licences that utilise the radio spectrum. Section 310(a) prohibits all ownership of broadcasting licences by foreign governments or their representatives. Section 310(b)(3) prohibits foreign persons or entities from owning more than 20 per cent of companies that hold such licences, and, subject to the FCC’s authority to waive the limit, section 310(b)(4) prohibits foreign persons or entities from owning more than 25 per cent of entities owning such companies.

Section 310(b)(4) authorises the FCC to exempt companies from the 25 per cent ownership limit if the Commission finds that the public interest will be served. In 1997, the Commission adopted a rebuttable presumption that 100 per cent foreign ownership of common carriers was in the public interest if the foreign entities were based in a WTO member country and no significant national security concerns were present. The presumption does not extend to broadcasting licences. Foreign persons may be officers or directors of FCC licensees.

There are no general restrictions on foreign ownership of domestic or international telecommunications carriers. In certain circumstances the Commission has imposed restrictive regulations on international telecommunications carriers for routes between the United States and a foreign country where the US international telecommunications carrier has an affiliation with a telecommunications carrier in the foreign country.

Certain acquisitions of US based companies by foreign entities that may impact national security must be cleared by the Committee on Foreign Investment in the United States (CFIUS), which includes senior members of the departments of treasury, justice, defence and homeland security, among others. CFIUS decisions are subject to review by the president of the United States, but do not receive judicial review.

7 Fixed, mobile and satellite services

Comparedly, how are fixed, mobile and satellite services regulated? Under what conditions may public telephone services be provided?

All incumbent and competitive telephone exchange carriers have blanket authority to provide interstate telephone service under section 214 of the Communications Act. The FCC regulates the interstate aspect of fixed telephone service, while the states over-see intrastate tariffs and other local aspects of service. The FCC reviews the qualifications of any buyer of a telephone company through its transfer procedure.

Mobile services are exclusively licensed by the FCC for fixed terms, usually 10 years. The licences serve specific geographical areas. The regulatory scheme for mobile service resides with the FCC. The states do, however, retain authority over such matters as the zoning of wireless antenna towers, subject to the FCC’s overall policy objectives.

Satellite services are extensively regulated by the FCC. The regulations cover spectrum assignment, orbital slots for geostationary systems, licensing, service requirements, and deorbiting policies. Licences are generally awarded on a ‘first come, first served’ basis for up to 15 years, and licensees must post a substantial bond with the agency as well as complete construction and launch of the system within a specified time frame. There is no limit on the types of services provided by satellite, but offering an international publicly available telephone service requires obtaining an FCC authorisation under section 214 of the Communications Act.

8 Satellite facilities and submarine cables

In addition to the requirements under question 7, do other rules apply to the establishment and operation of satellite earth station facilities and the landing of submarine cables?

The FCC licenses transmitting earth station facilities. Each licence specifies the site location and the type of earth station involved (fixed, mobile, temporary fixed), the frequencies utilised, power level, emission designators, and the like. Receive-only earth stations do not require a licence. However, to obtain protection against interference, one may obtain a licence for a receive-only station.

A cable landing licence is required from the FCC for the landing of a submarine cable in US territory. Applications must specify the cable type, capacity, proposed owners, US and foreign landing points and stations, and certify whether any owner is affiliated with a foreign carrier. In reviewing the application, the FCC consults with other executive branch agencies, including the Department of Justice and Department of Homeland Security.

Both earth station facilities and submarine cables may be operated on a common carrier or non-common carrier basis.

9 Universal service obligations and financing

Are there any universal service obligations? How is provision of these services financed?

Section 254 of the Communications Act requires every carrier that provides interstate telecommunications services to contribute, on an equitable and non-discriminatory basis, to the mechanism established by the FCC to preserve and advance universal service. In 1996, Congress passed a law that expanded the types of companies contributing to the Universal Service Funds. Currently the USF supports four programmes – high cost (ensures that consumers in all regions of the nation pay rates that are reasonably comparable to those in urban areas); low income (provides discounts to make telephone service more affordable to low-income consumers); rural health care (provides reduced rates to rural health care providers for their telecommunications and internet services); and schools and libraries (supports discounts to internet services for schools and libraries).

The FCC has designated the Universal Service Administrative Company (USAC), an independent, not-for-profit corporation, as the administrator of the USF. Carriers submit universal service contributions to USAC, which utilises the funds to support universal service programmes.

