

ICLG

The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2015

8th Edition

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

Published by Global Legal Group with contributions from:

Alain Bensoussan Avocats Selas

Attorneys at law Borenus Ltd

Camilleri Preziosi

Castillo y Castillo

Chajec, Don-Siemion & Zyto sp.k. – Legal Advisors (“CDZ”)

Colibri Kazakhstan

Cugia Cuomo & Associati

Davies Ward Phillips & Vineberg LLP

Dr. Norbert Wiesinger, Law Offices

Gjika & Associates Attorneys at Law

Heuking Kühn Lüer Wojtek

Hogan Lovells (CIS)

King & Wood Mallesons

Kromann Reumert

Langlet, Carpio y Asociados, S.C.

Lisa Thornton Inc

Mehmet Gün & Partners

Melchior, Micheletti & Amendoeira Advogados

Mori Hamada & Matsumoto

NautaDutilh N.V.

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Sébastien Fantì

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Editor
Gemma Bridge

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
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Fax: +44 20 7407 5255
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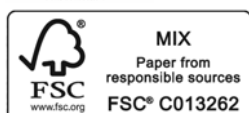
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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters provide overviews of the EU regulatory framework and of the different approaches and attitudes towards mobile network consolidation in the United States and Europe.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 34 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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

New Zealand

Wigley & Company

Michael Wigley



1 Overview

1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in New Zealand, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.

The incumbent fixed line operator was structurally separated in November 2011, with Telecom now owning the retail business and Chorus now owning the fixed line network operation. Each is a separate company listed on the stock exchange. Chorus has some open access obligations including providing access to new FTTP investments. See question 1.2. Telecom still holds a large part of the fixed line retail market, but there is substantial competition particularly from Vodafone (which has acquired competitor, TelstraClear) and CallPlus (which has acquired Orcon). Vodafone has the only HFC network, but that has a relatively limited footprint (in large parts of two cities).

For many years, Vodafone and Telecom were the only MNOs. In the last few years, 2degrees has set up a competing third MNO. 2degrees is extending its footprint. The MVNO market is weak and small.

The operators above, other than 2degrees, are also the largest ISPs. The ISPs are increasingly moving to supply content, often including retransmission of Sky content as noted below.

In addition to Chorus, other FTTP providers such as Enable provide FTTP services.

As for TV, the Free-to-Air space is dominated by channels operated by a New Zealand Government-owned company, TVNZ, plus by channels operated by commercial operation, Mediaworks, such as TV3. Mediaworks is facing some financial challenges at present. The Government charter obligations of TVNZ are largely removed so it has to operate commercially.

Sky TV (a company related to the international Sky group of companies) dominates PayTV. Vodafone retransmits Sky material over its HFC footprint.

The markets in New Zealand in this sector are generally liberalised with only some restriction on foreign ownership in Chorus, plus some overseas investment compliance rules that may or may not apply in particular circumstances.

1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in New Zealand.

New Zealand has general competition law (the Commerce Act). This overlaps with telecommunications regulation (the Telecommunications Act), radiocommunications regulation (the Radiocommunications Act) and broadcasting regulation (the Broadcasting Act). (All legislation is available at www.legislation.govt.nz.)

Telecommunications regulation revolves around encouraging investment, competition, and the interests of consumers.

New Zealand has a national Government-funded Public Private Partnership deployment of FTTP. This is the Ultra-Fast Broadband Fibre initiative (UFB). As much of UFB is provided by the incumbent, the Government has required it to structurally separate its network and retail units. In November 2011, the incumbent, Telecom, structurally separated into a network company (Chorus) and a retail company (Telecom). Each company is separately listed on the stock exchange.

This world-leading development replaces the UK-style functional separation. So, New Zealand is a case study for both functional and structural separation, complementary to a different roll-out of FTTP in Australia. There are other UFB providers too, such as Enable.

When going to press, a review of telecommunications regulation has commenced, driven off the relativity of copper and UFB wholesale pricing. This review may lead to substantial changes: updates will be reported on the website: www.wigleylaw.com.

