



ICLG

The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2018

11th Edition

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

Published by Global Legal Group, with contributions from:

Arnold & Porter Kaye Scholer LLP
Ashurst Hong Kong
Azmi & Associates
Bagus Enrico & Partners
Borenus Attorneys Ltd
Cairn Legal
Concern Dialog law firm
Cuatrecasas
de la cruz beranek Attorneys at Law Ltd.
Jeantet
Jingtian & Gongcheng
Josh and Mak International
Kromann Reumert
Melnitsky & Zakharov, Attorneys-at-Law
MinterEllison

Mobile Ecosystem Forum
Monereo Meyer Marinel-lo Abogados
Mori Hamada & Matsumoto
Nikolinakos – Lardas & Partners LLP
OrionW LLC
Pinsent Masons Germany LLP
Portolano Cavallo
Preiskel & Co LLP
Rato, Ling, Lei & Cortés – Advogados
SEUM Law
Shay & Partners
Tilleke & Gibbins
Udo Udoma & Belo-Osagie
Wildgen S.A.
Wiley Rein LLP





global legal group

Contributing Editor

Rob Bratby, Arnold & Porter Kaye Scholer LLP

Sales Director

Florjan Osmani

Account Director

Oliver Smith

Sales Support Manager

Toni Hayward

Sub Editor

Jane Simmons

Senior Editors

Suzie Levy, Rachel Williams

Chief Operating Officer

Dror Levy

Group Consulting Editor

Alan Falach

Publisher

Rory Smith

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design

F&F Studio Design

GLG Cover Image Source

iStockphoto

Printed by

Stephens & George
Print Group
November 2017

Copyright © 2017

Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-911367-79-6

ISSN 2050-7607

Strategic Partners



General Chapters:

1	Europe's Digital Single Market: Mid-Term Review – Rob Bratby, Arnold & Porter Kaye Scholer LLP	1
2	A Regulatory Re-Think? – Tim Cowen & Daniel Preiskel, Preiskel & Co LLP	7
3	Consumer Trust, Regulation and the Mobile Opportunity – Rimma Perelmuter, Mobile Ecosystem Forum	10

Country Question and Answer Chapters:

4	Armenia	Concern Dialog law firm: Aram Orbelyan & Vahagn Grigoryan	13
5	Australia	MinterEllison: Anthony Borgese	21
6	Belgium	Caim Legal: Guillaume Rue & Frédéric Paque	31
7	China	Jingtian & Gongcheng: Chen Jinjin & Hu Ke	40
8	Denmark	Kromann Reumert: Torben Waage & Alexander Ph. D. Rasmussen	50
9	Finland	Borenus Attorneys Ltd: Samuli Simojoki & Henriikka Piekkala	57
10	France	Jeanetet: Frédéric Sardain & Sophie Boinnot	64
11	Germany	Pinsent Masons Germany LLP: Dr. Florian von Baum & Dr. Igor Barabash	74
12	Greece	Nikolinakos – Lardas & Partners LLP: Dr. Nikos Th. Nikolinakos & Dina Th. Kouvelou	84
13	Hong Kong	Ashurst Hong Kong: Joshua Cole	93
14	Indonesia	Bagus Enrico & Partners: Enrico Iskandar & Bimo Harimahesa	102
15	Italy	Portolano Cavallo: Ernesto Apa & Adriano D'Ottavio	110
16	Japan	Mori Hamada & Matsumoto: Hiromi Hayashi & Akira Marumo	118
17	Korea	SEUM Law: Steve Kim & Hoseok Jung	126
18	Luxembourg	Wildgen S.A.: Emmanuelle Ragot	134
19	Macau	Rato, Ling, Lei & Cortés – Advogados: Pedro Cortés & José Filipe Salreta	142
20	Malaysia	Azmi & Associates: Khairul Fazli Abdul Kadir & Azarith Sofia Binti Aziz	154
21	Nigeria	Udo Udoma & Belo-Osagie: Olajumoke Lambo & Godson Oghenechuko	165
22	Pakistan	Josh and Mak International: Aemen Zulfikar Maluka & Pir Abdul Wahid	173
23	Portugal	Cuatrecasas: Leonor Chastre & Maria Luísa Cyrne	181
24	Russia	Melnitsky & Zakharov, Attorneys-at-Law: Semion Melnitsky & Anastasia Sivitskaya	189
25	Singapore	OrionW LLC: Winnie Chang	197
26	Spain	Monereo Meyer Marinel-lo Abogados: Sönke Lund & Consuelo Álvarez Pastor	205
27	Switzerland	de la cruz beranek Attorneys at Law Ltd.: Carmen De la Cruz	214
28	Taiwan	Shay & Partners: Arthur Shay & David Yeh	221
29	Thailand	Tilleke & Gibbins: David Duncan	228
30	United Kingdom	Arnold & Porter Kaye Scholer LLP: Rob Bratby	236
31	USA	Wiley Rein LLP: Jennifer D. Hindin & Madeleine M. Lottenbach	244
32	Vietnam	Tilleke & Gibbins: Tu Ngoc Trinh & Waewpen Piemwichai	253