In early 2011, the FCC issued a proposal to comprehensively reform both the universal service and intercarrier compensa-
tions programmes. In its proposals, the FCC identified near-term, immediate and long-term proposals designed to transition the USF to support broadband under the Connect America Fund and to reform intercarrier compensation. The near-term proposals would begin in 2012. The proposals are currently pending in an administrative rulemaking at the FCC.

10 Operator exclusivity and limits on licence numbers
Are there any services granted exclusively to one operator or for which there are only a limited number of licences? If so, how long do such entitlements last?

There is no policy to award services exclusively to one operator. Spectrum limitations and other factors can lead to de facto exclusivity. One recent example is that the FCC permitted the two licensees for satellite audio radio to merge.

11 Structural or functional separation
Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Currently in the United States, the FCC has required incumbent local exchange carriers (ILECs) to create structural separation mechanisms so that ILECs and their affiliates deal with each other on an arm's-length basis, pursuant to the same terms and conditions offered to third parties.

12 Number portability
Is number portability across networks possible? If so, is it obligatory?

The FCC requires that consumers who remain in the same geographical area may keep their existing phone number when they switch telephone service providers. In the local area, a consumer can take his number from a wireless, wireline or VoIP provider to any other wireless, wireline or VoIP provider. However, when consumers relocate the number often will not go with them.

13 Authorisation timescale
Are licences or other authorisations required? How long does the licensing authority take to grant such licences or authorisations?

The amount of time the FCC takes to grant the various types of licences under its jurisdiction can vary significantly.

The transfer of control process of an FCC licensee also varies, depending on the identity of the parties and the complexity of the transaction. The FCC attempts to impose on itself a 180 day ‘shot clock’ to complete its review of major merger transactions, but the 180 day period is a goal, not a requirement; the FCC frequently ‘stops its clock’ when it decides it needs more information from the parties.

14 Licence duration
What is the normal duration of licences?

Section 214 licences have no fixed term. However, if such a licence is being purchased, the FCC will review the qualifications of the buyer. Commercial mobile radio licences generally have 10-year terms.

15 Fees
What fees are payable for each type of authorisation?

As indicated in question 9, payments into the Universal Service Fund are required and now amount to approximately 14 per cent of a carrier’s interstate billed revenues.

The FCC also imposes annual regulatory fees to defray overall FCC operating costs.

The FCC requires per application processing fees; each authorisation or transfer requires the payment of a separate fee.

16 Modification and assignment of licence
How may licences be modified? Are licences assignable or able to be pledged as security for financing purposes?

Under FCC regulations, ‘major changes’ – for example, increasing the power of a broadcast station, or expanding the licensed service area of a mobile telephone system – require prior FCC authorisation. The licensee files an application for authorisation. The FCC puts the application on ‘public notice’, ie, on the public record, providing time for the public to comment (usually 30 days).

As to pledges for security, FCC licences are not considered owned by the licensee so therefore cannot be pledged. The FCC has, however, permitted lenders to take a security interest in the proceeds from the sale of a licence (as opposed to the licence itself).

17 Retail tariffs
Are national retail tariffs regulated? If so, which operators’ tariffs are regulated and how?

The FCC regulates interstate telecommunications services; the individual states have jurisdiction over local intrastate services.

For interstate residential services, no tariffs are required. The FCC does require tariff filings for interstate access rates (charged by local exchange carriers), purchased by other service providers and large corporations. Large carriers are subject to price cap regulation; most small carriers are subject to rate of return regulation.

For intrastate telecommunications services, most states, operating through their respective public service commissions, do require the filing of tariffs, although in some states those services have been deregulated and exempted from having to file a tariff.

For international telecommunications services, retail services are only subject to tariff filings when offered by a carrier for an international route on which the carrier possesses market power.

18 Customer terms and conditions
Must customer terms and conditions be filed with, or approved by, the regulator or other body? Are customer terms and conditions subject to specific rules?

The trend in the United States, at both the FCC and state levels, has been to deregulate competitive telecommunication services and not require filing. Even where tariffs are still required, tariffs generally go into effect automatically unless they are challenged. Either the regulator or an interested private party has standing to challenge a tariff. In such circumstances, the regulation may suspend the tariff while conducting an investigation.