Supplementing the UFB initiative (that is, urban FTTP) is a broadband initiative for rural areas, based around fibre to most rural schools with xDSL and radio services – such as cellular – to other points from the schools. Together, these are the Rural Broadband Initiative (RBI), provided jointly by Telecom and Vodafone.

Radiocommunication, as to spectrum allocation for mobile telephony and commercial broadcasting, applies an auction model (but with some exceptions such as in relation to public broadcast services).

Broadcasting has a light-handed regulatory model, with no licensing beyond spectrum.

There are many policy papers, but none that cohesively set out the full regime. Some background is available at www.med.govt.nz and www.comcom.govt.nz.

1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in New Zealand.

Competition law, applicable to all sectors, is regulated via the Commerce Commission and the courts.

Telecoms is regulated by the Telecommunications Commissioner along with other Commissioners from the Commerce Commission. This function is based in the Commerce Commission.

UFB is generally not regulated in practical terms apart from open access undertakings: there is a Government company engaged in the PPP structure around UFB. That is Crown Fibre Holdings Ltd. AV media distribution is the subject of light-handed regulation under the Broadcasting Act if the content is broadcast (in broad terms if it is linear, and not non-linear broadcasting, such as VOD: see question 5.2).

Content standards are impacted by the role of the regulatory Broadcast Standards Authority (and the censorship regulator as to more extreme material such as child pornography), plus the quasi-regulatory Advertising Standards Authority.

The internet does not have specific content regulation, but it is subject in many respects to the same regime, noted above, that applies to telecoms in respect to the mandatory supply of access services, etc.

At the time of going to the press, the content regulation model may change: updates will be at www.wigleylaw.com.

1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in New Zealand?

There are no restrictions except there are limits on foreign holdings in the newly separated fixed line network operator, Chorus.

2 Telecoms

General

2.1 Is New Zealand a member of the World Trade Organisation? Has New Zealand made commitments under the GATS regarding telecommunications and has New Zealand adopted and implemented the telecoms reference paper?

Yes. New Zealand has also adopted most terms of the Reference Paper, as well as the Basic Telecommunications Agreement.

2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

Regulation, via the Telecommunications Act, encourages competition and investment, by regulating access to certain wholesale services. There is little retail regulation. Wholesale services which can be regulated are briefly specified in the Telecommunications Act. Those services are inserted in the Act, following a decision by the regulator (endorsed by the Minister) or by insertion by amendment to the Act.

On request, the regulator then determines price and non-price terms (or only non-price terms) for those services.

The major urban UFB FTTP and rural RBI initiatives are “regulated” under a combination of legislation, agreements and undertakings. In practical terms, there is no regulation of UFB. This will be revisited in the Ministerial review recently commenced: see www.wigleylaw.com for updates. There is facilitative legislation for the incumbent’s structural separation.

Spectrum relevant to AV content and mobile networks is – generally – regulated via an auction-based allocation model.

2.3 Who are the regulatory and competition law authorities in New Zealand? How are their roles differentiated? Are they independent from the government?

The Commerce Commission and the courts look after general competition law applicable to all sectors. The Telecommunications Commissioner is responsible for telecommunications regulation, within the Commerce Commission. The Commerce Commission is independent of the Government. The Telecommunications Commissioner is independent (as part of the Commerce Commission), but may only regulate new services with the Minister’s agreement.

Radiocommunications are handled by a Government Department, the Ministry of Business, Innovation & Employment.

Broadcasting is managed by Government Departments.

2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

In the general competition law role, some decisions are made by the Commerce Commission and some by the court. Both can be appealed to the court as to Commission decisions (on the merits or on some other basis depending on the type of decision) and to the Court of Appeal as to court decisions (on normal court appeal grounds). Judicial review of Commission decisions may be possible.

The Telecommunications Commissioner can be appealed to the court (often only on points of law, depending on the type of decision) and can be judicially reviewed.

Radiocommunication and Broadcasting decisions by the Ministry are subject to judicial review by the courts.

Licences and Authorisations

2.5 What types of general and individual authorisations are used in New Zealand?

Authorisations and licences are not a requirement in New Zealand.

