ROUNDTABLE

***The International Who's Who of Regulatory Communications Lawyers* has brought together four of the leading practitioners in the world to discuss key issues facing lawyers today.**

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DEVELOPING MARKETS

Who's Who Legal: ***A number of the lawyers we spoke to in developed markets noted the continuing premium placed on their services by governments, regulatory bodies and private clients in developing jurisdictions. Is this the case in your experience? Which emerging jurisdictions are particularly active at the moment? And what effect is the influx of foreign legal professionals having on the local bar?***

Stefano Macchi di Cellere: It is true that lawyers that have gained in the US or Europe a deep understanding of the telecoms sector since its early liberalisation phase are better equipped to provide to governments, operators and investors in emerging jurisdictions the cutting-edge advice they are now seeking to support the development of their local market. Yet, while having a good knowledge of established telecom regulation frameworks is fundamental, a strong experience on the field is a necessary requirement to offer proper advice, as there are enormous differences among what are nowadays defined as "emerging markets": countries in the Middle East, for example, present challenges and opportunities that are often different from those found in Asia, or Africa, which indeed are composed of neighbouring jurisdictions that are particularly active at this moment, but stand at different mobile teledensity levels and population average wealth (such as South Africa and Nigeria). Therefore, whatever the lawyer's experience, there is no one-size-fits-all premium to be offered.

In the emerging jurisdictions, India has historically been hostile to foreign lawyers in general, and no exception is made today to legal experts bringing a particular know-how in TMT regulations. Other governments, like those within the MEA region, instead very much welcome foreign firms, which are invited to contribute to the building or development of their communications infrastructures and networks.

Andrew D Lipman: Having gone through some three decades of profound regulatory change in the US telecoms market, US-based telecoms attorneys are ideal repositories of experience and lore for governments, regulatory bodies and private clients in developing jurisdictions. Many developing countries find themselves trying to "cut to the chase", and to achieve rapidly a regulatory and market environment conducive to today's technology and conditions. By working with US experts, they can arrive at a deeper understanding of the areas in which US policy has succeeded in fostering technological innovation and universal service, but avoid making some of the mistakes that happened along the way in the US.

At the same time, of course, no developing jurisdiction faces exactly the same problems that the US has faced. Thus, sensitivity is needed among US practitioners to adapt their advice to individual circumstances faced by their clients abroad, be they governments, regulators, providers or buyers of services. This requires being attuned to pre-existing local regulatory conditions, market structures, entrepreneurial players and user needs.

US practitioners can be seen not so much as competing with the local bar in these countries as providing the opportunity to work together to interface US experience with local needs and conditions though constructive give and take. We value our ability both to listen and contribute to these partnerships. With this approach in mind, we have not found that there is a strict divide between those jurisdictions that are and are not amenable to this kind of cooperation. But jurisdictions that are taking particular advantage of this opportunity include Brazil, Russia, China, South Africa and Mexico.

Mike Conradi: In our experience there is less call for telecoms regulatory expertise in the developed economies of the European Union (except in the very largest of cases) but there is

still a strong demand in emerging markets – and especially in Africa and the Middle East. We often find ourselves advising either regulators or the regulated, and in either case our clients are keen to compare their own jurisdiction's rules with international best practice.

THE EFFECTS OF CONSOLIDATION

Who's Who Legal: *The continuing trend towards consolidation among the leading players in the telecoms sector has kept many of our sources busy over the past year, amid concerns of market dominance and anti-competitive behaviour. What might the long-term effects of this activity be for regulatory communications lawyers? What steps, if any, are regulators taking to maintain competition in your jurisdiction?*

Stefano Macchi di Cellere: What we are assisting to in the developed markets is a situation of mature consolidation, where there isn't much scope for further aggregations without seriously harming competition, at least at each national level. On the other hand, in most emerging jurisdictions, there is still room for extensive consolidation, which may become a necessity where governments have liberally assigned licences to the players but now that there is a need to invest in additional infrastructures (whether to reach rural areas, or to increase capacity) not all the operators will be able to resist and remain profitable under the pressure of continuous price squeezing. In both cases, the regulators, where applicable in coordination with the antitrust agencies, will have to increase their vigilance for anti-competitive behaviours, which, for example, may occur in cases where tower management joint ventures are established or spectrum/airwaves-sharing agreements are put in place or the outsourcing of passive infrastructures resort on co-location and multi-operators' leases.