19 Next-generation networks
How are next-generation networks (NGN) regulated?

Most NGNs have been classified as information services that are subject to limited regulation by the FCC. Certain public policy components have been extended to NGNs because of the FCC’s mandate to regulate in the public interest. These include CALEA enforcement, E-911, disability access, universal service, and others.

The most controversial issue has been net neutrality, which is discussed in response to question 31 below.
20 Changes to telecoms law
Are any major changes planned to the telecoms laws?

Although various bills are introduced in each Congress, in the current political environment in the United States, it is unlikely that there will be major changes to the telecoms laws in the near future. There may be legislative activity surrounding individual issues with which Congress is displeased with the FCC’s direction, some of which, for example, net neutrality, are discussed elsewhere in this chapter.

Telecoms regulation – mobile

21 Radio frequency (RF) requirements
For wireless services, are radio frequency (RF) licences required in addition to telecoms services authorisations and are they available on a competitive or non-competitive basis? How are RF licences allocated? Do RF licences restrict the use of the licensed spectrum?

Yes, radio frequency licences are required for almost all FCC authorised services except for wired telephone services and devices such as wireless microphones, medical devices and garage door openers.

The FCC will sometimes hold auctions for specific frequencies to serve specific geographic areas; winners normally receive licences for 10 year terms, if found otherwise qualified to hold a license.

Licensed spectrum can also be disaggregated or partitioned to create smaller service areas or to be assigned to another entity.

22 Radio spectrum
Is there a regulatory framework for the assignment of unused radio spectrum (refarming)? Do RF licences generally specify the permitted use of the licensed spectrum or can RF licences for some spectrum leave the permitted use unrestricted?

The FCC will periodically reallocate spectrum for new commercial and non-commercial uses. Incumbent users subject to reallocation will normally be given the opportunity to shift to alternative spectrum with the costs being picked up by the new users of the spectrum.

As discussed elsewhere in this chapter, spectrum reallocation is currently under serious consideration by the FCC and is engendering significant controversy among users and elected officials.

23 Spectrum trading
Is licensed RF spectrum tradable?

The FCC’s disaggregation and partitioning policies permit licensees to assign or transfer wireless licences in whole or in part, subject to FCC prior approval. The Commission promotes enhanced spectrum-efficient uses under its secondary markets or spectrum leasing policies. Licensees may enter into commercial arrangements to allow third parties to construct and operate systems using the spectrum under lease from an FCC licensee.

24 Mobile virtual network operator (MVNO) and national roaming traffic
Are any mobile network operators expressly obliged to carry MVNO or national roaming traffic?

Mobile network operators are not required to carry MVNO traffic. When they do so, the general Communications Act obligation to treat such traffic in a fair and non-discriminatory manner would apply.

25 Mobile call termination
Does the originating calling party or the receiving party pay for the charges to terminate a call on mobile networks? Is call termination regulated, and, if so, how?

The FCC does not regulate mobile wireless rates. Consumers usually purchase plans that permit amounts and categories of air time, often coupled with data rates. Whether the call is made or received is not usually a factor in calculating the rate.

26 International mobile roaming
Are wholesale and retail charges for international mobile roaming regulated?

International mobile roaming is not regulated except for the general prohibition against unjust, unreasonable and undue discriminatory pricing.

27 Next-generation mobile services
Is there any regulation for the roll-out of 3G, 3.5G or 4G mobile services?

As a practical matter, no. Rules are generally applied on a technology neutral basis.

Telecoms regulation – fixed infrastructure

28 Cable networks
Is ownership of cable networks, in particular by telecoms operators, restricted?

There are no restrictions as to who may own a cable programming network or a cable television system. Restrictions on telecom ownership of cable television systems were eliminated in 1996.

Under the 1992 Cable Act, cable operators who own cable programming networks are limited as to what proportion of their capacity can be devoted to such networks. In addition, the Act limited entities who own cable systems so that they could not serve more than 30 per cent of the national population; this ownership cap has been invalidated by the courts and is being reviewed again by the FCC.

29 Local loop
Is there any specific rule regarding access to the local loop or local loop unbundling? What type of local loop is covered?

