The Technology, Media and Telecommunications Review

Fifth Edition

Editor
John P janka

Law Business Research

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EDITOR'S PREFACE

This fully updated fifth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern the issues facing lawmakers and regulators, as well as service providers and new start-ups, in 29 jurisdictions around the world.

As noted in the previous edition, the pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models continue to fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today's world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a 'light touch' in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do

not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address 'network neutrality' concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

I would like to take the opportunity to thank all the contributors for their analytical input into this publication. In the space allotted, the authors simply cannot address all of the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2014

LIST OF ABBREVIATIONS

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

FTTH	Fibre to the home
FTTN	Fibre to the node
FTT*x*	Fibre to the *x*
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD–PCOs	Subscriber trunk dialling–public call offices
UAS	Unified access services
UASL	Unified access services licence

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

Chapter 13

ITALY

Stefano Macchi di Cellere[1]

I OVERVIEW

The 2014 first quarterly report of the Italian Authority Safeguarding Communications (AGCOM) highlights a slight improvement in the Italian macroeconomic situation in 2013, in line with the European trend and despite persistent contraction in the sector revenues, new investments have started to pick up, especially with the rolling-out of the Government digital agenda plan and the implementation of the next-generation network built around IP.

Unsurprisingly, there is a continuous reduction and replacing of traditional telephony services with VoIP services, with an accompanying expansion in broadband use and a constant increase in the number of mobile users, and in particular machine-to-machine mobile connections.

On the consumer side, the price of services and telecommunications devices has lowered across the board, while the consumption of data traffic is rising steeply for both the business sector and private users.

A renewed interest showed by the banking sector in integrated mobile services in light of the technological evolution and the widespread circulation of smartphones and tablets is promising. Today the vast majority of banks offer mobile banking services to their Italian customers. In the near future it is expected that a growth in more efficient and sophisticated mobile banking services could alter the conventional balance between TMT and the financial sectors. Similarly, the coming years are expected to see a growth in all the telecoms and media applications connected to the development of consumers' electronics products, including the automotive sector (remote management and safety systems) and utilities (management of electricity, water and gas).

1 Stefano Macchi di Cellere is of counsel at Jones Day.

As for regulation, AGCOM's activity is essentially aimed at removing the obstacles tackling the dynamic development of the 'digital ecosystem'. Alongside the traditional area of activities determined at the European level, AGCOM mainly focused on the following issues: broadening all operators' access to the networks (both fibre and copper), safeguarding media contents, and protecting competition in the media market by preventing the potential creation of monopolistic positions.

II REGULATION

AGCOM is the independent authority established by Italian Law No. 249 of 31 July 1997, with responsibility for regulating and controlling the Italian telecommunications market. Although in principle the authority is deemed to be fully independent from any economic and political power, its members are appointed directly by the Italian parliamentary chamber and senate.

AGCOM is made up of various directorates, including:

a the Electronic Communication Networks and Services Directorate, which deals with infrastructure and services issues such as interconnection and access to networks, wholesale and retail telephony and broadband, and numbering and spectrum issues;

b the Audio-visual Content and Media Directorate, which deals with all content issues, such as regulation of the licence and authorisation regime for contents and access to multimedia platforms, protection of minors, compliance with the right of reply, protection of intellectual property rights, advertising regulation and public broadcasting;

c the Market Analysis and Competition Directorate, which, *inter alia*, carries out all market analysis activity and liaises with the Italian Competition Authority (the AGCM) on the different opinions provided for under the law; and

d the Consumers Protection Directorate, which is responsible for dealing with consumer complaints and which also has the task of rendering opinions to the AGCM regarding misleading advertising and is in charge of functions such as that of resolving conflicts or disputes between operators and customers.

Merger control in the telecommunications market is jointly managed by both AGCOM and the AGCM. Pursuant to Law No. 249/1997, the AGCM, when investigating a merger concerning the telecommunication sector, must request a non-binding opinion from AGCOM, which must express its views within 30 days of such request. Moreover, Law No. 177 of 31 July 2005 (the Consolidated Text of Radio and Television) and AGCOM Resolution No. 646/06/CONS set out the rules in relation to merger control for transactions involving undertakings active in the integrated communication system.[2]

2 The sector of the economy comprising daily newspapers and periodicals, electronic publishing including the internet, radio and television, cinema, external advertising, product and service announcements and sponsorship.

