
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

SECOND EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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This article was first published in
The Technology, Media and Telecommunications Review, 1st Edition
(published in October 2010 – editor John P Janka).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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ISBN 978-1-907606-23-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

ADVOKATSKO DRUZHESTVO ANDREEV, STOYANOV & TSEKOVA
IN COOPERATION WITH SCHOENHERR

BAHAR & PARTNERS

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EDITOR'S PREFACE

The recent passing of TMT pioneer Steve Jobs provides an appropriate moment for reflecting on the impact that innovation in the sector has had on our lives, and how it also has driven – and outpaced – the development of the law.

Dramatic advances in microchips have fuelled the digital revolution, spawning a wide range of devices and services that our parents never could have imagined. The iPhone, the iPad, iTunes and the iPod are but a few examples of technological changes that have challenged old ways of doing business, and also have changed society. We are connected to our work and our social circles anywhere we go; we instantaneously access vast information resources from mobile devices; and we watch films and TV programmes, and listen to music, of our choosing, whenever and wherever we want.

Similarly, the Internet has changed the way people communicate, and has altered our preferences for receiving information and entertainment. Internet-based businesses have challenged traditional media businesses, such as print newspapers, print magazines, and television and radio broadcasting. Internet media delivery is now challenging more recently developed forms of media–cable and satellite delivery of subscription video programming. As a result, the legal constructs once put in place to govern media outlets are changing.

The existing telecommunications infrastructure is becoming outmoded. ‘Twisted pair’ (copper) is being bypassed in favour of fibre and wireless, as existing phone lines cannot readily support the increasing demand for broadband speeds and throughput. A robust wireless communications infrastructure is necessary to support the booming demand for mobile broadband connectivity to smart phones and tablets. As a result, government policy is evolving to support the deployment of broadband infrastructure, and to facilitate the growth of mobile services; but regulatory change never seems to occur fast enough. While nations are making significant investments to deploy high-speed broadband services to their citizens, significant private investment is still needed for tomorrow’s critical telecommunications and information infrastructure.

Historical spectrum planning did not provide for the current wireless boom. As a result, no incumbent user of spectrum is safe in the refarming of existing spectrum bands. The transition from analogue to digital signal forms is leading to more efficient use of the spectrum, and also is facilitating new approaches to sharing radio spectrum.

Regulators are coming under increasing pressure to capture the value associated with the spectrum bands that are being opened for these new purposes.

The broadband revolution has eliminated one information bottleneck that once existed when consumers had to rely on a few newspapers, TV stations and radio stations. Now they are able to use Internet-based services such as Facebook and Twitter – albeit sometimes in the face of governmental attempts to stem the free flow of information to and from their jurisdictions. Other ‘gatekeepers’ are developing in the distribution chain as application service providers seek to constrain access to certain content, whether by using their influence to cause broadband providers to block access to that content entirely, or to prioritise one information source over another.

We are being monitored, and our personal information is being collected, stored and mined, in a manner that regulators never envisioned and that the law is not well-suited to constrain. Virtually every Internet access and wireless device we use knows where we are, and tracks what we do. While this personal information can be used for purposes that some may find desirable (such as targeting products and services to us), gathering and storing that information virtually eliminates any expectation of privacy. In many jurisdictions, the law is inadequate to manage the chances for abuse and the consequences of security breaches.

This second edition of *The Technology, Media and Telecommunications Review* expands to 30 the jurisdictions in which we provide an overview of the legal constructs that govern these types of issues. While the authors cannot fully address every one of these topics in the following articles, we do hope this book provides a helpful framework for your analysis.

John P Janka

Latham & Watkins LLP

Washington, DC

October 2011

LIST OF ABBREVIATIONS

3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
ARPU	Average revenue per user
BIAP	Broadband Internet access providers
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular Mobile Telephone System
DAB	Digital audio broadcasting
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'
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node
FTTx	Fibre to the x
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second

List of Abbreviations

GSM	Global system for mobile communications
HDTV	High-definition television
HITS	Headend in the sky
HSPA	High-speed packet access
ICT	Information and communications technology
IPTV	Internet protocol television
ICP	Internet content provider
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
MMS	Multimedia messaging service
MMDS	Multichannel multipoint distribution service
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
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
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
UHF	Ultra-high frequency
UWB	Ultra-wideband
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over Internet protocol
WiMAX	Worldwide interoperability for microwave access

Chapter 11

FRANCE

*Myria Saarinen and Jean-Luc Juhan**

I OVERVIEW

The TMT sectors in France are characterised by the interactions of mandatory provisions originating from many sources. Indeed, in addition to statutes and regulatory texts, four specialist independent administrative authorities render decisions and opinions that constitute the regulatory framework for these sectors. The French Competition Authority ('the FCA') also renders decisions and opinions that may have a structural impact on these sectors. 2010 and 2011 (beginning) have not been marked by any major institutional changes in this regard.