Section 251 of the Communications Act requires ILECs to provide unbundled access to network elements in response to requests from telecommunications carriers. A local loop network element is a transmission facility between a distribution frame (or its equivalent) in an ILEC central office and the loop demarcation point at an end-user customer premises. ILECs must make copper loops available on an unbundled basis and must provide loop-conditioning when requested to. ILECs are not required to provide access to fibre-to-the-home or curb loops constructed in previously unserved areas, but must either maintain access to the copper loop or provide a 64 kilobit per second channel when they place fibre-to-the-home or curb loops to a previously served area. The FCC has also adopted limits on unbundled access to certain high-capacity loops.

30 Interconnection and access
How is interconnection regulated? Can the regulator intervene to resolve disputes between operators? Are wholesale (interconnect) prices controlled and, if so, how? Are wholesale access services regulated, and, if so, how?

Sections 251 and 252 of the Communications Act, implemented by detailed FCC regulations, regulate the interconnection process.
Under the statute, each telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. The scheme places a more rigorous duty to negotiate the terms of interconnection agreements on ILECs. An ILEC must provide any requesting telecommunications carrier with access at any technically feasible point within the ILEC network for the facilities and equipment needed to transmit and route telephone exchange and exchange access traffic. The law requires that interconnection be provided on a just, reasonable, and non-discriminatory basis.

The basic interconnection tariffs are local loop and sub-loop; local switching; dedicated transmissions links, shared transmission facilities between tandem switches and end offices; tandem switching, signalling and call-related database services, collocation, and network interface device.

Regulation of interconnection between the ILEC and a telecommunications carrier is a matter of joint federal and state jurisdiction. Regulatory standards are set by the FCC with state utility regulators overseeing the negotiation and the approval of interconnection agreements. If a state declines to exercise jurisdiction, the carrier may petition the FCC to assume jurisdiction over negotiation and approval of the interconnection agreement.

Since the enactment of this regulatory regime in 1996, nearly every component of the regime and its implementation has been highly contested, with several cases going to the United States Supreme Court. On the whole, the scheme has led to fewer competitive local exchange carriers surviving and operating than was envisioned when the statute passed.

**Telecoms regulation – internet services**

### 31 Internet services

**How are internet services, including voice over the internet, regulated?**

Internet services are classified as information services by the FCC. They are not subject to licensing, price or non-discrimination regulation. A VoIP service not interconnected to the public switched telephone network is regulated as an information service. The FCC has specifically applied universal service obligations, various reporting duties, and the requirements for emergency access dial services (E-911) and telecommunications relay service to interconnected VoIP.

The FCC’s approach to ‘net neutrality’ has been, and remains, quite controversial. In December 2010, the FCC by a 3-2 vote adopted net neutrality rules. This action occurred after a court decision that reversed a previous assertion of jurisdiction by the FCC to regulate net neutrality. In this newest Order, the FCC relied on its ancillary jurisdiction in the Communications Act as sufficient authority for regulation.

The December 2010 Order adopted rules reflecting three basic principles for providers of broadband internet access. The principles apply differently for fixed and mobile providers, with less regulation on wireless providers as wireless is a newer and rapidly evolving platform. The three principles are:

- **Transparency:** Providers must transparently disclose to consumers and third parties commercial terms, performance, and network management practices. The FCC wants disclosures to educate consumers on commercial terms and likely network congestion, but also to assure that start-ups and other edge providers have the technical information necessary to create and maintain online content, applications, services and devices.

- **No blocking:** Subject to reasonable efforts to address unlawful traffic, wireline providers many not block lawful content, applications or services, or the use of non-harmful devices. Wireless providers may not block lawful websites or applications offering voice and video telephony that compete with the wireless provider’s offerings.

- **No unreasonable discrimination:** Wireline providers may not engage in ‘unreasonable discrimination’ in transmitting lawful traffic over broadband internet access service. Reasonable network management remains permitted.

The December 2010 Order is extremely detailed. The FCC indicated that it will enforce its new rules case by case.

There has been legislation introduced in the United States Congress to overturn the December 2010 Order. Judicial challenges are also forthcoming.

### 32 Internet service provision

**Are there limits on an internet service provider’s freedom to control or prioritise the type or source of data that it delivers?**

See question 31.

### 33 Financing of broadband and NGA networks

**Is there a government financial scheme to promote broadband penetration?**

The development of broadband is a major policy initiative of the Obama administration. The administration and the FCC have developed a National Broadband Plan. The stimulus package passed in 2009 contained hundreds of millions of dollars for broadband development.