Undertakings operating in the integrated communication system that intend to merge with other operators active in the same market are required to notify the merger to AGCOM, which then has 60 days from the notification to verify the compliance of the merger with the rules set out in the Consolidated Text of Radio and Television.

AGCOM can only issue licences for TV broadcasting to Italian or EU companies. Where non-EU entities control such companies, the issuance of the licence is possible only if the country of origin of such entities would grant reciprocal market-entry rights to Italian companies.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i General authorisation Regime

The establishment of electronic communications networks and the supply of related telecom, data or media services, also for private use, and regardless of the means or technology employed, is governed by the general rules set out by Legislative Decree No. 259 of 1 August 2003, as subsequently amended (the Electronic Communications Code).

Under Article 25, Section 3 of the Code, the supply of networks or services for 'electronic communications', is subject to a general authorisation issued by the Ministry of Economic Development. Such authorisation grants the applicant the rights to negotiate the necessary network access and interconnection with existing electronic communication network or services operators in Italy and apply for any numbering of spectrum frequency resources.

In accordance with Article 25, Section 3 *bis* of the Code, 'the operators that supply cross-border electronic communication services to enterprises located in more than one Member State, are not obliged to file more than one notification per Member State'. 'Electronic communications networks', broadly speaking, consist of any transmission system, including any switching or routing equipment or any other resources, including passive network elements that permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks; fixed-to-mobile terrestrial networks (whether circuit or packet switched, including the internet); the networks for the broadcasting of television or radio programmes; any other system for the transport of electricity in so far as these are used to convey electronic signals; and the television cable networks irrespective of the kind of content transported.

The Code specifies that, 'electronic communication services' means those services, whether supplied for a fee or not, which mainly consist in the transmission of signals on 'electronic communications networks'.

The installation in Italy of even a single switch or router connecting to a communications network would require the operator of that switch or router to apply for a general authorisation.

Different requirements and fees apply depending on the kind of network or services (e.g., public communications networks, public telephone services, satellite communications services, mobile services and other communication services). To obtain an authorisation it is necessary to file a declaration with the Ministry of Economic Development. Once the application has been filed, the operator may start negotiating

access or interconnection with any provider of publicly available communications networks or services, although the Ministry of Economic Development has 60 days from filing to review and challenge the same, should the operator not be able to meet all the necessary requirements. The applicant may commence operations immediately upon notification of the authorisation. The authorisation is granted for 20 years and is transferable and renewable.

ii Internet and IP regulation

The offering of services over the internet is governed by the general rules set out by the Electronic Communications Code and is subject to a general authorisation. The Code is aimed at promoting efficient investments and innovation in the telecommunications facilities, at increasing a flexible and efficient management of frequencies spectrum, at strengthening security measures in the communications as well as at consolidating users' rights.

By Resolution No. 219/02/CONS, AGCOM defined and segmented the market for the access to the internet for the first time. In particular, AGCOM stated that the market for access to the internet could be divided into (1) the end market of services for internet access in the dial-up fixed network; and (2) the intermediate market of interconnection of termination of calls directed to the internet. Therefore, since 2002 AGCOM has considered the internet access market to be separate from the traditional telephony market.

All ISPs operating in the sector referred to in (1), pursuant to Law No. 59/2002, may have access to the reference wholesale offer determined by the dominant operator Telecom Italia, which is recognised by AGCOM as having significant market power.

With reference to services over the internet, AGCOM expressly regulates the supply of VoIP services under Resolution No. 11/06/CIR.

iii Universal service

Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (the Universal Services Directive), provides that EU Member States must ensure that a person dialling the European emergency number from a mobile phone can be located and that details about his or her location are sent to the relevant emergency services. The implementation of the emergency number was tested in 2010 in the Italian province of Varese and in 2013 the Ministry of Internal Affairs and the Ministry of Economic Development were granted full powers to implement the emergency number in compliance with Article 75 *bis* of the Electronic Communications Code.

iv Restrictions on the provision of service

In Italy, AGCOM is the competent authority (together with the SIAE, the Italian association of authors and publishers) to prosecute copyright violations committed by means of internet content, applications or services.