The regulatory framework applicable to TMT sectors is made up of rights and obligations. For instance, between 2009 and early 2010, the fourth 3G UMTS licence was allocated and the duration of the exclusivities in TMT sectors was limited. Incentives can also result from governmental measures. For example, a national ultra-fast broadband programme was launched in August 2010 in order to give every French citizen access to ultra-fast broadband by 2025.

II REGULATION

i The regulators

There are four specialist authorities involved in the regulation of technology, media and telecommunications in France:

- a* The Electronic Communications and Postal Regulatory Authority ('ARCEP') oversees the electronic communications and postal services sector. It ensures the implementation of the universal service, imposes requirements upon operators that exert a significant influence in the context of market analyses, participates

* Myria Saarinen and Jean-Luc Juhan are partners at Latham & Watkins LLP. This chapter was written with the contributions of associate Delphine Sak Bun.

in defining the regulatory framework, allocates finite resources (radio frequencies and numbers), sanctions, resolves disputes and delivers authorisations for postal activities.

- b* The Superior Audio-visual Council ('the CSA') is responsible for the audio-visual sector. The CSA sets rules on broadcasting content and allocates frequencies by granting licences to radio and television operators. It also settles disputes that may arise between TV channels and their distributors, and is empowered to impose sanctions on operators in case of breach of specific regulations.
- c* The national commission on computing and Liberty ('the CNIL') ensures the protection of personal data. Automatic personal data processing systems must be declared to the CNIL. The CNIL also supervises compliance with the law, by inspecting IT systems and applications, and is empowered to pronounce measures that range from warnings to sanctions.
- d* The High Authority for the Distribution of Works and the Protection of copyright on the Internet ('HADOPI') is in charge of protecting intellectual property rights over works of art and literature on the Internet, and was established in 2009 (see Section VI.iii, *infra*).

These four authorities may deliver opinions upon request by the government, parliament or other independent administrative authorities such as the FCA (except for the HADOPI).

ii Ownership and market access restrictions

Investment in TMT sectors in France could be concerned by the general regulation of foreign investments made in strategic sectors. In addition, specific ownership restrictions apply to the media sector.

General regulation of foreign investment

According to Articles L151-1 et seq. of the French Monetary and Financial Code, when a foreign (EU or non-EU) investment is made in a strategic sector (such as security, public defence, cryptology or interception of correspondence), the investor must submit a formal application file to the French Ministry of Economy for prior authorisation. Any transaction concluded without prior authorisation is null and void, and criminal sanctions (imprisonment of five years and a fine amounting to twice the amount of the transaction) are also applicable.

Specific ownership restrictions applicable to the media sector

French regulations provide for media ownership restrictions in order to preserve media pluralism and competition. In particular, any single individual or legal entity cannot hold, directly or indirectly, more than 49 per cent of the capital or the voting rights of a company that has an authorisation to provide a national terrestrial television service where the average audience for television services (either digital or analogue) exceeds 8 per cent. In addition, any single individual or legal entity that already holds a national terrestrial television service where the average audience for this service exceeds 8 per cent

may not, directly or indirectly, hold more than 33 per cent of the capital or voting rights of a company that has an authorisation to provide a local terrestrial television service.¹

Further, unless otherwise agreed in international agreements to which France is a party, any foreign national may not acquire shares of capital of a company holding a licence for a radio or television service in France and that uses radio-electrical frequencies if this acquisition has the effect of raising (directly or indirectly) the share of capital or voting rights owned by foreign nationals to more than 20 per cent. This provision does not apply to publishers with less than 80 per cent capital or voting rights being held by public radio broadcasters belonging to Council of Europe Member States, or with less than 20 per cent being owned by one of the public companies mentioned at Article 44 of the Law of 30 September 1986.² Specific rules restricting cross-media ownership also apply.³

The aforementioned restrictions with respect to media ownership and foreign investments have not been modified in response to the globalisation of media companies, and the operators active in the French media sector are still mainly French companies. However, the evolution of media consumption habits, and in particular the changes induced by the development of Internet-connected mobile devices that particularly enable listening to music, reading books and watching films and TV programmes, affects the French media sector, and are taken into consideration by the operators of this sector.

iii Transfers of control and assignments

French general merger control framework applies to the TMT sectors, without prejudice to the aforementioned ownership restrictions and to specific provision for the media sector. Any modification to the capital of companies authorised by the CSA to broadcast TV or radio services on an Hertz-based frequency is subject to the approval of the CSA.⁴

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and Internet protocol regulation

As regards the ADSL network, and pursuant to local loop unbundling, alternative operators must be provided with direct access to the copper pair infrastructure of France Télécom, the historical operator. Therefore, as with traditional fixed telephony, DSL networks are subject to asymmetrical regulation.

As regards services, ISPs must file a declaration with the ARCEP prior to commencing operations.⁵

1 Articles 39-I and 39-III of the Law of 30 September 1986.

2 Article 40 of the Law of 30 September 1986.

3 Articles 41-1 to 41-2-1 of the Law of 30 September 1986.

4 Article 41-4 of the Law of 30 September 1986.

5 Article 34-1 of the Post and Telecommunications Code

ii Universal service

According to ARCEP, at the end of June 2011, there were 22 million high-speed and very high-speed broadband subscriptions, among which 20.5 million were xDSL subscriptions in French territory. The next step is the development of an ultra-fast fibre-optic broadband network ('FTTx'). To this end, ARCEP granted alternative operators access to France Télécom civil engineering infrastructures by regulating the access conditions. It is now further developing its regulatory framework for the efficient deployment of the FTTx infrastructures throughout the country. After a series of public consultations in 2009 and 2010, it set the framework for operators to deploy and share the last mile of fibre networks and, notably, indoor networks.

In addition, in August 2010, the government launched the national 'ultra-fast broadband' programme, the aim of which is for ultra-fast fibre-optic broadband infrastructure to cover the entire country. This programme, which the FCA endorsed in December 2009, will be partially financed by a national loan.

iii Restrictions on the provision of service

Network neutrality is a growing policy concern in France (see Section VII, *infra*, for further developments).

Pursuant to the Law of 21 June 2004, ISPs have a purely technical role and they do not have the general obligation to review the content that they transmit or store. Nevertheless, when informed of unlawful information or activity, they must take prompt action to withdraw the relevant content, failing which their civil liability may be sought (see Section VII, *infra*).

Since 2009, HADOPI has been competent to address theft and piracy matters. It intervenes when requested by regularly constituted bodies for professional defence who are entitled to institute legal proceedings in order to defend the interests entrusted to them under their statutes (e.g., SACEM), or by the public prosecutor. After several formal notices to an offender, the procedure may result in a request to the ISP to suspend the offender's Internet connection for anywhere between two months to one year.

iv Security

Law No. 91-646 of 10 July 1991 concerning the secrecy of electronic communications provides that the French prime minister may exceptionally authorise, for a maximum period of four months (renewable only upon a new decision), the interception of electronic communications in order to collect information relating to the national defence or the safeguarding of elements that are key to France's scientific or economic capacity.

The collection and future processing of personal data is subject to several cumulative conditions, which include information, consent and legitimate purpose, and – as a matter of principle – no transfer outside the EU. Any operator that determines the purposes and the manner in which personal data are processed is considered a 'data controller', and therefore, needs to file a prior declaration of such processing to the CNIL. According to the CNIL, IP addresses are considered as personal data. However,

as French case law has not decided on the issue,⁶ a legal proposal is currently being examined by Parliament to qualify IP addresses as such.

In addition to these general rules applicable to the protection of personal data, the Post and Electronic Communications Code (‘the CPCE’) provides specific rules pursuant to which operators must delete or preserve the anonymity of any traffic data relating to a communication as soon as it is complete.⁷ Exceptions are provided, however, in particular for the prevention of terrorism and in the pursuit of criminal offences.

French e-consumers benefit from consumer law provisions and from specific regulations. In particular, they are protected against unsolicited communications (such as spam) insofar as their consent is required prior to the use of their personal data for commercial exploitation. Moreover, consumers must be provided with valid means by which they may effectively request that such unsolicited communications cease.

Data used for the purpose of location identification are also to be considered as personal data in the meaning of the Law of 6 January 1978. During the past year, the CNIL has taken decisions on a statistical measure of advertising effects based on locational identification of smartphones, ‘pay-as-you-drive’ systems, anti-theft devices, Google Latitude and Google Street View. Two conditions are usually required: the individual’s knowledge and consent.

Any person under 18 is considered as a child under French law. Unlike in the US, there is no specific statute governing the protection of children online. In general terms, the Law of 9 July 2004 provides that an ISP should inform subscribers where there is a technical means of restricting access to selected services.

As for privacy, children’s online rights are protected in the same way as those of adults. According to CNIL practice, collecting children’s personal data is allowed only with prior authorisation from their parents and if clear information is provided to the child. Yet, the webmaster of a website to which a child connects is still allowed to collect his or her age and e-mail address to send newsletters.

In addition, provisions aimed at protecting children against activities or products such as pornography, gaming or alcohol are enshrined in criminal law and in a range of sectoral legislation. In order to increase the efficiency of the already-existing provisions meant to prevent child pornography, the proposed Law No. 1697 on guidance for police and security performance (‘LOPPSI 2’) suggests that the administrative authorities could order an ISP to cut access to websites displaying images of child abuse.

Unauthorised access to automated data-processing systems are prohibited by Articles 323-1 to 323-7 of the French Penal Code. In addition, with regard to cyber attacks, the LOPPSI 2 proposal would introduce a new offence of online identity theft and would empower police officers, upon juridical authorisation and only for a limited period, to install software in order to observe, collect, record, save and transmit all the content displayed on a computer’s screen.

6 Supreme Court, criminal section, 13 January 2009 in a case opposing the SaceM to a person suspected of piracy.

7 See Articles L34-1 and D98-5 of the CPCE.

v Emergency response networks

In France, emergency calls are routed to a call centre located in the same geographical area as the caller. In this context, Article D98-8 of the CPCE provides that operators must allow their clients to access, and therefore route their calls, to the emergency services free of charge.

IV SPECTRUM POLICY

i Development

The management of the entire French radio frequency spectrum is entrusted to a state agency, the National Frequencies Agency ('the ANFR'). It apportions the available radio spectrum, whose allocation is administered by governmental administrations (e.g., civil aviation, defence, space, interior) and independent authorities (ARCEP and the CSA). ARCEP issues general authorisations for the use of radio frequencies ('RFs') for public networks, audio-visual carriage networks, independent networks and video reporting links.

Articles 28 to 32 of the Law of 30 September 1986 determine the CSA's allocation procedures. As for private television and private radio broadcasting on Hertz-based terrestrial frequencies, analogue and digital licences are granted by the CSA following a call for applications. Public television and radio channels are authorised without a call for applications. Authorisations granted cannot exceed 10 years.

Broadcasting services that are not subject to CSA's authorisation are nevertheless subject to a standard agreement or a declaration regime.⁸

Development of DTTV and release of the Digital Dividend

French spectrum policy is currently primarily concerns the development of DTTV and the Digital Dividend.

The Law of 5 March 2007 includes a coverage objective of 95 per cent of the population by the end of 2011 (the switch-off date of analogue terrestrial television). By September 2011, 93 per cent of the French metropolitan population could receive DTTV according to the CSA. The digital switchover will free up a large amount of spectrum as a result of the superior transmission efficiency of digital technology, 'the Digital Dividend'.

On 22 December 2008, pursuant to the Law of 5 March 2007, which provides for the reuse of Digital Dividend frequencies to be planned under a national framework, the French prime minister issued orders formalising the government decisions on the national schemes relating to the end of analogue broadcasting (see Section V.ii, *infra*) and the allocation of Digital Dividend:

- a* allocation to the ARCEP of the entire 790–862MHz sub-band for mobile services as of 1 December 2011;
- b* densification of the use of the 470–790MHz band for the deployment and growth of DTT; and

⁸ Articles 33 to 34-5 of the Law of 30 September 1986.

- c allocation of band III (174–220MHz, currently used by the Canal Plus analogue network) for exclusive use by digital sound broadcasting.

At the European level, the commission adopted a communication⁹ and a recommendation¹⁰ in order to facilitate the release of the Digital Dividend in the EU and to transform the Digital Dividend into social benefits and economic growth.

ii Flexible spectrum use

The trend towards greater flexibility in spectrum use is facilitated in France by the ability for operators to trade frequency licences, as introduced by the Law 9 June 2004.¹¹

The general terms of spectrum licence trading were defined by Decree No. 2006-1016 of 11 August 2006, and the list of frequency bands whose licences could be traded was laid down by a Ministerial Order of 11 August 2006. a frequency database that provides information regarding the terms for spectrum trading in the different frequency bands open in the secondary market is publicly accessible.¹² The spectrum licence holder may transfer all of its rights and obligations to a third party for the entire remainder of the licence (full transfer) or only a portion of its rights and obligations contained in the licence (e.g., geographical region or frequencies). Transfer of frequency licences is subject either to prior approval of ARCEP¹³ or to notification to ARCEP, which may refuse the assignment under certain circumstances.¹⁴ Another option available for operators is spectrum leasing, whereby the licence holder makes frequencies fully or partially available for a third party to operate. Unlike in a sale, the original licence holder remains entirely responsible for complying with the obligations attached to the frequency licence. All frequency-leasing operations require the prior approval of ARCEP.

iii Broadband and next-generation mobile spectrum use

Three 3G (UMTS) licences were awarded to Orange France and SFR¹⁵ on 18 July 2001 and to Bouygues Telecom on 3 December 2002. The fourth 3G mobile licence was awarded to Free Mobile on 17 December 2009 (see Section VII, *infra*).

Furthermore, on 18 May 2010 ARCEP awarded the two remaining blocks of available 3G spectrum in the 2.1GHz band (5MHz block and 4.8MHz block), respectively to SFR and to Orange France, for a total sum of €582 million.¹⁶ SFR and Orange have committed to improve hosting conditions for MVNO.

The next stage is the allocation of spectrum in the 800MHz and 2.6GHz bands, for the deployment of ultra high-speed 4G mobile networks. The ARCEP launched two

9 COM(2009)586/2.

10 COM(2009)8287/2.

11 Article L42-3 of the CPCE.

12 www.arcep.fr/index.php?id=8977.

13 Article R20-44-9-2 of the CPCE.

14 Article R20-44-9-2 of the CPCE.

15 Société Française de Radiotéléphonie.

16 Decision No. 2010-0581.

public consultations on 5 March 2009 and 27 July 2010, respectively. The authority has launched the allocation procedures in June 2011 to award the licences to use these two frequency bands by the end of 2011.

iv Spectrum auctions and fees

Spectrum auctions in case of scarce resources

Pursuant to Article L42-2 of the CPCE, as amended by the Law of 17 December 2009, when scarce resources such as RFs are at stake, the ARCEP may decide to limit the number of licences, either through a call for applications or by an auction. The government sets the terms and conditions governing these licensing selection procedures, and until now such proceedings have always been in the form of calls for applications (see Section IV.iii and the allocation of RFs for UMTS).

Fees

Depending on their size and their turnover, electronic communication operators are subject to different types and levels of fee.¹⁷ If an operator's licence only covers one region in France or its overseas regions, the fee is reduced by half.

In addition to these fees and pursuant to Articles R20-31 to R20-44 of the CPCE, licensed operators contribute to the financing of the universal services.

V MEDIA

i Digital switchover

As previously indicated (see Section IV.i), the digital switchover was carried out in most areas of France and will be complete by the end of 2011.

According to the government digital technology should be free of charge and accessible to everyone. As a consequence, financial aid has been released to help those who are located in 'zones blanches'¹⁸ and those who cannot afford switching costs (the costs of a new antenna and of a decoder).

As regards pay-DTTV, the CSA launched a call for applications to transmit pay-DTTV on the country's R3 DTTV multiplex in July 2010;¹⁹ it was thought that the allocation of new pay-DTTV channels would boost the attractiveness of this service. The CSA should shortly launch calls for applications for two more pay-DTTV channels.

Alongside this, the Law of 9 July 2004 on Electronic Communications and Audio-visual Communication Services provides a legal framework for digital terrestrial radio. The CSA launched a public consultation on 23 November 2009 relating to the deployment of digital terrestrial radio, which failed to be implemented in Paris and Nantes. Tests will now be launched in Lyon.

17 Article 45 of the Law of Finance of 1987 as amended.

18 Areas not served by a mobile or Internet network.

19 Decision No. 2010-569 of 20 July 2010.

ii Internet-delivered video content

Internet video distribution refers to IPTV services, which can be classified into the three following main categories: live television, time-shifted programming and VOD. IPTV services were used by 26.7 per cent of households in 2009 and the number of users is growing steadily.

For customers who cannot afford triple-play offers, access to video content is limited to the content of free channels (analogue and DTTV channels). The regulatory framework for ‘social’ offers set by the Law of 4 August 2008 is indeed limited to mobile telephony offers, triple-play offers being thus outside its scope; however, pursuant to Article 25 of Law of 17 December 2009, the government was asked to submit a proposal for a social Internet access subscription to parliament before July 2010. In January 2010, the prime minister asked willing ISPs to think about a social triple-play offer amounting to €20 and gave the Minister for Industry the task of taking all necessary steps to modify the CPCE for this purpose.

iii Mobile services

Mobile personal television (‘TMP’) was initiated by the Law of 5 March 2007. This new video broadcasting device has since suffered from substantial delays due to disagreements among operators and content providers on the applicable economic model and on how to finance the deployment of a new network. Nevertheless, on 8 April 2010, the CSA delivered authorisations to 16 channels (13 private channels selected by the CSA after the call for applications launched on 6 November 2007, together with three public channels selected by the government) for the broadcasting of personal mobile television services.

On 22 April 2010, TDF²⁰ and the operator Virgin Mobile signed an agreement under which TDF committed to developing the new network with up to a 50 per cent coverage of the ‘outdoor’ population and 30 per cent of the ‘indoor’ population, with Virgin Mobile paying TDF a monthly per-customer fee using DVB-H, an airwave broadcasting format that does not allow interaction with the user. In January 2011, TDF decided to end the agreement and in June it announced that it no longer wished to be the DVB-H operator in charge of the TMP. TDF will soon offer the use of the broadcast mobile multimedia, which would have a greater content and would also allow interaction; however such format may only be functional by 2014.

VI THE YEAR IN REVIEW

i New security rules

LOPPSI 2 gives guidance on internal security and enforces the use of new technologies for the purpose of combating crime. The law makes online identity theft an offence and allows the police to intercept, record, keep and transmit e-mails, phone communications and electronic data without the consent of the person concerned for the purpose of investigation. It further helps the detection of infringements, the collection of evidence

20 TéléDiffusion de France.

and search for criminals by facilitating the creation of police files and by organising their coordination using reconciliation software.

In terms of personal data protection, LOPPSI 2 increases the instances where authorities may set up, transfer and record images on public roads, premises or facilities open to the public in order to protect the rights and freedom of the individuals, and recognises that the CNIL has jurisdiction over the control of video protection systems.

Law No. 2010-788 dated 12 July 2010 (Grenelle II) forbids any type of communication with the purpose of promoting the sale, the provision or the use of a mobile phone for children under 14 years old.

ii Transposition of the EU telecom package

Directive No. 2009/136/EC and Directive No. 2009/140/EC, which amended the five Directives of the 2002 Telecom Package, have finally been implemented into French law by Order No. 2011-1012 dated 24 August 2011.

The Order, which mainly aims to provide better regulation of the telecoms sector, facilitate the access to radio frequency and strengthen consumer and data protection, modifies the Code on Post and Electronic Communications, the Consumer Code, the Data Protection Act and the Criminal Code. The Order broadens the powers granted to ARCEP, which regulates the sector by setting obligations for operators and ruling on disputes arising between them.

Furthermore, the Order imposes new obligations on telecoms operators in order to improve consumer protection, such as the reduction in delays to implement the portability of phone numbers, the obligation to notify any unauthorised access to personal data, the ban on spam and the mandatory consent of the user prior to the use of cookies (such consent may be expressed by specific settings of the browsers).

Finally, the successful implementation of these provisions is backed up by the introduction of harsher sanctions to act as a deterrent. For instance, the manufacturing, importation, detention, offer, rent or sale of technical devices that enable the interception or use of electronic communications gives rise to a €300,000 fine and five years' imprisonment, instead of a previous €45,000 fine and year's imprisonment.²¹

Considering how recently the EU Telecom Package was introduced in French legislation, there is not much case law and only time will tell whether its aims have been achieved.

iii Case law on Web 2.0 sites

In the *Joyeux Noël* case,²² in which Dailymotion had posted a French movie online, the Supreme Court ruled that Web 2.0 sites (i.e., 'community sites' and 'video-sharing sites'), are merely hosting service providers able to benefit from the liability exemption regime set out in Act No. 2004-575 on E-Commerce, and not editors that could be held directly responsible for infringing items or contents. Likewise, in a decision held the same day

21 Article 226-3 of the Criminal Code

22 Cass. civ 1ère, 17 February 2011.

in the *O Martinez v. Société Bloobox-net* case,²³ the Supreme Court confirmed a prior decision of the Paris Court of Appeal, which had ruled that a company was not a website publisher, but a mere host (benefiting from the aforementioned exemption regime) since its activity was only structuring the information received from Internet users, and not in choosing the content of the website. These two decisions are a reversal of the previous *Tiscali* case,²⁴ which, in contrast, had considered that the intervention of this Web 2.0 provider as going beyond the services performed by a hosting provider, and deprived it of immunity.

iv ARCEP decisions

Following a decision of the FCA, and taking into account observations of the European Commission and of participants in the sector, ARCEP has adopted Decision No. 2010-0892 dated 22 July 2010 regarding the analysis of wholesale SMS termination markets. In this decision, ARCEP sets the maximum tariffs for the SMS termination charged to third parties' mobile operators, tariffs' orientation and tariff framing must be maintained from October 2010 and for three years.

ARCEP Decision No. 2010-1312 dated 14 December 2010, specifying access procedures to the ADSL networks in the whole of France except for high-density areas, has been homologated by an Order dated 10 January 2011. France thus becomes the first country of the EU to have implemented a regulatory frame for the deployment of optical fibre for the whole of its territory.

v HADOPI responsibilities

Decree No. 2010-1366 dated 10 November 2010 (regarding the labelling of service provisions of online communication to the public and the regulation of technical measures for protection and identification of works and objects protected by copyright), gives specific information on the functions of HADOPI. These include encouraging the development of legal offer of cultural products on the Internet and regulation of the legal and illegal use of copyright-protected items on the electronic networks, and oversight of the technical measures related to the protection and identification of protected works and objects.

vi 4G licence

Four Orders and one Decree (No. 2011-659) dated 14 June 2011 regarding the call for proposals for the 4G licence frequency have been published.²⁵ ARCEP has set deadlines to apply for the licence of 15 September 2011 for the 2.6GHz frequency and 15 December 2011 for 800MHz. Licences should be distributed by the end of 2011.

23 Cass. civ. 1ère, 17 February 2011.

24 Cass. civ. 1ère, 14 January 2010.

25 Official Journal No. 0137.

vii Online gambling

Law No. 2010-476 dated 12 May 2010 allows online gambling and has created the Online Gambling Regulatory Authority ('ARJEL'), an independent administrative authority whose mission it is to authorise operators and ensure they respect their obligations. ARJEL further seeks to protect vulnerable individuals such as children, prevent addiction, ensure the safety and the validity of the games and combat illegal site fraud as well as money laundering.

Appendix 1

ABOUT THE AUTHORS

MYRIA SAARINEN

Latham & Watkins LLP

Myria Saarinen is a partner in the Paris office of Latham & Watkins LLP. She has extensive experience in IP and IT litigation, including Internet and other technology-related disputes. She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes.

She has developed specific expertise in the area of privacy and personal data, including advising clients on their trans-border data flows, handling claims raised by the French Data Protection Authority and setting up training sessions on the personal data protection framework in general and on specific topics. She has also expertise on cross-border issues raised in connection with discovery or similar requests in France.

Ms Saarinen is also active in the corporate governance and compliance areas and assists clients in drafting and implementing grant of powers, delegation of liability and other compliance schemes. She is active in firm management, serving on the ethics, technology and privacy and security committees of Latham & Watkins.

JEAN-LUC JUHAN

Latham & Watkins LLP

Jean-Luc Juhan is a partner in the corporate department in the Paris office of Latham & Watkins LLP.

His practice focuses on outsourcing and technology transactions, including business process, information technology, telecommunications, systems and software procurement and integration. He also has extensive experience advising clients on all the commercial and legal aspects of technology development, licensing arrangements, web hosting, manufacturing, distribution, e-commerce, entertainment and technology joint-ventures.

Mr Juhan is quoted in *Option Droit & Affaires 2011*, *Legal 500 EMEA 2011*, *Legal 500 Paris 2011* and he notably ‘focuses on ICT’ and ‘assists French and international users, financial institutions’, ‘on many cases’.

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