2.6 Please summarise the main requirements of New Zealand’s general authorisation.

This is not applicable in New Zealand.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

This is not applicable in New Zealand.

Public and Private Works

2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Yes, telecommunications operators have access rights over public and private land, and there is a special provision for fibre to the premises initiatives. This is outlined in the Telecommunications Act.

Access and Interconnection

2.9 How is network-to-network interconnection and access mandated?

Both interconnection and access are regulated under the Telecommunications Act; for example, PSTN interconnection, mobile termination access, bitstream access, etc. Price and non-price terms are regulated.

Access to the FTTP is not, in practical terms, regulated beyond open access undertakings.

2.10 How are interconnection or access disputes resolved?

These are initially resolved by the Telecommunications Commissioner. For example, the price and non-price terms can be changed, clarified, augmented, etc., by the Telecommunications Commissioner. Enforcement is by the courts.

2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

New Zealand does not have a RIO regime, but price and non-price terms of regulated services are published at www.comcom.govt.nz.

2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

PSTN interconnection, mobile termination, backhaul, LLU and other services are regulated on a cost basis. Bitstream pricing will be cost-based from December 2014. Mobile domestic roaming is potentially capable of regulation, but the regulator has not imposed regulation yet.

Connection to UFB is not regulated beyond open access undertakings.

2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

In November 2011, the incumbent moved from functional separation of its fixed line local access network to structural (legal) separation between its network and retail operations to facilitate the incumbent participating in the FTTP UFB initiative. The two de-merged companies – Telecom and Chorus – are now listed on the stock exchange.

Regulatory reporting at a relatively light level is required on a different basis from accounting separation. This replaced the previous regime which imposed a combined functional and accounting separation model.

2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

The Telco network company, Chorus, must enable unbundling. There is no mandated access of any kind to the cable TV network; it only has a relatively limited footprint anyway.

LLU is available from Chorus exchanges to an end-user, plus, via Chorus' cabinets, and sub-loop unbundling over the extensive FTTN network covering most of urban New Zealand is also available. So far there has been widespread LLU uptake from urban exchanges, but little uptake of sub-loop unbundling (as the regulated price and cost of cabinet backhaul have been too high so far to allow this, relative to the small addressable markets).

However there is a major dispute and debate around the pricing of bitstream and UCLL and this might lead to viable sub-loop unbundling pricing.

2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

Copper-based bitstream is currently regulated at retail minus pricing, but will move to cost-based pricing from December 2014. However, regulation of bitstream access at VDSL speeds is currently withheld by the regulator (to see how competition emerges). However it is currently being argued before the regulator that VDSL is currently regulated.

New Zealand has an extensive FTTN network with regulated LLU access to cabinets, backhaul to the exchange and sub-loop unbundling. However, pricing has been too high so far as to enable carriers to unbundle the cabinets.

Therefore, over FTTN, and in view of the lack of regulation of VDSL-based bitstream, there is no effective regulated access to high NGN speeds. But under the current regulatory dispute regime this may change.

Low frequency services – for voice – are provided over copper to use with bitstream services for broadband.

FTTP wholesale access from the UFB initiative is to be available initially at access prices negotiated with the Government. Regulatory review in the near term is unlikely. The Telecommunications Commissioner retains the ability to consider the regulation of fibre services under Schedule 3 of the Telecommunications Act, but given the contractual basis of access prices already established, most view such a step as unlikely.

However, these issues around copper and fibre wholesale terms are highly controversial and being debated at present.

Price and Consumer Regulation

2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

Only limited: the incumbent must provide toll-free local calling and the charges for the standard home package with that free local calling cannot rise faster than the Consumer Price Index. There is a prospect that, if the off-net/on-net pricing differentials do not reduce enough, the Commission will regulate in a way that effectively controls mobile retail prices.

2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

No, but it is subject to general trade practices and marketing law (for example, the Fair Trading Act that requires no misleading and deceptive conduct by Telcos (e.g. Telco claims about performance must be sustainable)). New consumer law is likely to come into force shortly: an update will be available at www.wigleylaw.com. In particular, there will be legislation as to unfair contract terms in standard form contracts.