Pursuant to Royal Decree No. 633/1941 and subsequent amendments (the Copyright Code), AGCOM must investigate copyright violations committed through any form of telecommunications (including the internet). Having said that, pursuant

to Italian law, AGCOM does not have the power to apply any kind of civil or criminal penalty, since any such penalties may only be imposed by a competent judicial authority.

Furthermore, although Italian law tends to exclude the imposition of civil or criminal liability on internet providers for copyright infringements resulting from content posted by their network users, the applicable rules vary in relation to the type of operator involved. In particular, while access providers cannot be held liable for copyright violation as a consequence of their particular activity, content providers supplying additional services (i.e., hosting and caching) could be held liable only if they had knowledge of the breach and did not intervene to prevent it; however, no general monitoring obligation can be imposed on content providers.

An ISP could be held liable if a copyright owner proves that it had knowledge of the copyright violation or that the ISP itself created the infringing content. Notwithstanding the foregoing, if AGCOM issues an order to the ISP to monitor the contents of its websites, the posting of copyright-infringing content may result in administrative liability for the ISP (since ISPs are obliged to comply with orders issued by AGCOM).

Although internet copyright violations may be prevented by using various technical measures, many of these can raise issues concerning violations of privacy or discrimination against users (e.g., AGCOM deemed content filtering, deep-packet inspections or port blocking as contrary to users' privacy rights and to the principle of network neutrality, and, moreover, has already expressed its concerns about the efficacy of such measures).

Therefore, at present, network operators such as ISPs do not have any specific obligation to monitor compliance with copyright regulation of contents, applications or services posted by users through their networks even if, under specific circumstances, they could be held liable for such violations.

In this latter respect, an Italian court recently found that 'the possibility must be ruled out that a service provider, which offers active hosting, can carry out effective pre-emptive checks of the entire content uploaded by its users.' Such an obligation would impose a 'pre-emptive filter on all the data uploaded on the network', which would alter the network's functionality, and thus only the users who upload content to the internet are fully responsible for compliance with data privacy laws.[3]

v Security

Law No. 14 of 24 February 2012 and Article 10 of Legislative Decree No. 69 of 9 August 2013 have finally removed the obligation for entrepreneurs running a business offering the opportunity for clients to use electronic communications (e.g., wi-fi) devices of any kind (except public phones) to obtain a mandatory licence from the local police and to ask for any identification of its customers, while still maintaining the obligation to store

3 Milan Court of Appeal, Case 4889/2010, where in 2013 the appellate court overturned the conviction of three Google executives on charges of unlawful data processing in violation of Article 167 of the Italian Privacy Code for allowing a video depicting the bullying of an autistic teenager to be uploaded to the Google Italia YouTube website (see www.law360.com/privacy/articles/426406/italian-court-s-google-decision-a-significant-precedent).

data according to Legislative Decree No. 196/2003 (the Privacy Code), as amended, among others, by Legislative Decree No. 69 of 28 May 2012.

Furthermore, the Electronic Communications Code provides that the Ministry of Economic Development shall identify the technical and organisational measures to guarantee network safety, to limit damages to the network arising from its violation, as well as any significant negative effects on the proper functioning of the services.[4]

Privacy and consumer protection

The Privacy Code sets out the rules generally applicable to protection of consumers' privacy in relation to electronic communications.

Generally speaking, network operators are allowed to collect and process personal data only if the users have given their prior consent to such activities following an 'information notice' from network operators, which must contain information relating, *inter alia*, to the purpose of the data collection and treatment, the subjects on which data could be transmitted and the rights of users to request the deletion of their data from the operators' databases.

With regard to the processing of users' data, the Privacy Code states that network operators must delete users' traffic data[5] from their databases once such data ceases to be necessary for the purposes indicated to the user in the information notice. However, network operators are allowed to keep this data for a longer period (up to six months) if necessary for invoicing purposes.

Network operators must also store data for the purposes of crime prevention. The storage period varies depending on the type of data at issue. In particular, the storage period is:

a 24 months as of the date of the communication for traffic data;
b 12 months for computer data; and
c 30 days for unsuccessful calls.[6]

The data to be retained includes the data required to, *inter alia*, trace and identify the source and the destination of a communication, identify the date, time and duration of a communication, and to identify the type of communication.