While the Obama administration remains committed to financing and promoting broadband penetration, the current controversy in the United States regarding government spending and the federal budget deficit will likely affect, at least in the short term, the amount of federal funds available to implement the National Broadband Plan.

### Media regulation

#### 34 Ownership restrictions

**Is the ownership or control of broadcasters restricted? May foreign investors participate in broadcasting activities in your jurisdiction?**

There is a complex set of numerical caps on the number of radio and television stations a single entity may own in a local market, and for television broadcasters, there is also a nationwide limit to the number of persons that can be served by a single entity. The regulations are also complex as to what ownership interests will trigger the ‘attribution’ of a station to a single entity or individual under these regulations.

The Communications Act restricts the foreign ownership of broadcasting stations. The Act prohibits ownership of licences by foreign governments or representatives of such governments. Foreign persons or entities may own up to 25 per cent of holding companies whose subsidiaries hold such broadcasting licences, and, subject to the FCC’s ability to waive the limit, foreign persons or entities may own up to 25 per cent of holding companies whose subsidiaries hold such licences. Foreign investors may own voting common or non-voting common or preferred or non-voting stock up to those limits. Foreign investors may have board representation and also serve as officers of broadcasting companies.

Foreign companies may also acquire convertible debentures, stock options or warrants that would entitle the owner to claim more than 20 per cent or 25 per cent of the company’s value upon a sale.
Broadcasters also have a general obligation to exercise reasonable care to avoid airing advertisements that are false and misleading.

As to online advertising the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act prohibits commercial e-mails that, among other things, do not have a specific opt-out mechanism.

Currently, there are various proposals that have been brought forth to further protect consumers’ privacy rights with respect to online activity. Several bills have been introduced in Congress, but the way forward is very uncertain at this time.

39 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators’ broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Under provisions added to the Communications Act by the 1992 Cable Act, full-power commercial broadcast stations have the right to elect for ‘must-carry’ whereby a local cable operator must carry the station or ‘retransmission-consent’ where the broadcast station and local cable operator must work out a commercial arrangement under which the operator may carry the signal. The broadcaster’s election is made under the law every three years and may be made operator by operator. FCC regulations apply to both the must-carry and retransmission-consent regimes.

As retransmission-consent negotiations have recently led to several well-publicised ‘blackouts’ of broadcast stations, there is a pending proceeding at the FCC as to whether to modify retransmission consent regulations. The must-carry provisions are not at issue in this proceeding.

There are similar must-carry/retransmission-consent rights between commercial television stations and satellite-delivered multichannel video providers. The one distinction is that those rights are dependent on whether the satellite providers choose to carry any commercial television stations in a particular market.

Local non-commercial television stations have must-carry rights, but no retransmission-consent rights under the statute.

40 Changes to the broadcasting laws

Are there any changes planned to the broadcasting laws? In particular, do the regulations relating to traditional broadcast activities also apply to broadcasting to mobile devices or are there specific rules for those services?

In every Congress, many laws intending to change the broadcasting laws and regulation are introduced, but few are enacted.

As discussed elsewhere in this chapter, legislation has been introduced to set aside the FCC’s net neutrality decision.

41 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

Broadcast media is subject to much greater FCC regulation than online content. Both broadcast and cable television is subject to a considerable body of regulatory requirements found in Title III and VI of the Communications Act respectively.

The major issue currently in the regulation of online content is the issue of net neutrality.

42 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Over the air broadcasting switched to a digital format in June 2009. The spectrum formally used for broadcasting became avail-
able for auctioning by the federal government for other uses to prospective licensees.

Low-power television stations were not subject to the deadline for digital conversion. While radio stations have been converting to a digital format, there is no government-mandated conversion deadline.

43 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multichannelling, high definition, data services)?

No.

44 Regulatory agencies

Which body or bodies regulate the communications sector? Is the telecoms regulator separate from the broadcasting regulator?

At the federal level, the FCC regulates both telecoms and broadcasting. The National Telecommunications and Information Administration is part of the Department of Commerce, and the head of the NTIA has a place in the president’s cabinet; the NTIA has responsibility to assist the FCC in fulfilling its international coordination functions. It is also responsible for allocating and regulating the federal government’s use of frequency spectrum.

As discussed below, the Department of Justice and Federal Trade Commission share with the FCC reviewing authority over mergers and acquisitions in the communications sector.