Andrew D Lipman: The US is presented with what appears to be a dilemma: how to maintain competition in the face of growing industry consolidation, while at the same time advancing the fundamental policy goal of extending the benefits of emerging technology – especially broadband – to all it citizens? The age-old argument that telecoms is a natural monopoly, although thoroughly discredited by decades of experience in the US, has nevertheless resurfaced in the arguments of some that only by permitting more and more consolidation can regulators assure adequate investment in infrastructure. But again and again in the US, innovation has come from new competitors, who then by their very presence as a threat force the incumbents to innovate or be rendered irrelevant. Thus, while we foresee continued consolidation among existing players, we also foresee the continued emergence of new entrepreneurial providers. All of this means a continuing important role for telecoms lawyers in the US as they advocate on behalf of clients in helping guide regulators down this sometimes tortuous path and in structuring transactions and business practices accordingly. Emerging jurisdictions' regulators face the same challenges – and must react even more speedily to shifting conditions.

Mike Conradi: While it is true that there has been some consolidation in the sector the other trend we see is that the long-heralded era of "convergence" is finally upon us. This means that operators that traditionally focused on either fixed or mobile services are starting to compete with one another to a much greater extent - which of course has the effect of increasing not reducing competitive pressures. I foresee the day in the not-too-distant future when regulators will cease to distinguish between fixed and mobile markets - it is probably already the case, for example, that mobile calls are widely seen as a full substitute for fixed-line calls in most situations.

ECONOMIC CONDITIONS

Who's Who Legal: *Aside from consolidation, what other measures are communications companies taking to ensure stability and growth in the current economic environment? What role are lawyers playing in these strategies?*

Stefano Macchi di Cellere: Of course there are several strategies played simultaneously by large multinational communications groups, depending on their market position and jurisdiction of reference. To my knowledge, developed regions are investing in NGNs, with a particular attention paid by most mobile and fixed operators to the upgrading of data networks, in order to satisfy the ever-increasing requests of transmission capacity and speed, while enhancing the quality and range of added-value data services made available to customers. On the other hand, in the developing regions, we shall assist at an increased rate of infrastructure-sharing and spectrum-sharing agreements, the incidence of outsourcing deals will also steadily contribute to a certain activity of the sector worldwide, notwithstanding the current economic climate.

The function of lawyers will be fundamental in the regulatory execution and contractual realisation of these transactions although, to be honest, I do not believe that, with few exceptions in some jurisdictions in Africa, lawyers individually or through local associations will be able to play any original ex ante regulation steering role.

Andrew D Lipman: Communications companies' strategies vary with size, age and place in the market. The very largest providers are following (apart from consolidation, which remains central for them), a strategy of investing in infrastructure such as wireless broadband and fibre to the home, while arguing to regulators that they could invest even more if they were allowed

to consolidate further and finding ways to use existing regulation to fend off emerging competition. Smaller and newer players meanwhile continue to take advantage of their greater market and industry nimbleness to spot niches that are not served or underserved by the larger companies, develop effective and efficient ways of meeting these needs and making themselves an economic alternative even to existing services for many users. This has been the story of the US telecoms market for decades now, and we see no sign of its abating.

Lawyers must be nimble too. Those advising cutting-edge clients must quickly understand both the new technologies themselves and the market – which often does not yet even exist – for those technologies. Where existing regulation does not adequately lend itself to fostering specific technological innovation, lawyers can design and implement regulatory (and sometimes even legislative) strategies to change this. More often, lawyers can guide clients in structuring their activities in a way that avoids pitfalls present in existing regulation while not requiring affirmative regulatory change. This guidance takes many forms, from the structure of interconnection with existing services, to the development of forms of agreement for use with enterprise and individual customers, to negotiating contracts with large counterparties, to defending against attempts by established incumbents to defend their turf with regulatory measures.

Mike Conradi: The biggest issue facing mobile operators is the enormous, exponential growth in demand for mobile data services that they are currently experiencing. Their networks are generally not able to cope with the predicted levels of demand in only a few years' time and so there are several trends being played out to deal with this:

- outsourcing the management of networks to a third party (often an equipment vendor). This involves reducing costs by handing over management of a telecoms network to a third party, who is able to manage the network more cost effectively because, usually, they are also providing the same service to other operators in the same region and so can benefit from economies of scale;
- some other form of network sharing - ie, reducing costs by sharing telecoms infrastructure with other operators. There are many forms that network sharing can take - ranging from "passive" sharing (of lines, ducts and masts) to "active" sharing (of electronic switching equipment). The latter involves more regulatory issues since it has a stronger tendency to reduce competition;
- spectrum trading and leasing. The shift to the new generation of mobile technology, known as LTE (long-term evolution) will provide for a more efficient use of spectrum and operators will certainly be interested in acquiring new spectrum for this purpose. In countries that allow it we can also expect a much greater use of the ability to trade spectrum in order to ensure it is put to its most efficient use. The UK is pioneering one innovation that can be expected to have an impact in this area - spectrum "leasing" will allow the holder of spectrum to permit a third party to use all or part of it for a limited time.

REGULATORY DEVELOPMENTS

Who's Who Legal: *Have any further regulatory measures been employed in your jurisdiction in the past year? How are these changes affecting the work of lawyers in this discipline?*

Peter Waters: Australia and New Zealand are now well underway in the planning and deployment of their large-scale, government-funded (and owned or partly owned) FTTP networks. While national elections are on the short-term horizon in both countries, these FTTP projects may soon be beyond the point of no return and will be difficult for any new government to undo.

While perhaps "extreme" examples, what is happening in Australia and New Zealand seem to illustrate a major shift in the underlying policy "ideology" that has informed regulatory decision-making in telecommunications for the past 15 to 20 years.

I would be interested if others see similar signs in their home markets – and hopefully other contributors will give me licence to set out my views at some length.

Since the telecommunications was first liberalised in the mid-1970s and 1980s, the unquestioned twin assumptions have been that the role of government is appropriately limited to regulation and that services and networks should be built and delivered by private sector competitors at all levels of the market.

Although there has been a continuing and unresolved debate about the relative weight to be given to services-based competition over facilities-based competition, there was little, if any, doubt about relying on private capital to deliver services and networks, even among those who considered that the local network would remain an enduring monopoly.

The continued public ownership of the incumbent provider was, in fact, seen as being at odds with effective access and competition regulation because the government would be placed in a 'conflict of interest' – why would the government impose regulation that would increase competition if that also diminished the value of the government's investment in the incumbent?

These long-held concerns about government ownership of networks – the inherent inefficiency of publicly owned utilities and the 'conflict of interest' between regulation and government ownership – have, at least in Australia and New Zealand, been cast aside with great rapidity and not much debate.

Why has this fundamental shift occurred?

I think that there are five converging views that have, among other things, made it easy for governments to partly or wholly "nationalise" FTTx deployment.

First, there is a "moral panic" among governments that their market is falling behind other comparable markets in the

availability of high-speed broadband services. This "moral panic" is driven by international rankings of broadband penetration, take-up and pricing, particularly the OECD's broadband "league table".

Second, there is widespread doubt that the existing regulatory model – in particular regulated access – can deliver an innovative, vibrant NGN market. This is less about the inherent deficiencies of services-based competition or the shortcomings of access regulation and more about perceptions that the incumbent's market power has proven to be more enduring than originally anticipated when markets were first liberalised.

The incumbent's vertical integration is increasingly seen as the "root of the problem", which has been hardly dented by behaviourial remedies. Now policymakers are turning back to structural remedies – which most outside North America shied away from after the court-driven break up of AT&T.

Incumbents have argued that the deployment of FTTx networks should provide a natural "breakpoint" with the past because incumbents and entrants are both "starting from scratch" in building these networks, particularly FTTP/B; the economics of building FTTx networks are much better for entrants than legacy networks because, as multi-service networks, FTTx networks provide opportunities for additional revenue streams; and there are powerful companies in neighbouring markets that have the resources and their own natural advantages, which will make them formidable competitors in an NGN world, including cable companies, satellite pay-TV providers (eg, BSkyB's entry into the UK broadband market) and more recently, applications providers (eg, Google's plans to build local area fibre networks).

However, there is a hardening scepticism that FTTx can or will have a transformative effect on the structure of the industry. In Australia, the ACCC comes close to regarding vertical integration as being bad per se – to the extent of criticising a proposed industry-owned FTTx network because its shareholders could influence decisions made about technology and rollout that would affect other players that were not shareholders.

Third, there seems to also be a growing view that the deployment of ubiquitous high-speed broadband networks is not economically feasible, even by an incumbent as a de facto monopoly network, and that only governments are up to the task. While government funding was easier to announce in the climate of the global financial crisis as part of government stimulus spending, the philosophical support for government ownership of FTTx networks runs deeper. Proponents embrace the historic example of government funding of the deployment of the PSTN to justify government funding of a national FTTx network as its replacement. They also evoke the language of "nation building". The view that the private sector cannot afford to deliver ubiquitous FTTx networks has received support from a cost study undertaken by WIK.

The decision to go down the road of taxpayer-funded national networks leads has some knock-on consequences that show just how far we have travelled from the original ideology of facilities-based competition. In Australia, there is a strong political imperative to make broadband services available at a similar cost between urban and rural populations. That requires implicit cross-subsidies between urban areas (with lower cost base) and rural areas (with higher network costs). But cross-subsidisation immediately exposes the government network builder to "cherry picking" from alternative network builders in urban areas – which in turn would undermine the national uniform pricing policy. This has been addressed in Australia by legislative provisions that impose on builders of high-speed broadband networks the same wholesale-only (vertically separated) and regulated bitstream requirements that apply to the government's own network. The practical effect will be to discourage alternative fibre build.

Finally, there seems to be a concern that ULLS represents the "high water" mark of access-based competition – that unbundled loops on copper networks is as good as we are going to get competition. It will be difficult to replicate access to the physical layer in an FTTx environment. In a GPON FTTx architecture, individual fibres only run to each premises from the splitter located in a street cabinet. New Zealand originally proposed a dark fibre access network but has backed away from that. Australia's will be a Layer 2 bitstream network.

The concern with active access products is that the access provider will be able to control the nature of competition in downstream markets through the technical specification of the service. Concerns over the greater control that access providers will have over downstream competition when based on active access products reinforces the concerns about the continued force of vertical integration and the reduced opportunities for infrastructure-based competition in an FTTx world. It is then argued that, if a monopoly FTTx is inevitable, it is better that the network should be owned by a "neutral", non-vertically integrated operator. It is then a short step to say that, given the financial challenges of deploying an FTTx network and the reduced margins available to a wholesale-only operator to fund that build, the government is the only neutral party that can own and operate the network.

Stefano Macchi di Cellere: It looks like the very interesting regulatory framework in Australia and New Zealand is different from that developed in most of Europe, where the need for building infrastructures and bringing telecom services to rural areas is still in the government's agenda, but does not have such an overwhelming and compelling importance to require a direct investment by the state, especially when such governmental action would have to face the painstaking scrutiny of competition agencies and the European Commission state aid control.

In Italy, we are assisting to a peculiar mobile-fixed duality phenomenon, as opposed to other western European countries, partially caused by its geographic characteristics as well as the level of informatics' education in its population.