Location data[7] can be processed only with the user's agreement, provided that the user maintains his or her right to request the competent network operator to stop the processing, even temporarily.

Users' consent is also required for the storing and accessing of cookies in their computers as well as any handheld device (i.e. any terminal).

4 Article 16 *bis* of the Electronic Communications Code.

5 Data processed for the purpose of the conveyance of a communication on an electronic communications network or of the relative billing.

6 Articles 123 and 132 of Privacy Code.

7 Data indicating the geographical position of the terminal equipment of the user of a publicly available electronic communication service.

Operators must adopt all the appropriate technical means to protect personal data.

Failure to comply with the aforementioned legal requirements is punishable by the application of both administrative fines ranging from €10,000 to €120,000 and criminal sanctions ranging from six to 24 months' imprisonment.[8]

Network operators must inform AGCOM, the Privacy Authority and, where possible, the interested person, about the risk of network security violations. Additionally, the network operator must timely and in detail inform the Privacy Authority in case of violation of personal data. If the violation can cause any damage, the interested person must be informed as well.[9]

Failure to comply with the aforementioned legal requirements is punishable by the application of administrative fines and criminal imprisonment.

In particular, in case of omitted communication to the Privacy Authority, a sanction ranging from €25,000 to €150,000 applies, and in case of omitted communication to the interested person, a sanction ranging from €150 to €1,000 per person applies up to a maximum amount of 5 per cent of the turnover of the operator in the year before the notification of the administrative fine was made. Such cap might be disregarded if the resulting fine on the operator's turnover is not a sufficient deterrent.

Finally, in case of misleading communication to the Privacy Authority, or should the operator supply the Privacy Authority with forged documentation, the offender could be subject to imprisonment from six months to three years.

Protection of children

Italian law prohibits in principle the broadcasting of programmes that, taking into account the time of the broadcasting, can seriously harm the physical, psychological or moral development of children or contain brutal violence or pornographic scenes.

Broadcasting companies may broadcast programmes with the content indicated above only upon request and subject to the condition that they adopt any technical measure to prevent young persons from watching such programmes without warning (i.e., parental control systems). AGCOM establishes the requirements that broadcasting companies have to comply with in order to ensure the protection of children. Such programmes must also be marked with a proper acoustic or visual signal. Following the amendments contained in Legislative Decree No. 120 of 2012,[10] the broadcasting of X-rated and VM18[11] programmes is prohibited, while VM14[12] programmes cannot be broadcasted between 7am and 10.30pm. Moreover, broadcasting companies must

8 Articles 162 and 167 of Privacy Code.

9 Article 32 and 32 bis of Privacy Code.

10 Article 1, § 1 of Legislative Decree No. 120 of 2012 amended Article 34 of Legislative Decree No. 177 of 2005.

11 Parental guidance content for minors under the age of 18.

12 Parental guidance content for minors under the age of 14.

guarantee that programmes particularly directed to underage persons that are transmitted between 4 p.m. and 7 p.m. contain appropriate content.[13]

The protection of children is also pursued by the application of the Self-Regulation TV and Underage Code, which provides for specific rules directed to broadcasting companies for the protection of minors during TV programmes. The violation of the Code may lead to (1) the application of fines, ranging from €25,000 to €350,000; (2) the suspension of a broadcasting licence for between three and 30 days; and (3) the disconnection of the broadcasting facility for a maximum period of 30 days.

Cybersecurity

The National Anti-Crime Computer Centre for Critical Infrastructure Protection (CNAIPIC) is the public body responsible for the cybersecurity of infrastructures operating in particular sectors, such as health care, transport, telecommunication and energy. The CNAIPIC is a branch of the Italian police. It comprises two departments (operational and technical) and its purpose is to intervene to prevent and fight cyberattacks, cybercrime and industrial espionage.

In particular, the protection of strategic infrastructure is carried out by the Italian police by creating an 'external wall' to an existing protection infrastructure, meaning an electronic protection system that monitors possible access anomalies and communicates them to the CNAIPIC. In such a case, the latter will promptly inform any other entities of such anomalies.

The Italian police also entered into various agreements with telecoms operators, providing for the exchange of data and information in order to prevent, detect and fight cyber attacks.