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

EDITORIAL

Welcome to the eleventh 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:

Three general chapters. These chapters provide readers with an overview of key issues affecting telecoms, media and internet laws and regulations, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 29 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 Arnold & Porter Kaye Scholer 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.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

A Regulatory Re-Think?



Tim Cowen



Daniel Preiskel

Preiskel & Co LLP

1 Introduction

The past year might have given some the impression that we are heading towards another “Age of Extremes”, and the technology and telecoms sectors are no exception.

The UK and Europe were pioneers in the liberalisation of telecoms markets which saw the break-up and regulation of former state monopoly telecoms companies. The implementation of the European Framework has, in many parts of Europe, been successful, leading to better outcomes for consumers and businesses, where competition and investment has followed liberalisation.

However, with questionable mobile signal coverage in many rural areas and one of the lowest levels of FTTx penetration in the OECD, many in the UK have been asking what has gone wrong in the UK?

In the internet sector, too, there is the impression that competition law is not quite living up to its *raison d'être*. The past decade has seen considerable concentration in the industry, and consolidation of the market power of those at the top, often without much regulatory scrutiny.

Brexit may give us in the UK an opportunity to re-visit and re-assess existing EU regulation.

This raises a number of questions:

- Are we blindly walking into another age of monopoly?
- How can we better implement our regulatory framework to ensure the best consumer outcomes in the long term?
- How will the ever-omnipresent shadow of Brexit impact on this?

2 Is Current Regulation Working?

The basis for the UK’s telecoms regulation is found in a series of EU Directives. Historically, the way in which this framework has been implemented in the UK, and across Europe, has been with a view to ensuring the best outcomes for consumers, in particular by reference to price. UK merger control has also tended to focus on the price implications of mergers, and, with some exceptions, only scrutinises mergers where the parties involved meet certain turnover levels.

The focus on financial outcomes isn’t inherently illogical or wrong, *per se*, and a focus on short-term consumer welfare – in the relatively easy-to-model form of pricing outcomes – is a central tenet of competition law and regulation worldwide. However, the risk is that the current framework is implemented in the UK with undue focus on the short term, failing to properly consider the long-term outcomes of regulatory decisions, or the future shifts that may be seen in the market.

The focus on short-term consumer welfare and measurable impacts on post-merger prices is a common issue among merger control authorities. One example of overly focusing on consumer welfare means that dominant companies may be able to stifle competition through acquisition. Internet giants like Google and Facebook, who hold considerable market shares in Internet Search and Social Media, respectively, as well as various other projects each company invests in, are able to purchase innovative start-ups “under the radar”, since the turnover of the purchased company is below merger assessment thresholds.

An example in telecoms regulation is found in Ofcom’s 2016 Business Connectivity Market Review (BCMR), where the regulator implemented a price cap in the form of the Leased Line Charge Control (LLCC) on BT/Openreach’s wholesale Ethernet lines. The essential rationale was to drive the dominant incumbent’s infrastructure wholesale prices down towards cost. The reduced wholesale prices would be passed on to businesses and consumers, allowing for price reductions across the industry.