In every state, there normally exists a state authority to review intrastate communications. There are also state or local level franchising authorities to cable or other video services.

45 Establishment of regulatory agencies

How is each regulator established and to what extent is it independent of network operators, service providers and government?

The FCC is established by law, passed by Congress and signed by the president. The FCC consists of five commissioners, who are appointed by the president and confirmed by the United States Senate for seven-year terms. No more than three commissioners can be members of any one political party.

The establishment and process of selection of members of state regulatory agencies vary from state to state.

All these regulators are independent of network operators and service providers. They are, however, instrumentality of government.

46 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

Final decisions of the FCC are reviewed by the federal courts by parties who have standing – parties who have been ‘aggrieved or adversely affected by the decision’. Review of certain licensing decisions by the FCC must be brought to the United States Court of Appeals for the District of Columbia Circuit, one of the thirteen appellate courts at the level directly below the United States Supreme Court. Other FCC decisions may be brought to the DC Circuit or another Circuit geographically proximate to the appealing party.

United States district courts, the lowest level of the federal court system, have jurisdiction to review FCC fines and forfeitures.

The losing party at the appellate level can seek further review by the United States Supreme Court, where the decision to hear the further appeal is at the Court’s discretion.

Grounds on which appeals can be based range from substantive errors of law or statutory interpretation, procedural errors, or arguments that the FCC has exceeded its statutory authority. As an ‘expert agency’, the FCC is accorded deference in some circumstances in interpreting the Communications Act or in adopting policy to implement statutory directives.

Decisions by state bodies, usually state regulatory agencies, are normally reviewable in the court of that state as set forth in the state’s relevant legislation. Actions by state bodies, including the enactment of state laws, are sometimes challenged in federal court on the grounds that the state or its agency has acted in an area pre-empted by federal law.

47 Interception and data protection

Do any special rules require operators to assist government in certain conditions to intercept telecommunications messages?

Explain the interaction between interception and data protection laws.

The Communications Assistance to Law Enforcement Act (CALEA) requires telecommunications providers, interconnected voice over internet protocol providers and facilities-based internet access providers to incorporate specified network modifications that support the efforts of authorised law enforcement agencies to intercept electronic communications.

In addition, in response to a lawful subpoena, authorised law enforcement and national security agencies may require operators to facilitate interception of communications. This would include both real-time access to communications and could also encompass access to content, stored communications or subscriber records. Since the 9/11 attack a decade ago, in most circumstances, law enforcement and national security claims for access to communications and data have trumped claims of individual privacy rights.

48 Data retention and disclosure obligations

What are the obligations for operators and service providers to retain customer data? What are the corresponding disclosure obligations?

Will they be compensated for their efforts?

There is no generally applicable legal requirement to retain customer data.

However, law enforcement or national security agencies through lawful process, judicial subpoenas or warrants can compel an operator or service provider to retain customer data. The operator or service provider will usually receive reasonable compensation for its costs.

49 Unsolicited communications

Does regulation prohibit unsolicited communications? Are there exceptions to the prohibition?

There is substantial federal and state legislation, enforced by the FCC, the Federal Trade Commission, and various state public service commissions, that prohibit unsolicited communications by telephone, fax, e-mail or text.
Network neutrality
In December 2010, the FCC staked out its claim for jurisdiction to regulate internet services and, invoking its ancillary jurisdiction under the Communications Act, codified three basic principles – transparency; no blocking; and no unreasonable discrimination by providers. It did so after a federal court invalidated a previous attempt to regulate through an adjudication when the court concluded that the jurisdiction upon which the Commission relied did not support the action.

A highly-divided FCC is treading gingerly here. It plans to apply its principles case by case. Immediate judicial challenges to the rules were dismissed as premature. Bills have been introduced in Congress to set aside the FCC’s regulations. Several more chapters remain to be written.

National Broadband Plan
As required by federal statute, the FCC has promulgated a National Broadband Plan. It is wide-ranging, not self-executing, potentially expensive and politically controversial. Its implementation and evolution will be highly controversial in the current political environment.

Reallocation of broadcast spectrum for mobile broadband use
One of the proposals in the National Broadband Plan is to recover 120MHz of television broadcast spectrum for mobile broadband use. The FCC initiated a rulemaking in early 2011 to permit new uses for spectrum in the form of VHF and UHF broadcast bands and lay the ground for incentive auctions of television broadcast spectrum. The NPRM proposes to add new allocations for fixed and mobile broadband services in the existing television bands to make all television spectrum available for future broadband use; establish a regulatory framework for television stations to share channels; and improve television service on VHF channels. The Commission views the rulemaking as a necessary step towards the National Broadband Plan goal.

Reform of USF
Consistent with the National Broadband Plan, the FCC has launched a proceeding to reform the payment scheme into the Universal Service Fund and to convert the focus of the Fund into broadband support. Since there will be ‘winners and losers’ under any such reform, arriving at an acceptable consensus among policymakers, elected officials, and current and future stakeholders in the Fund’s distributions will be difficult.

AT&T acquisition of T-Mobile
The Department of Justice’s antitrust review and the FCC’s public interest review of the proposed acquisition of T-Mobile by AT&T will likely take a year. In addition to the competition issues in local and national wireless markets posed by the transaction, the reviews will have implications for all of the topics listed above.

Competition and merger control
50 Competition and telecoms and broadcasting regulation
What is the scope of the general competition authority and the sectoral regulators in the telecoms, broadcasting and new media sectors? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation? Are there special rules for this sector and how do competition regulators handle the interaction of old and new media?

General enforcement of the United States antitrust laws is shared by the United States Department of Justice (DoJ) and the Federal Trade Commission (FTC). The major substantive antitrust statutes are the Sherman and Clayton Acts. Section 7 of the Clayton Act is an incipiency statute that prohibits anti-competitive mergers. Under the Hart-Scott-Rodino Act, transactions of a certain size (the jurisdictional thresholds are adjusted annually) cannot legally be completed until the HSR filing is made and the waiting period designated under the statute has expired.

If a company has an FCC licence, an application for a transfer of control must be filed at the Commission, and the transaction cannot legally close until the FCC approves the application. While the FCC does not have express antitrust authority, it applies basic antitrust principles in its evaluation of whether the transfer will be in the “public interest, convenience, and necessity”.

The DoJ and FTC coordinate so that only one agency will review or investigate a particular transaction or practice. During the Obama administration, the decision as to which agency will review particular transactions has become more contentious and unpredictable.

The antitrust agencies and the FCC do coordinate their reviews and confer and reinforce each other’s judgments as to outcomes and remedies. A very good recent example of that dynamic is the DoJ and FCC review of the Comcast/NBCU transaction.

51 Competition law in the telecoms and broadcasting sectors
Are anti-competitive practices in these sectors controlled by regulation or general competition law? Which regulator controls these practices?

The Communications Act contains specific statutory and regulatory requirements aimed at potential anti-competitive practices by telecoms and cable operators. The FCC enforces those requirements.

The Communications Act is not an exemption to the general prohibitions of the antitrust laws. Those laws are enforced by the DoJ, FTC, state attorneys general and private litigants.

52 Jurisdictional thresholds for review
What are the jurisdictional thresholds and substantive tests for regulatory or competition law review of telecoms sector mergers, acquisitions and joint ventures? Do these differ for transactions in the broadcasting and new media sectors?

As indicated above, if an FCC licence is involved in a merger, acquisition or joint venture, the Communications Act requires prior FCC consent for any licence transfer, and hence approval before the transaction is consummated.

The antitrust laws do not have a minimum threshold. In 2011, in most circumstances, transactions valued at US$66 million or more will require Hart-Scott Rodino filings, and be subject to the HSR waiting period.

53 Merger control authorities
Which regulatory or competition authorities are responsible for the review of mergers, acquisitions and joint ventures in the telecoms, broadcasting and new media sectors?

As indicated above, either the DoJ or the FTC (but not both), and the FCC would review mergers, acquisitions and joint ventures, in the telecoms, broadcasting, and new media sectors.
Procedure and timescale

What are the procedures and associated timescales for review and approval of telecoms and broadcasting mergers, acquisitions and joint ventures?

The FCC has a self-adopted, non-binding 180 day “shot clock” under which it attempts to complete its merger reviews. It has had mixed success in meeting that deadline.

The FTC and DoJ have no fixed deadlines. Depending on the circumstances, and the antitrust issues raised by the transaction, the antitrust review can take from weeks, to months to over one year.
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