Emergency response networks

By Resolution No. 52/12/CIR, AGCOM adopted a new numbering plan in the Italian telecoms sector. Articles 12 and 13 of the Resolution set out specific rules in relation to numbering for emergency services and for public utility services. In particular, the Resolution states that numbers for emergency services (e.g., the police, fire service and ambulance) are established by prime ministerial decree while numbers for public utility services (such as harbour offices or the Financial Police) can be allocated directly upon request submitted to AGCOM. Such numbers are unique to the whole of Italy and users can call them free of charge. Operators have to ensure access to emergency service numbers either directly or by agreement with network operators.

Consumers' protection

One of the main goals of the Electronic Communications Code is to protect consumers. In order to extend the scope of this protection and to comprehend all kind of possible legal relationships between the client and the provider, the Italian parliament has recently replaced the term 'subscriber' in the Code with the broader term 'contracting party', which is to be defined as usual (i.e., the 'natural or legal person that is party to an

13 See Article 34, Sections 1, 2, 3 and 7 of Legislative Decree No. 177 of 2005.

agreement with a provider of communication services available for the community, for the supply of such services'). Indeed, a subscription contract is no longer permitted to be put in place in the communications sector.

Furthermore, the legislature set forth certain provisions that oblige providers of network connection services, at the request of end-users and consumers, to specify in the relevant agreement the exact services provided and the limits applied, the prices, the duration of the agreement and the right of termination in favour of the consumer.

Additionally, the consumer cannot be prevented from terminating an agreement for a period longer than 24 months from the execution of same and the provider shall in any case prepare and put at the disposal of customers a standard contract form envisaging a maximum duration of 12 months.[14]

Consumers have a right to number portability and to change their mobile or fixed operator in one working day and to always receive clear information about the operator minimum levels of service quality, including amounts of refunds in case such minimum levels are not met.

IV SPECTRUM POLICY

i Development

Radio spectrum is a limited but essential resource for telecoms operators. The management of radio spectrum is becoming a major issue both for operators and for political players at national and international levels. With regard to the foregoing, the trend that is emerging relates to a more flexible and market-oriented use of radio spectrum. In fact, while originally telecoms regulators were inclined towards a rigid division of spectrum in relation to each technology, in recent years the political agenda has begun to lean towards a more efficient use of spectrum resources.

Such goal has been and will be pursued by various means, such as the reallocation of spectrum resources (white spaces) following the digital switchover.

The Ministry of Economic Development has adopted a spectrum allocation plan, indicating for each band which kind of services are allowed.

ii Mobile frequencies allocation

Broadband and next-generation mobile spectrum use

The Radio Spectrum Policy Programme (RSPP) elaborated by the European Commission indicated 1 January 2013 as the latest date for rendering the 800MHz broadband available to mobile network operators, in connection with a simplification of the various problems related to roaming services. The regulators are considering making further broadband available to mobile customers, and the 700MHz frequency – which at present is used for television broadcasting – is the most eligible one. The RSPP also prescribes that coordinated availability of the 800MHz band for electronic communication services other than broadcasting should be achieved in all EU Member States by 2015.

14 Articles 70 and 80 of the Electronic Communications Code.

Such spectrum resources should be made available by assigning to mobile operators some frequencies previously used for military purposes and reassigning to mobile operators frequencies previously assigned to other telecoms operators, but that they have not used.

It is interesting to note that in the first quarter of 2014, the overall number of mobile lines in Italy decreased, even though in 2013 the amount of telephone traffic increased by about 8.5 per cent. In particular, it is worth emphasising that most of the current growth was due to business contracts, rather than consumer pay-as-you-go deals and, as a consequence, there has been an increase in the number of new 'business' SIMs with post-paid contracts (totalling 12.5 million lines in March 2014), while the prepaid SIMs have been decreasing, as well as the 'residential' SIMs (which stand at about 78 million lines overall as of end of March 2014). Voice-traffic-only SIMs fell by 8.8 million in 2013, while the use of SMS also dropped by more than 40 per cent.

These statistics reflect the operators' commercial strategies, typical of a mature market, in which bundle offers and the increased demand for Data-SIMs are mostly boosted by the success of smartphones and tablet devices.[15]

In terms of market shares, Telecom Italia is the undisputed leader in the business mobile segment (64 per cent), while Vodafone is the lead operator in the residential segment (31 per cent), closely followed by Telecom Italia (29 per cent) and Wind (28 per cent).