Indeed, while we have one of the highest mobile penetration rates in the region (where mobile teledensity exceeded 100 per cent since 2007), also encouraged by new regulatory measures,

such as the AGCOM plan to make available to mobile network operators 300MHz of mobile broadband by the end of 2015, or the successful public auction closed by the Ministry of Communications this last September with the assignment of 22 lots of 4G mobile frequencies for the new long-term evolution technology (LTE) services, Italy's mobile sector is still predicted to continue growing; on the other hand, the already depressed fixed-line market in Italy has been experiencing a decline, with a broadband penetration rate still among the lowest in the region, notwithstanding AGCOM's 2010 supporting initiatives, such as a plan to have all broadband operators involved in a next-generation network (NGN) initiative to co-invest in a fibre-optic network spanning all of Italy, which instead has been extremely controversial among certain operators with respect to the authentic incentive offered to invest where the incumbent operator is not present.

Also the Italian regulatory media sector saw a number of new initiatives, with an AGCOM resolution to establish 25 new DVB networks (which includes 16 DVB-T "terrestrial" networks and three DVB-H "handheld" networks) and providing that at least one-third of the available frequencies must be reserved for local broadcasting networks, or demanding the transfer of 40 per cent of the transmission capacity held by DVB-T networks to new players, so as to favour pluralism and competition in the market by providing the opportunity for independent content providers to access the market and offer high-quality products to the public.

Understandably, this variegated and complex scenario represents a test for communications lawyers involved in representing clients active in the TMT front, with matters increasingly spilling into multifarious litigation before the administrative agencies and civil courts.

Andrew D Lipman: The FCC's National Broadband Plan released in March 2010, remains the central document in understanding and predicting US telecoms policy this year and in years to come. This is not surprising, since the Plan was developed at the specific direction of Congress, and developing the Plan was the primary business of the FCC's staff for a full 13 months. However, the structure and tradition of the US telecoms market is such that the Plan envisions private industry will play the predominant role in seeing to it that broadband access becomes ubiquitous, with government activity being limited to the development of a regulatory framework to speed such deployment, the freeing up of spectrum resources in government hands and some level of targeted stimulus spending.

The Plan provides for four key areas of activity, which are already well underway, even if their ultimate direction is not always clear. These include:

- competition policies: regulatory actions to encourage investment in broadband networks;
- infrastructure policies: spectrum reallocation and access to government-owned, -regulated, and -funded property;
- universal availability and adoption: Universal Service Fund (USF) reform (subsidies for network deployment and operation and subsidies for low-income subscribers); and
- achieving national priorities: recommendations for using broadband to improve health care, education, public safety, and other areas.

The key FCC regulatory change in 2011 toward this end is its effort to reform its intercarrier compensation (ICC) regulatory regime and the mechanism for funding universal service in the US. The FCC issued its first major order in these areas in October, with further rule-makings and orders to follow.

In the ICC area, the FCC's efforts have centred on trying to harmonise the complex regime in place today, which has historically resulted in carriers charging different rates to different parties in different circumstances for what might often be viewed as the same services at the same cost. In the FCC's view, this regime has resulted not only in administrative burdens and undue regulatory uncertainty, but has opened the door for gaming and arbitrage that may enrich private parties but does not arise from true economic efficiency. Highly technical, the FCC's October order constitutes its first effort at harmonising and simplifying the ICC structure in a way that, it is hoped, will more correctly reflect underlying economics and encourage innovation. While laudable in intent, the process is of course quite controversial, since the ultimate structure arrived at by the FCC would clearly make some parties better off and others worse, no matter what it might be. Thus, stakeholders (and their attorneys) face the challenge of both adapting to regulation in this area as it changes today and of seeking to influence the details of the regulatory structure as it continues to be refined.

As to universal service, the FCC has long been concerned that the method for assessing contributions to its USF might be unfair and uneconomic, while at the same time its regime for distributing funds from the USF to providers might not be well matched to the objective of actually assuring universal service – especially broadband and other new technologies – for US citizens. Its October order begins the transition from historical USF support to a Connect America Fund (CAF) that is focused on deployment of broadband. State commissions will continue to designate and oversee carriers eligible for CAF support, including enforcement of carrier of last resort obligations. CAF recipients will be required to offer voice and broadband services, file annual reports, and meet performance, build-out, and public interest obligations (such as the requirement to connect anchor institutions). The order adopts rules to reduce or eliminate support if these obligations are not met and a further notice of proposed rule-making requests comment on additional enforcement mechanisms.