Numbering

2.18 How are telephone numbers and network identifying codes allocated and by whom?

Numbers are allocated under the Number Administration Deed (NAD), signed between carriers. The NAD operates within industry group, Telecommunications Carriers Forum (TCF). For more information, see www.tcf.org.nz.

2.19 Are there any special rules which govern the use of telephone numbers?

There are a number of rules. More detail is available at www.tcf.org.nz. For example, certain number ranges can only be used geographically, nomadically or via mobiles. However, with NGN and VoIP, these limitations are changing. Overseas carriers and others interested in local numbers would need to work through the requirements.

2.20 Are there any obligations requiring number portability?

Number portability is a regulated service, and the detail is handled by the Telecommunications Carriers Forum (TCF). See www.tcf.org.nz for full details. The processes are based around an Industry Portability Management System (IPMS), which facilitates number portability between carriers, but relies on carriers to configure and update their networks and support systems to ensure calls to and from ported numbers are correctly routed. The IPMS does not handle call routing.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Radio spectrum is regulated by a combination of legislation (the

Radiocommunications Act and relevant regulations) and Ministerial direction. Spectrum is managed by the Government department, Ministry of Business, Innovation & Employment. The model, so far as it affects mobile and broadcast spectrum is – generally – based on auctions. Increasingly, there are rules to prevent aggregation, and requiring “use it or lose it”. Digital Switchover means that allocation of freed-up spectrum is, like elsewhere, an issue. This is changing as this guide goes to press; an update will be available at www.wigleylaw.com.

3.2 How is the use of radio spectrum authorised in New Zealand? What procedures are used to allocate spectrum between candidates - i.e. spectrum auctions, comparative ‘beauty parades’, etc.?

See question 3.1. The relevant spectrum is auctioned.

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

Generally, this is unlikely for telecommunications carriers and broadcasters. Some Wi-Fi applications (e.g. as provided by local government) may use licence-exempt spectrum.

3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

Apart from purchase cost (in particular, the price payable on auction), these fees are modest.

3.5 What happens to spectrum licences if there is a change of control of the licensee?

The model in New Zealand is designed to facilitate transferability of spectrum between parties, sub-licensing, etc., so long as competition law and other conditions are complied with. Therefore restrictions on transfer of spectrum are limited. Some licences contain other restrictions, depending on the category of licence.

3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so on what conditions?

Yes. Trading cannot breach the general competition law, and increasingly, there are restrictions that stop the aggregation of spectrum. Some licences contain other restrictions, depending on the category of licence.

4 Cyber-security, Interception, Encryption and Data Retention

4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

All matters in this Section 4 are under review, with substantial amendments proposed at the time of going to press. This overlaps with the international focus on Government surveillance. Updates are available at www.wigleylaw.com.

A new Telecommunications (Interception Capability and Security) Act is expected, setting out the obligations of Telcos and others to provide interception capability to the police, the electronic surveillance agency (GCSB, equivalent to the UK's GCHQ), and the intelligence agency (SIS, equivalent to the UK's MI5).

Those agencies have surveillance powers under the Search and Surveillance Act, the SIS Act and the GCSB Act (with the latter two, particularly the GCSB Act, likely to be amended).

With the current litigation involving Dotcom, this area is controversial in New Zealand at present.

4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

This answer comments on the legislation: see www.wigleylaw.com for the latest developments. For PSTN and, probably, VoIP calls and Internet traffic including emails, the Telcos and ISPs must have capability to enable the Government agencies to access traffic. That is so unless the Telco/ISP is small – for which there is a lower level of capability that is required. Controversially, other providers including some providers of international services may have to have capability if so required by Ministerial direction. This may extend well beyond traditional telephony providers.

4.3 How does the state intercept communications for a particular individual?

In so far as a connection is required to a network, the Government agency proceeds under the legislation referred to above: the circumstances dictate, for example, whether a warrant is required or not to enable interception.

4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

The Telco/ISP has no obligations as to encryption, unless, where it is required to intercept it has provided that encryption. In that event, it must facilitate decryption if required.

4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?

Absent a requirement to do so, for example, under a warrant issued under legislation, the Telco or ISP is not required to retain call data.

5 Distribution of Audio-Visual Media

5.1 How is the distribution of audio-visual media regulated in New Zealand?

New Zealand has a light-handed regime largely limited to competition law (Commerce Act) and some content standard controls. Some aspects may be regulated under the Telecommunications Act. See question 5.2. Also there may be regulation of AV content as components in bundles of, for example, internet services.

5.2 Is there a distinction between the linear and non-linear content and/or content distributed over different platforms?

Yes. Linear content is governed by the light-handed Broadcasting Act. Non-linear content (such as video on-demand (VOD)) is not governed by that Act. There is an issue as to the extent to which VOD-related services are governed by the Telecommunications Act.

The same distinction applies whether the content is transmitted over internet, cable TV or via radio waves.

5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

The only limit on distribution of AV material is, in the case of radio or TV broadcasting, the broadcaster having rights in spectrum.

5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

New Zealand does not have a licence regime so this is not an issue.

6 Internet Infrastructure

6.1 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

The New Zealand courts have rarely considered these issues and New Zealand in any event does not have a telecoms "common carrier" concept.

The position depends on whether the issue is defamation or copyright, etc. For example, as to defamation, a carrier without notice of breach (a "mere conduit") is likely to avoid liability if it is just a carrier and has no notice. If it provides value-added services, it is more at risk.

As New Zealand often applies precedents from the UK, Canada and Australia, decisions in those countries are useful. Additionally, the statutory regime (e.g. as to copyright) is often the same or similar. There are developments frequently in this area, reported on at www.wigleylaw.com.

6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Yes, there is the "3 strikes" model, under the Copyright (Infringing File Sharing) Amendment Act. The Act provides safe harbours to ISPs in some situations where their customers infringe others' rights. For reliable information, see: <http://3strikes.net.nz/> (this site was established by the reliable NGO, InternetNZ).

6.3 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any 'net neutrality' requirements?

Subject to the general regulatory and competition obligations, yes. However, net neutrality and related issues are under continued observation, as is happening elsewhere in the world. So change is possible in the medium to long-term. If an operator was to act strongly anti-competitively in this area, the regulator or government may well move reasonably quickly.

6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?

There are no significant obligations to block access. ISPs may block sites that could breach censorship legislation (although that only applies to relatively extreme pornography, etc.). Many Telcos and ISPs voluntarily comply with a Government-sourced blacklist as to, for example, child pornography.

6.5 How are 'voice over IP' services regulated?

They are not regulated currently, and there is no intention at present, for example, to regulate the quality of service or emergency services, etc. (save that emergency services and VoIP are under review by Government). There is increased uptake of VoIP services.



Michael Wigley

Wigley & Company
Level 6, 36 Waring Taylor Street
Wellington
New Zealand

Tel: +64 4 472 3023
Fax: +64 4 471 1833
Email: michael.wigley@wigleylaw.com
URL: www.wigleylaw.com

Michael Wigley is Principal of Wigley & Company. The firm specialises in IT, telecommunications, media and complex projects and disputes. Michael is one of the few telecommunications and media regulatory specialists in New Zealand, and also has a substantial practice outside New Zealand. He has particular experience in NGN, mobile, and internet issues, as well as in functional and structural separation, on which New Zealand has led the world on many aspects. He has a substantial dispute resolution practice.



Wigley & Company is a specialist law firm focusing on IT, telecommunications, regulation/competition, media and complex projects/disputes. The firm acts for Telcos, ISPs and other internet and telecommunications stakeholders, in New Zealand and internationally. Wigley & Company is known for its strong approach of meshing legal issues with economics, advocacy, contracts and pragmatic commercial and technical consideration. Pure law is only one part of the approach. Wigley & Company has been involved in most regulatory issues in New Zealand, as well as many of the largest IT and Telco projects.

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

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