Under the European Union's Roaming Regulation No. 717/2007, AGCOM is required to monitor compliance in Italy of the approved roaming directions for tariffs and price caps for data downloads. On 27 June 2013, AGCOM issued Resolution No. 371/13/CONS which required Vodafone to take necessary steps to ensure that its customers who subscribed to certain old tariff plans[16] be admitted to more favourable tariff conditions, in compliance with the Eurotariff applied for EU-wide SMS roaming services.

iii Television frequencies allocation

From beauty contest to public auction

In early 2011, the Italian government began preparing what was initially devised as a 'beauty contest'[17] among existing broadcasting companies satisfying certain specific requirements, for the free allocation of the broadcasting frequencies deriving from the Italian 'digital dividend' resulting from the switchover from analogue to digital TV.

The eligibility requirements were designed in such a way that the two broadcasters dominating the Italian market in the analogue era, RAI (the national public broadcasting company) and Mediaset (the largest private broadcasting company) were very likely to continue holding a strong dominant position in the digital market.

15 Data from the 2013 AGCOM Report. The Report is available at www.agcom.it/Default.aspx?message=contenuto&DCId=5.

16 'Vodafone no connection', 'Free You & Friends', 'Free You & Me', 'Zero Limits Smart'.

17 Announcement published in the Italian Official Gazette No. 80 on 8 July 2011.

Therefore, with the prior endorsement of the European Commission (which had previously opened an infringement procedure against Italy for hampering the entry of new players in the broadcasting market) in April 2012, the government[18] revoked the beauty-contest procedure and set forth the rules for a public auction on a non-gratuitous basis to be launched within 2012. The forecasted revenues deriving from the sale of the frequencies is believed to range between €1 and €1.2 billion.

While Mediaset has in the meantime challenged without delay the revocation of the beauty contest before the Italian Administrative Courts, on 11 April 2013 AGCOM adopted a regulation containing the procedural rules for the public auction,[19] which was announced by the Ministry of Economic Development on 7 February 2014, while litigation was still pending.

Adoption of the technology and service neutrality principle

On May 2012,[20] the government implemented Directive 2009/140/CE and introduced to the Electronic Communications Code the principle of technology and service neutrality, aimed at opening the market and at maximising the value of the frequencies spectrum. The adoption of the principle will allow broadcasting companies to transform the DVB-H frequencies into DVB-T frequencies; in other words, it will be possible for companies owning frequencies currently used for video mobile phones to transform them as digital terrestrial television frequencies. The relevant application shall be filed with AGCOM within 25 May 2016.

Nowadays, Mediaset and RAI own four multiplexes for DVB-T frequencies and one multiplex for DVB-H frequencies each. Therefore, they would all be entitled to ask for the conversion. Were they to do so, they would reach five DVB-T multiplexes each which is, according to the European legislation, the maximum number of DVB-T multiplexes that a player may own; as consequence, they would in principle be prevented from taking part in further future public auctions.

Digital video broadcasting – second generation terrestrial (DVB – T2)

By 1 July 2015,[21] all television sets will be able to receive DVB-T2 frequencies. As of 1 January 2015, only devices for the broadcast of DVB-T2 technology programs with MPEG-4 codification may be put on the market. Both RAI and Mediaset have recently started testing these radio frequencies.

V MEDIA

i Restrictions on the provision of service

Broadcasters and suppliers of audio-visual services (such as IPTV) or on-demand media are all subject to 12-year authorisations to be granted by the Ministry of Economic

18 Law No. 44 of 26 April 2012, Article 3 *quinquies*.

19 Resolution No. 277/13/CONS.

20 Legislative Decree No. 70 of 28 May 2012 amending the Electronic Communications Code.

21 Law No. 44 of 26 April 2012, Article 3 *quinquies*.

Development. Law No. 220 of 13 December 2010 (the Financial Law 2011), at Section 11 of Article 1, mandates the Ministry of Economic Development and AGCOM to set further obligations on the holders of radio frequencies assigned for the broadcasting of audio-video content, demanding a more efficient use of the spectrum and the broadcasting of programming on regional and local culture. Failure to comply with such obligations may lead to the revocation of the relevant authorisations. In Section 12 of Article 1 of the Financial Law 2011, it is also established that, in case of digital broadcasting without authorisation, the party that has editorial responsibility for the broadcast may be fined up to €2.5 million.

ii Digital switchover

On July 2012, all 20 Italian regions had completed the switchover from analogue to digital transmissions. AGCOM Resolution No. 300/10/CONS established the allocation of DVB frequencies. Such resolution provided for the establishment of 25 DVB networks and provided that at least one-third of the available frequencies must be reserved for local broadcasting networks.