Lower prices sounds like a fantastic outcome for all involved, so what’s the problem? BT/Openreach is a huge organisation with a legacy network already built across the whole of the UK. Economies of scale and scope mean its costs are likely to be below that of any new-entrant competitor, although Ofcom did not do the modelling to determine this for sure. With fast and reliable fibre connections becoming a necessity for business and leisure, the upcoming “5G revolution” in mobile, and BT/Openreach’s track record of under-investment and failure to meet FTTx targets, now more than ever the UK needs alternative infrastructure providers, with innovative, faster, more reliable network architecture than BT/Openreach’s tree-and-branch network. Lower prices in the short term may thus restrict the opportunity for competitive investment and be undermining the UK’s digital future in the medium to longer term.

3 What Can be Done to Improve Implementation of the Current Framework?

The current framework for regulation and competition law is not necessarily broken beyond repair; regulatory and competition authorities have scope to work within the legal framework to address some of the issues of market concentration and decreasing levels of innovation.

There is scope within the existing framework for the focus to be on more than just pricing outcomes. Yes, it is easier to accurately model short-term pricing effects, with concepts such as innovation, particularly in the long term, being generally more difficult to

determine and calibrate. This may be limited by the current modelling methods used by economists, with their focus on Upward Pricing Pressure (UPP) and post-merger outcomes based on historic information of pre-merger market dynamics and pricing. And yes, of course regulatory bodies and competition authorities feel more able to make decisions based on the more reliable short-term data than potential long-term outcomes. However, no investigation of the effects of transactions on innovation is routinely conducted.

Seen in the context of the increasingly concentrated market structure, it is vital for the UK's digital future that regulatory bodies and competition authorities investigate innovation and market structure. Take Google's acquisition of Beat That Quote, for example. Beat That Quote was an online insurance company, small by comparison to others in the insurance industry. Economic modelling in the OFT's investigation indicated that it was unlikely that Google would use its market power in Internet Search and online advertising to promote this online insurance company in search rankings, because that would mean foregoing revenue from other companies who were sponsored links at the top of Google search. If the aim of any reasonable business endeavour is to profit maximise, there would be little economic logic in the short term in such action.

However, somewhat predictably, after the deal was approved, that is exactly what Google did. The economic rationale for such an approach is anti-competitive and recognised in the case law on abuse of dominance; Google sought to promote its own product to the detriment of its rivals, in an effort to exclude others from the market and maximise its profits from being one of the very few players left providing online insurance quotations. Google has now been fined £2.4bn for self-promotion of its own online price comparison products at the expense of its rivals by the EU Commission. Actions like this aim to guarantee future revenue stream through maintaining a company's position to the detriment of competitors, while foregoing an element of short-term revenues. The authorities' focus on short-term profit maximisation means such possible outcomes are often not duly captured in modelling; yet the impact on competition in the market and the effect on other players, the choices available to users, and the prospects for market structure to deliver future innovation can be significant.

Indeed, the EU has to an extent been leading the way in this respect, raising innovation concerns in a number of merger situations in the last few years – although there is undoubtedly more that can be done. One example of this is in the Novartis/GlaxoSmithKline merger, where concerns were raised about the parties' oncology business, where the Commission required the parties to divest one of the pipeline projects in order to mitigate risks to innovation. Another example where innovation concerns were addressed by the Commission is the General Electric/Alstom merger, where concerns were raised about the impact on innovation in the energy sector. Again, the Commission approved the acquisition of Alstom's energy business by General Electric subject to divestment of central parts of Alstom's heavy duty gas turbines business. The recent Dow/DuPont decision continues in this vein, as approval to the merger was given conditionally on divestment of DuPont's global pesticide business over innovation concerns about reduced numbers of new "active ingredients" in the pesticides business to be developed per year by the merged entity.

It is clear innovation is something the European Commission is increasingly concerned about; even so, the indications are that authorities are predisposed to favour relying on the available historic evidence of pricing implications than in investigating the evidence of detrimental impact upon innovation. To avoid unsatisfactory medium- and long-term outcomes for consumers, more focus *needs* to be placed on factors other than short-term consumer welfare in the form of pricing, and the scope is there in the law to do this.