By Resolution No. 181/09/CONS, AGCOM defined the criteria for the distribution of terrestrial digital frequencies among network operators by using the horizontal-entry model (providing for three different qualifying models to enter the market: content provider, services provider and network operator) and the single frequency network technique (a network of several transmitters operating at the same frequency), thus increasing network efficiencies. Moreover, AGCOM established the rules for the allocation of spectrum frequencies in relation to the digital dividend in order to increase competition in the market and favour entry into the market of new operators.

Finally, AGCOM sets out the rules for the transfer of 40 per cent of the transmission capacity of DVB-T networks to new players.

In compliance with the above, on 10 July 2012,[22] the Ministry for Economic Development granted to national broadcasters 20-year rights to use 19 networks. In particular, 16 frequencies were DVB-T frequencies, split among RAI (four), Mediaset (four), Telecom Italia Media (three) and other competitors (collectively five frequencies), while three were DVB-H frequencies.

iii Internet-delivered video content

The increasing availability of broadband and high-speed internet connections to consumers is leading to the rapid expansion of the market for internet-delivered video content. The creation and consumption of video content through the internet is emerging also thanks to other factors, such as the creation of high-quality content and the availability of affordable distribution platforms, as well as the growing habit of consumers watching video content online. The market for internet-delivered and mobile video content in particular is expected to grow at a yearly rate of 65 per cent between

22 According to Law 220/10 (the Financial Law 2010) the government was obliged to convert the temporary entitlements to use frequencies into permanent entitlements by 30 June 2012.

2002 and 2014. Particularly, internet access is constantly increasing, having reported a 7 per cent increase since 2011, with approximately 38.4 million people having access to the internet from at least one device or location (comprising 79.6 per cent of persons between 11 and 74 years old).

In order to adapt to consumers' needs and to control the consumption of video content, TV broadcasters and ISPs are developing a series of business models, the most important of which is IPTV.

IPTV allows users to access online video content through their internet-enabled TV sets. The development of IPTV poses various challenges as well as benefits for ISPs and traditional TV broadcasters.

As to the challenges, the delivery of online video content raises issues of multi-territory rights licensing considering that online video content can be – and often is – transmitted to different jurisdictions and this could trigger the need to impose a single licensing standard. Moreover, ISPs and other network operators should operate to combat piracy and IP rights violations.

The major benefits of IPTV are, on the consumer side, the increase and diversification in the offer of video content and in the competition in the market for video content; and on the offer side, the increase in marketing opportunities for TV broadcasters and ISPs.

It is important to note, however, that the diffusion in Italy of IPTV, and more generally of internet-delivered video content, is held back by the 'digital divide' and lack of availability of broadband network connections in various southern Italian regions. According to the data provided by the 2013 AGCOM Report, IPTV is slowly gaining ground in Italy as well as in other European countries: at the end of 2012 the customers using IPTV technology were only 0.8 per cent of the total users.[23]

From a legal standpoint, even if a complete legislative framework is still under construction, we emphasise that AGCOM has issued Regulation 607/10/CONS, which provides for a specific regulatory regime governing IPVT and TV-on-demand media services.

iv Mobile services

Consumption of data and video contents via mobile devices is steadily increasing in Italy. UMTS users reached a record 34 million in 2010.

The number of SIM cards actually downloading or uploading data and USB data communication keys in the first term of 2013 reached 32 million units, with a 36 per cent growth since the first term of 2011 and 17 per cent growth since that of 2012, reaching 215 petabytes of transmitted volume in 2012.

In order to reduce the risk of network collapse, AGCOM is currently planning to make available an additional 300MHz of broadband for the mobile network by the end of 2015 (see Section IV.ii, *supra*).

23 Whereas in early 2011, they numbered about 700,000. See the 2013 AGCOM Report, Part 1, Section 1.2.

VI THE YEAR IN REVIEW

Network neutrality is increasingly becoming an important aspect of AGCOM monitoring exercise in order to safeguard a free and democratic utilisation of the internet and the delivering of content.

AGCOM and the AGCM launched an investigation in 2014 on static and dynamic competition in the electronic communication services access, and the development of the broadband and ultra-broadband markets.

Together with the increase in usage of fixed and mobile data traffic, the increasing number of mobile subscribers who are choosing MVNO 'virtual operators' (exceeding 5.4 million SIMs, which is equal to about 5.6 per cent of the whole market) is notable.

On the transactions side, Wind Telecomunicazioni instructed HSBC and Intesa Saopaolo for the possible sale of its telecoms tower assets, while Vodafone acquired for €145 million Cobra Automotive Technologies, an Italian company providing key telematics and electronics services to car manufactures. On the litigation side, the AGCM and AGCOM have recently opened separate investigations against Telecom Italia and Vodafone in relation to the alleged infringement of the Italian Consumer Protection Code for possible illicit unilateral modification (from free to fee based) of certain telecom services.

In 2014 AGCM completed its four-year investigation against Telecom Italia, determining that the operator abused its dominant position in the access to its network infrastructure and applied a fine of almost €104 million. The appeal, filed with the Council of State, confirmed that Telecom Italia abused its dominant position in the provision of wholesale access to the local network and broadband, hindering the expansion of competitors in markets for voice telephony services and broadband internet access. The competitors (Vodafone, Wind, BT and others) have filed a series of follow-on actions before the ordinary courts to claim millions in damages.

VII CONCLUSIONS AND OUTLOOK

The Italian telecoms market is dynamic and characterised by a sufficient degree of competition and pluralism, even if some sectors of the market appear to require further development and regulation to prevent – and in some cases, to eliminate – market distortions and competition restrictions.

On the wave of the implementation of the European Digital Agenda, it is hoped that Telecom Italia will pursue the deployment of an advanced NGA network capable of offering the necessary platform, also through unbundled access to its infrastructure, to foster competition in the offering of digital media content and services to consumers.

The protection of consumers and operators continues to be one of the main concerns of both the AGCM and AGCOM, especially on the side of telecoms services, bundled offers and online banking and gaming, as well as for the Italian government, which is planning to review the rules governing copyright protection to allow adequate protection to authors for content broadcast online, in light of the ever-increasing growth of multimedia consumption in our digital society.

In particular, the AGCM has advised the government that, in light of the transnational dimension of the internet phenomenon, it is necessary that the Italian

institutions adopt specific measures for the protection of online editorial content 'on appropriate international forums'.

The long-awaited advanced development of Wi-Fi in Italy (which began in 2011) for which coverage is currently limited to only the most densely populated areas, is yet to be completed. To make it possible for more consumers to access online content, the legislature has moved to free up Wi-Fi access and eliminated a number of administrative burdens, however, various regional and local entities have been slow in dropping the old system of customer registration and it remains to be seen whether a wider territorial coverage will actually be achieved as rapidly as it should, as in the most industrialised countries.

Appendix 1

ABOUT THE AUTHORS

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Stefano Macchi di Cellere is head of the Italian TMT as well as the antitrust and competition law departments at Jones Day. A dual-qualified lawyer; both solicitor and *avvocato*, he practises international competition law, acting in cross-border merger and cartel cases before the EU antitrust authorities and assisting global enterprises on abuse of dominance claims and investigations, as well as on private damages, unfair competition and intellectual property litigation; he has gained extensive experience in communications law representing international clients since the liberalisation of the industry, working with operators involved in fixed, mobile and satellite networks and services, and advising corporations on radio and television broadcasting, information technology and internet communications.

Mr Macchi di Cellere is a regular author and speaker on antitrust and communications law topics and a contributor to the World Bank's annual *Doing Business* reports. He is a member of the Italian Bar, the Law Society of England and Wales, the International Bar Association (Antitrust and Trade and Communications Law Committees), the American Bar Association (Section of Antitrust Law), the Inter-Pacific Bar Association (council member and chair of the Aerospace Committee from 1998 to 2000; vice-chair from 1996 to 1998) and the Alumni Association of the Academy of American and International Law (deputy secretary general from 1990 to 1991).

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