4 Making Lemonade: Reform of UK Competition Law and Regulation After Brexit

The previous section focused on what can be done within the current legal and regulatory framework. However, as readers will be aware, much of this framework is based on European legislation, and as the UK is currently in the process of negotiating an exit from the European Union, currently set to be completed by March 2019, the obvious question is what happens next?

While some competition lawyers, many of whom started their careers being called "European law experts", may be concerned by the approach of the great unknown, might it be best to see the upcoming shift in paradigms as an opportunity for the UK to become a leader, at the forefront of competition and regulatory law and policy, to create a regime suitable for a fast-paced, technology-dominated market.

What possible reforms could be implemented?

In telecoms regulation, the focus could shift from ensuring short-term prices match the dominant provider's costs. Emphasis could instead be on ensuring barriers to entry are lowered to encourage market entry from disruptive new players, who invest in competing infrastructure. This would lead to more intense competition in the provision of telecoms infrastructure and services, which would, in time, increase capacity in the system and bring better quality, innovative products to consumers at lower prices.

In the merger control regime, changes could also be made to the turnover thresholds. This might include lowering the threshold, to capture some of the "under-the-radar" mergers mentioned above. It might include making merger assessment based upon the value of the transaction in question, rather than the turnover of the target entity. This has been done in Germany. Another approach would be to monitor the acquisitions of all dominant companies for their effect on innovation. To be clear only those companies that have already been found to be dominant would be subject to such scrutiny, since many smaller deals between non-dominant players would be of no concern.

Alternatively, or additionally, the merger control regime with its focus on consumer welfare could be reformed to bring in matters that are of public concern and general regulation under consumer protection law. Further (non-economic) public policy considerations can be included for scrutiny of mergers and acquisitions, such as the levels of personal data held by each relevant party. The EU data protection authorities have been calling for this approach for some time.

Another consideration currently under consideration by the EU and the UK authorities and something that has been a matter of merger control might be whether any infrastructure owned by the relevant parties could be deemed "Critical National Infrastructure" (CNI). Such reform is likely to include communications infrastructure, and might limit the extent to which foreign parties can purchase UK telecoms companies, or impose special conditions on those that do.

5 Conclusions

The above raises just a small number of current issues to be considered and potentially reformed. This will no doubt be an interesting sector to watch over the next few years, and these issues are likely to develop with or without Brexit, or whatever form Brexit eventually may take.

**Tim Cowen**

Preiskel & Co LLP
4 King's Bench Walk, Temple
London, EC4Y 7DL
United Kingdom

Tel: +44 20 7332 5645
Email: tcowen@preiskel.com
URL: www.preiskel.com

Tim is independently recognised as one of the leading competition/regulatory lawyers specialising in the technology sector. Tim's practice covers the full range of competition law and regulatory matters. He has a long and successful track record of defending and taking contentious matters before the authorities.

**Daniel Preiskel**

Preiskel & Co LLP
4 King's Bench Walk, Temple
London, EC4Y 7DL
United Kingdom

Tel: +44 20 7332 5656
Email: dpreiskel@preiskel.com
URL: www.preiskel.com

Daniel is co-founder of Preiskel & Co LLP and has around 25 years' experience working in the telecoms, media and technology sectors, advising across the globe. He has been ranked for over 20 years in major independent research guides as one of the world's leading communications lawyers.

He speaks seven languages and is particularly recognised for commercial and regulatory work in the UK and overseas. He was formerly an investment banker specialising in telecoms & technology and was recently elected during MWC to the EMEA Board of MEF (Mobile Ecosystem Forum), is a co-founder of the International MVNOx Association and former Vice-Chair of the IBA Communications Law Committee.

PREISKEL & CO

Preiskel & Co LLP is a City law firm which specialises in UK and multi-jurisdictional corporate, commercial (including IPR), and regulatory matters with a particular focus on telecommunications, media, and technology. Since its foundation in 2004, the firm's practices has expanded beyond its core expertise in TMT to build leading competition and telecoms regulatory practices.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk