
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

FOURTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

Fourth Edition

Editor
JOHN P JANKA

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Adam Sargent, Nick Barette

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Lucy Brewer

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EDITOR'S PREFACE

The pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models 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.

This fourth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern these types of issues in 30 jurisdictions around the world. In the space allotted, the authors simply cannot address 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 2013

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

List of Abbreviations

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
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

List of Abbreviations

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 24

SPAIN

Pablo González-Espejo and Leticia López-Lapuente¹

I OVERVIEW

i Electronic communications

The Spanish General Telecommunications Law² was approved in 2003 to implement the EU Telecoms Package as part of the liberalisation process. In 2012, the government approved Royal Decree-Law 13/2012, which amended the General Telecommunications Law and the e-Commerce Law³ to implement Directives 2009/136/EC and 2009/140/EC, both of 25 November 2009. The main purpose of this amendment was to reinforce certain operators' rights (such as the occupation of public domain and private property) and consumer rights (such as the right to change operator with number portability within one working day) as well as to regulate the management of security risks and certain aspects of the secondary spectrum market. As regards the e-Commerce Law, it also sets out new rules for the use of cookies.

In recent months, the only amendments to the General Telecommunications Law have derived from the approval on 4 June 2013 of the National Markets and Competition Commission Law,⁴ according to which the government has reorganised the Spanish regulatory authorities in order to integrate most of them (except for the capital markets regulator) into one single body, the National Markets and Competition Commission (NMCC), which has assumed the functions of the Spanish Telecommunications Market Commission (CMT). As a consequence of the creation of this body, the General

1 Pablo González-Espejo is a partner and Leticia López-Lapuente is a senior associate at Uría Menéndez.

2 Ley 32/2003.

3 Ley 34/2002.

4 Ley 3/2013.

Telecommunications Law has been amended accordingly (e.g., those sections of the law regulating the composition and functioning of the CMT have been repealed).

As a result of the approval of the National Markets and Competition Commission Law, the main national regulatory authority for the electronic communications market in Spain is the NMCC. Nevertheless, and until the NMCC is up and running, the CMT will continue to be operational and has been temporarily assigned the supervisory tasks of the electronic communications market.

Apart from the above changes, it should be noted that the government has recently initiated a new process to amend the Spanish General Telecommunications Law in order to, among other things, reinforce the territorial unity of the electronic communications market, simplify certain administrative procedures for operators and amend the general operators' fee. This process is currently at a very early stage: the initial draft law has just been made public and the relevant supervisory bodies and agents are issuing their reports on it.

In compliance with its periodic duty to analyse the electronic communications markets, the CMT set a review of the markets among its objectives for 2012. This review of the electronic communications markets has been extended in time and it is expected that, during 2013, the CMT will complete its analysis of those markets which review, for different reasons, was not carried out in 2012. In particular, the following markets were reviewed in the first half of 2013 or are to be reviewed in the second half of 2013:

- a* broadband markets: wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and the wholesale broadband access market;
- b* fixed telephone markets: call origination on the public telephone network provided at a fixed location and the call termination on individual public telephone networks provided at a fixed location market; and
- c* leased lines markets: wholesale terminating segments of leased lines and the wholesale trunk segment of leased lines market.

The following could be highlighted as the most relevant market trends in recent months: the effective launch of the 4G mobile service in Spain by certain operators; and the continual migration of a significant number of users of mobile telephony services to low-cost operators following the number portability procedures.

ii Audio-visual

There have been some very significant events in the Spanish audio-visual sector in the last year, but the most noteworthy is probably the ruling of the Spanish Supreme Court (the highest Spanish court) of 27 November 2012, which declared void the resolution of the Spanish Council of Ministers of 16 July 2010, which assigned a digital multiplex to each of the Spanish nationwide DTT service providers. The Supreme Court ruling was followed by another resolution of the Spanish Council of Ministers dated 22 March 2013, which set out the basis for the enforcement of the Supreme Court ruling of 27 November 2012. While such enforcement is now in progress, the Spanish DTT service providers have challenged the resolution of the Spanish Council of Ministers of 16 July 2010, either individually and through their sector association – *Unión de Televisiones*

Comerciales Asociadas (UTECA). The complexity of the case and the different factors at stake make it difficult to envisage the outcome of all these procedures and the corresponding timeline to have a precise picture of the final scenario in the Spanish DTT environment. Among other things, the Spanish government is likely in the near future to initiate the procedure to approve a new Technical Plan that should bring order to the allocation of the spectrum within the framework of the aforementioned enforcement of the Supreme Court ruling and of the 'digital dividend' release.

There have also been some developments regarding the financing scheme of the Spanish national TV broadcaster RTVE. In this regard, bear in mind that in 2011 the European Commission decided to refer Spain (and France) to the European Court of Justice because they had both imposed specific charges on the turnover of telecoms operators to finance the public TV broadcaster when the decision to do away with paid advertising on such public television was decided. Only a few days after the European Court of Justice ruled that France could continue to apply this special tax on telecoms to finance public television without advertising, the European Commission decided to put an end to the parallel claim against Spain and thus endorsed the Spanish Law of 2009 that imposed a charge of 0.9 per cent on the gross revenues of telecoms operators to make up for the loss of revenue from paid advertising by the public television broadcaster (in addition to the 1.5 per cent payable by private audio-visual communication services operators, as detailed in Section V.i, *infra*). However, other appeals against this financing at national level are still awaiting judgments, the outcomes of which remain uncertain.

As a final introductory remark, the recent creation of the NMCC (see Section I.i, *supra*) also has an effect on the audiovisual sector since it will be the main supervisory authority in the audio-visual field.

iii Internet

One of the most relevant developments of recent months regarding the internet is that the Spanish Supreme Court⁵ has confirmed the legality of the procedure for the Intellectual Property Commission to monitor and close websites for alleged infringements of copyright, as this procedure was set out in Spanish Royal Decree 1889/2011. The Intellectual Property Commission was set up by the 43rd final provision of Law 2/2011 of 4 March on sustainable economy, and developed by Royal Decree 1889/2011. According to these rules – now confirmed by the Supreme Court – the Second Section of the Commission has authority to examine claims for alleged infringements of copyright by service providers. Unless the service provider removes the contents voluntarily, this procedure will conclude by way of a resolution declaring the existence or not of the infringement and, as the case may be, with an order to remove contents or interrupt the service being provided. The Commission's decisions may be challenged in court and a court order is required for them to be effective, all as regulated by a relatively swift and complex procedure. The only objection in the Supreme Court's rulings to the legality of this procedure is limited to Section 20.2 of Royal Decree 1889/2011, since the rulings have declared the nullity of the rule stating that the voluntary removal of the

5 By means of two rulings of the Supreme Court dated 31 May 2013.

potentially infringing work by the service provider would amount to a tacit recognition of an infringement.

As regards other recent court rulings of relevance for the Spanish TMT market, on 25 June 2013 Advocate General Jääskinen issued his conclusions on Case C-131/12, which involved Google and the Spanish Data Protection Agency (AEPD).⁶ This case referred to the ‘right to be forgotten’ on the internet. According to Advocate General Jääskinen’s conclusions, the rights to erase and block data and the right to object established under Directive 95/46 do not confer on the data subject a right for him or her to address a search engine service provider to prevent indexing of information relating to him or her personally that is published legally on third parties’ web pages, requesting that such information remains unknown to internet users when he or she considers that it may be prejudicial to him or her.

Finally, in the first half of 2013, the AEPD also issued certain guidelines affecting two relevant internet-related matters: cookies and cloud computing. These guidelines, although not of a direct legal or mandatory nature, are very useful to know how the AEPD will construe the relevant data protection rules and following the guidelines may help companies avoid potential data protection infringements and fines. Regarding cookies, the AEPD – together with industry representatives – has drafted a practical guide for the implementation and management of cookies and other similar devices used for the collection and storage of data. This guide reveals the AEPD’s position on how service providers should comply with the prior information and consent duties approved in 2012 (see Section I.i, *supra*) and provides practical recommendations and examples. Regarding cloud computing, the AEPD has published two different guides, one addressed to cloud computing users and one addressed to cloud computing service providers. In order to ensure that the engagement of cloud computing services complies with the Data Protection Law,⁷ these guides require the fulfilment of certain conditions, such as the prior identification of all the territories where the data will be located and the verification that the security measures established under the Data Protection Law will be adopted by the service provider and subcontractors.

II REGULATION

i The main sources of regulation

The main sources of regulation applicable to the TMT sector in Spain are the following:

- a* the General Telecommunications Law;
- b* the General Audio-visual Law;
- c* the e-Commerce Law;
- d* the Data Protection Law and its ancillary Regulation approved by Royal Decree 1720/2007 of 21 December;

6 *Google Spain, S.L. and Google Inc. v. the Spanish Data Protection Agency and Mario Costeja González.*

7 Organic Law 15/1999.

- e* Law 25/2007, of 18 October, on the retention of electronic communications and public communication networks data (the Data Retention Law); and
- f* the National Markets and Competition Commission Law.

There have also been several administrative orders, instructions, recommendations and guidelines issued by the government, the relevant ministries and the national regulatory authorities (NRAs) that develop these laws.

ii The NRAs

Historically and until the approval of the National Markets and Competition Commission Law in June 2013, the main NRA that was competent for telecom-related matters in Spain was the CMT. However, as explained in Section I.i, *supra*, the recently created NMCC has integrated and assumed the functions of the CMT.

The NMCC is an independent public body in charge of supervising market competence in Spain as well as certain relevant markets including the electronic communications market. Its main functions as regards the electronic communications market are to establish and supervise the fulfilment by operators of their obligations, to promote fair competition and the plurality of the offer of electronic communications services and the resolution of disputes between operators. The NMCC has, *inter alia*, the power to assign numbering to operators, to manage the financing of the universal service, to define the relevant electronic communications markets, to advise on the regulation of the electronic communications market, to keep a record of the operators in Spain and to exercise certain supervisory and sanctioning powers. However, and until the NMCC is effectively given resources and is up and running, the CMT will remain operational and in charge of these tasks.

The State Secretariat for Telecommunications and Information Society (SETSI), which is part of the Ministry of Industry, Energy and Tourism, currently holds certain powers regarding electronic communication, audio-visual and other TMT matters, and is responsible for proposing general policies and regulations on the electronic communications and information society; the promotion and development of TMT infrastructures and services; the management of domain names under the Spanish country code (.es); the management and control of TMT scarce resources (such as spectrum, including the processing and granting of licences for private spectrum use); and the exercise of certain supervisory and sanctioning powers with respect to TMT matters.

For audio-visual matters, the NMCC has also become the new supervisory authority. Among its functions, the NMCC will be in charge of monitoring compliance by TV service providers with the quota and financing obligations set out in the General Audio-visual Law as well as with the advertising restrictions and other content-related obligations established in this law (see Section V.i, *infra*). Until the NMCC is up and running, these tasks will be temporarily carried out by SETSI and the CMT.

As regards matters included in TMT laws that relate specifically to personal data protection and to the submission of commercial electronic communications, some control and sanctioning powers have been granted to the AEPD, which is the independent authority responsible for the enforcement of data protection regulations. The AEPD has

the power to grant authorisations set out in the data protection regulation, to hear claims concerning personal data protection, to publish databases that are registered with the Spanish Data Protection Registry, and to exercise sanctioning powers, imposing fines for infringements under the data protection, e-commerce and electronic communications regulations. In addition, some autonomous regions (Catalonia and the Basque Country) have set up regional authorities, whose functions are limited to the processing of personal data by regional public entities.

Finally, and although not a specific regulatory body for the TMT sector, the Spanish Competition Authority (CNC) has historically had competence over matters such as abusive practices and merger control in the TMT sector. In recent years, the CNC has been relatively active in monitoring mergers of television broadcasters in Spain and has imposed strict conditions to clear these transactions. The CNC has also been recently integrated in the new NMCC, although until the NMCC is up and running, the CNC will continue to be operative and in charge of these tasks.

At the time of writing the NMCC is not yet operational and as the CMT, SETSI and CNC have been temporarily assigned the NMCC's tasks on the relevant TMT markets, any references to the NMCC in this Chapter should be understood as being currently and temporarily carried out by the CMT, the CNC and the SETSI, depending on the task in question.

iii Regulated activities

Electronic communications

According to the General Telecommunications Law, telecommunications are services of general interest to be provided under conditions of free competition regardless of the imposition of certain public service obligations on operators. Under the General Telecommunications Law, no licence is required for the provision of electronic communications services and the operation of networks, but formal notice must be provided to the NMCC before these activities can begin. The prior notice must include corporate and identification data and documentation, a declaration of compliance with the applicable laws, a description of the services that are to be provided or of the networks that are to be exploited, and an approximate date of when the activity is expected to start. The NMCC has 15 days to reject the notification if it does not comply with the requirements established in the General Telecommunications Law and its ancillary regulations. If the requirements are met, the NMCC will automatically register the notifying party with the General Operators Registry. Every three years, the operator must notify the NMCC of its intention to continue or discontinue providing the electronic communication services.

An administrative authorisation or concession is required to make private use of the radio-electric spectrum in Spain. The procedure to obtain the authorisation or concession for spectrum use is set out in Royal Decree 863/2008, according to which operators must submit a spectrum use application together with a technical proposal to the Ministry of Industry, Energy and Tourism (through SETSI), in response to which SETSI must issue a resolution granting or rejecting the application. As a general rule, as a prerequisite for obtaining a spectrum concession, applicants must prove their status as registered electronic communications operators; however, SETSI may limit the

concessions in certain frequency bands in order to guarantee the efficient use of spectrum or when the demand for the spectrum exceeds the offer. In those cases, the relevant concessions will be awarded through public tender processes.

In addition, operators interested in obtaining numbering use rights must submit an application to the NMCC, which will decide whether to grant or refuse these rights according to the National Numbering Plan and other regulations within three or six weeks (in the case of competitive selection procedures) following the submission of the application.

Audio-visual

The provision of audio-visual communication services is only subject to a prior notification by the relevant administrative body, be it national or regional, depending on the coverage of the service. Exceptionally, DTT services, and any other audio-visual services that require the use of terrestrial radio waves must obtain a licence through a public tender process called by the Spanish government (for nationwide broadcasting) or by the regional governments (for regional and local broadcasting). Licences are granted for 15-year terms and are subject to subsequent 15-year term renewals if the audio-visual service provider meets all the conditions.

If the provision of audio-visual services requires spectrum use, such use is subject to the prior reservation of the corresponding spectrum pursuant to a public resolution by SETSI.

iv Ownership and market access restrictions

Electronic communications

Under the General Telecommunications Law, there are no limitations on ownership, not even for foreign entities. The only limitation is imposed not on ownership but on the provision of direct electronic communications services by foreign (non-EU) entities in Spain, which requires a reciprocal treaty to allow such provision. Otherwise, the government may grant general or specific exceptions for the provision of these services. In addition, any natural or legal person that operates networks or provides electronic communications services in Spain must have a legal representative domiciled in Spain for notification purposes.

Royal Decree-Law 6/2000 of 23 June on urgent measures to improve competition in the goods and services markets provides for certain restrictions on the ownership of certain types of telecommunications service providers.

Individuals and legal entities holding, directly and indirectly, more than 3 per cent of the total share capital or voting rights of two or more principal operators in, among others, the fixed-line and mobile telephony markets, cannot exercise their voting rights in excess of 3 per cent of the total in more than one operator without the prior authorisation of the NMCC. Principal operators are defined as one of the five operators with the largest market share in the relevant market, and are published yearly by the CMT (this task will in future be assumed by the NMCC).

Furthermore, no individual or legal entity may appoint, directly or indirectly, members of the management body of more than one principal operator in, among

others, the fixed-line or mobile telephony markets, without the prior authorisation of the NMCC.

Additionally, individuals or legal entities considered principal operators may not exercise more than 3 per cent of the voting rights of another principal operator or appoint, directly or indirectly, members of the management body of any principal operator, without the prior authorisation of the NMCC.

Finally, Royal-Decree 458/2011, as amended by Ministerial Order ITC/2499/2011, establishes certain thresholds to the holding of frequencies by each operator and some temporary restrictions to the transfer or assignment of spectrum in certain frequency bands.

Audio-visual

According to the General Audio-visual Law, the following requirements must be met to be granted a TV licence.

Natural persons and legal persons must be citizens of a country within the European Economic Area or a country that allows Spanish citizens to hold equivalent licences and they must have a legal representative domiciled in Spain. For legal persons, any foreign (non-EEA) stake in their capital must also comply with the reciprocity principle, and the individual stake of any non-EEA natural or legal person cannot directly or indirectly exceed 25 per cent of the share-capital while the total non-EEA stake must be below 50 per cent of the share capital.

In addition, there are some constraints on aggregate holdings in TV and radio service providers that are intended to guarantee pluralism in those markets. In relation to TV service providers, individuals and legal entities are forbidden from holding a significant stake⁸ in more than one operator providing national television audio-visual communication services, if the average viewers of the television channels broadcast by the audio-visual communication service providers in question exceeds 27 per cent of the total viewers in the past 12 consecutive months. Individuals and legal entities are not allowed to acquire a significant stake or voting rights in more than one provider of television audio-visual communication services when:

- a* national providers, in aggregate, hold rights to use the spectrum exceeding the technical capacity corresponding to two multiplex channels; and
- b* regional providers, in aggregate, hold rights to use the spectrum exceeding the technical capacity corresponding to one multiplex channel.

Moreover, individuals or legal entities holding a stake in a national provider of television audio-visual communication services cannot acquire a significant stake or voting rights in another provider of the same service if the acquisition prevents the existence of at

8 That is, a direct or indirect holding of 5 per cent of the share capital or 30 per cent of the voting rights, or a lower percentage if such percentage is to be used to appoint, within 24 months following the acquisition, a number of members to the board of directors representing more than half of the total.

least three different private providers of national television audio-visual communication services so as to ensure pluralism in the media.

With regard to radio licences, no individual or legal entity may control, directly or indirectly, more than 50 per cent of the private licences for the terrestrial radio services within the same coverage area. Furthermore, no individual or legal entity may control, directly or indirectly, more than five of these licences within the same coverage area. In addition, no person is allowed to control more than 40 per cent of the total licences in an autonomous community where there is only one licence per licence area. Nor is any person allowed to control more than one-third of the licences with total or partial nationwide coverage.

v Transfers of control and assignments

Electronic communications

As explained in Section II.iii, *supra*, no licence is required to provide electronic communication services or to operate networks in Spain, the only requirement being the notification of the NMCC in advance. Consequently, there is no express regulation on the transfer of control of an operator or of its telecoms business to a third party. When a telecoms business is assigned to a third party, the latter must ensure that it has previously notified the NMCC of its intention to provide the services in question or operate the relevant network.

The transfer of authorisations or concessions or the assignment of rights to use the spectrum are regulated under Royal Decree 863/2008 and require the prior authorisation of SETSI. The transferor or assignor must be in compliance with any applicable laws, including payments of spectrum reservation fees, and the transferee or assignee must also comply with all the applicable legal and technical requirements to obtain such licence. No transfer or assignment of the spectrum can take place if it is proven that it will restrict market competition. The authorisation procedure differs somewhat for transfers and assignments of spectrum use rights. For the latter, there are also different formalities that apply depending on whether or not the term of the assignment exceeds six months. Finally, Royal-Decree 458/2011 sets out a two-year restriction to the transfer of frequencies of 800MHz, 900MHz, 1,800MHz and 2.6GHz granted in accordance with the same Royal-Decree.

Regarding numbering use rights, the holders of these rights may assign them (including the management or marketing of the numbers) to other telecommunications operators with the prior authorisation of the NMCC and provided that the application specifies the intended use of the numbering rights being assigned.

Audio-visual

The General Audiovisual Law repealed the notification procedure for transfers of interests in TV licence holders. In addition, for the first time it allows and regulates legal transactions involving audio-visual communication licences. Under this regulation, these transactions require the prior authorisation of the relevant public authority (once the applicant has provided evidence of compliance with all applicable legal conditions) and the payment of a fee.

The following requirements must also be met for the transfer or lease of licences:

- a* at least two years must have passed since the granting of the licences in question;
- b* the transferee or lessee must be an EEA national or a national of a country in which the reciprocity principle applies (although this requirement can be lifted by the competent authorities for public interest reasons);
- c* if the object of the licence is a whole multiplex or two or more channels, no more than 50 per cent of the licence capacity may be leased;
- d* subleasing is not allowed; and
- e* all requirements applicable to the licence holder must also be met by the transferee/lessee.

It should be noted that mergers within the TMT sector may be subject to the authorisation of the NMCC or the European Commission if the thresholds set out in competition regulations are exceeded.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

IP-based services are not subject to a separate regulatory structure, but are regulated under the traditional electronic communications regulation, the General Telecommunications Law and its ancillary regulations.

Internet services that do not qualify as electronic communications services or the operation of telecom networks, such as the provision of mere content services, are excluded from the scope of the General Telecommunications Law and its ancillary regulations and are regulated by the e-Commerce Law.

ii Universal service

The General Telecommunications Law establishes that electronic communications operators may be requested to provide certain universal services. Universal service covers a range of electronic communications services that must be provided to all users at a reasonable price and be of a certain quality, regardless of their geographical location. This includes access to the fixed telephony network and the provision of telephony services to the public, availability of directory information (excluding telephone directory enquiry services), sufficient provision of public payphones and access to fixed telephony for the disabled and those with special social needs (who will be offered different options or bundled tariffs to those offered under normal commercial conditions).

The amendment of the General Telecommunications Law in 2012 detailed in Section I.i, *supra*, included within the universal service list the availability of functional access to the internet, allowing bandwidth communications at a downlink speed of at least 1Mb/s.

The General Telecommunications Law states that the Ministry of Industry, Energy and Tourism will designate the operators entrusted to ensure the universal service. Telefónica is still considered the sole operator providing universal services throughout Spain until 31 December 2016, but other operators are obliged to contribute to a fund that finances the provision of these services by Telefónica.

In the same vein, to reinforce the development and use in Spain of internet and broadband services, the government and the CMT have recently issued certain decisions with the aim of encouraging the provision of broadband services (e.g., restructuring the wholesale price offering) and the deployment of NGA networks by alternative operators, improving the technical conditions for the deployment of networks by using the main operator's infrastructure. Among these decisions, a new plan developing the Spanish Digital Agenda was approved by the government in February 2013 and a plan with specific measures for the development of ultra-fast networks was published in June 2013.

iii Restrictions on the provision of service

Regarding restrictions on pricing, the only regulated retail price that was in place in 2012 (i.e., the subscription fee (line rental)) has been recently liberalised as a result of the review of the market of access to the public telephone network at a fixed location carried out by the CMT in December 2012. However, Telefónica has undertaken to freeze this fee at €13.97 (plus CPI increases) until 2016. The CMT (and, in the future, the NMCC) also establishes restrictions on wholesalers' prices, which means the price charged by Telefónica to the alternative operators for the use of its infrastructures and networks. Please note that the review of the methodology used for the setting of these prices is one of the CMT's objectives for 2013.

Operators that provide publicly available electronic communications services are subject to several conditions pursuant to the General Telecommunications Law and its ancillary regulations. They have, among other things, the right and the obligation, if so requested by other operators, to negotiate interconnection with each other and access to networks and associated resources for the provision of these services and their interoperability.

For operators with significant market power, the NMCC may impose additional obligations in order to ensure transparency on the interconnection and access, non-discrimination (i.e., the operator applies equivalent conditions to operators providing equivalent services) and wholesale price control. In this regard, Telefónica has issued a reference interconnection offer (OIR) and a local loop unbundling offer (OBA), validated by the CMT and available to all other operators.

In addition, all operators must respect end users' rights, which are established in the General Telecommunications Law and developed by Royal Decree 899/2009.

iv Security

Spanish legislation recognises general principles such as homeland security, law enforcement, network security and freedom of access to information and self-expression, either as inspiring principles or in specific rules. They are also measured and applied by the rulings of Spanish courts.

In particular, operators that provide public electronic communications services or networks must guarantee the secrecy of communications, which is a fundamental right under the Spanish Constitution. The protection of personal data and privacy is mainly regulated by the Data Protection Law and its ancillary regulations (Royal Decree 1720/2007), although all the other TMT rules referred to in this chapter (the General Telecommunications Law, the General Audiovisual Law, the e-Commerce Law, etc.) also

contain specific provisions to ensure the applicability of data protection in the relevant sectors.

Electronic communications operators also have the obligation to retain certain electronic communications data (traffic and locational data and data that enables the identification of users) pursuant to the Data Retention Law (which implements Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC) and, upon judicial request, they must provide this data to the relevant authorities so that they can be used to detect, investigate and judge serious crimes pursuant to the Criminal Code. To a similar end, the General Telecommunications Law and Royal Decree 424/2005 set out the operators' obligations to intercept electronic communications upon judicial request according to the Criminal Procedure Law and other applicable regulations.

There is particular concern regarding the protection of children's online communication, based on the minor's right to personal and family privacy set out in Basic Law 1/1996 on the legal protection of minors. In this regard, the regulations developing the Data Protection Law establish specific rules that require parental consent for the processing of the personal data of children under 14. The AEPD has also issued several guidelines with the aim of increasing the protection of minors' privacy, in particular with regard to the use social networks.

Lastly, cybersecurity concerns were specifically addressed by the amendment of the Spanish Criminal Code in 2010, which criminalised hacking and other conducts. Since then, the Criminal Code establishes significant pecuniary fines (that last, as a general rule, up to 24 months) and the possibility of imprisonment (as a general rule, up to four years) for activities such as the interception of telecommunications or use of technical devices for listening, transmitting, recording or reproducing sounds, images or any other communication signal, the unauthorised seizure, use or amendment of personal reserved data that are recorded on computer, electronic or telematic files or media, and the unauthorised access to computer data or software within a computer system in breach of the security measures established to prevent such access.

IV SPECTRUM POLICY

i Development

The radio spectrum is a public domain commodity that is owned, managed and controlled by the state (through the Ministry of Industry, Energy and Tourism and SETSI). The general rules and principles on the regulation of the spectrum are set out in the General Telecommunications Law.

Royal Decree 863/2008, which develops the General Telecommunications Law with regard to spectrum use, was approved in 2008. Among other goals, it intended to make spectrum use and its assignment more flexible, with the aim of creating a secondary market for spectrum. Another key piece of legislation is the National Chart of Frequency Attribution, which sets out the allocation of frequency bands to the different categories of services in accordance with the relevant technical characteristics.

ii Flexible spectrum use

Several measures have been implemented in Spain to make the use of the spectrum more flexible and to accommodate such use to the current and new uses of technology. Following the European Commission's recommendations, the government announced in 2009 its intention to reserve the 800MHz band (the Digital Dividend), previously reserved for TV services broadcast through the former analogue system, for electronic communications services (particularly, for mobile broadband services). This release became possible as a consequence of the digital switchover, which was completed in April 2010 (see Section V.ii, *infra*), and was intended to enable a more efficient use of the spectrum according to the current spectrum uses.

Along the same lines, Royal Decree 458/2011 of 1 April on actions related to the spectrum for the development of the digital society, imposes certain measures as regards the 900MHz and 1,800MHz bands, such as the technology neutrality principle. Regarding the 800MHz band, it established that this band should be totally released by 2014 and that the licences for the use of spectrum blocks should be granted to electronic communications operators through public tenders.

Finally, as set out in Section III.ii, *supra*, a new plan developing the Spanish Digital Agenda was approved by the government in February 2013. This plan highlights the need to optimise spectrum use in Spain. In order to achieve this goal, the plan proposes certain measures to increase the flexibility in its use, such as to advance the availability to the telecom operators of the spectrum blocks of the Digital Dividend for their use in the provision of electronic communication services; to facilitate and simplify the regulation of the management and use of the spectrum by encouraging, for instance, the secondary market; to review the current use of spectrum to identify those frequency bands that are underused; or to evaluate the spectrum needs for an effective development of the NGA networks.

iii Broadband and next-generation mobile spectrum use

The growing need for spectrum for broadband services and next-generation mobile services is being addressed within the new spectrum reorganisation and assignation process explained above.

iv Spectrum auctions and fees

As explained above, whenever the efficient use of spectrum needs to be guaranteed and demand for the spectrum exceeds the offer, spectrum use licences are granted through public tenders. The most recent tenders, in 2011, were for the awarding of spectrum concessions to electronic communications operators for the use of the 800MHz, 900MHz and 2.6GHz bands.

In addition to other fees applicable to electronic communications operators, the reservation of spectrum use for private purposes is subject to the payment of an annual fee, as set out in Annex I of the General Telecommunications Law. The amount of this reservation fee is calculated according to the number of spectrum reservation units multiplied by the value assigned to each unit and divided by the euro exchange rate, following certain parameters set out annually in the relevant law.

The amount of the fee will depend, mainly, on the type of service to be provided, the category of band reserved, the equipment and technology used, the level of use and congestion of the bands, the geographical areas, the market value of the reserved frequency and the revenue that the beneficiary may obtain.

V MEDIA

i Restrictions on the provision of service

As a general rule, audio-visual service providers enjoy programming freedom; however, the General Audio-visual Law establishes certain service obligations and restrictions in order to protect other general interests such as those of consumers, children's rights, cultural and linguistic diversity, and political pluralism in the news. Therefore, the main restrictions and obligations imposed on TV service providers are as follows:

Quota obligations

At least 51 per cent of annual broadcasting time (excluding news, sports events and advertisements, among others) of each channel or set of channels must be reserved for European works. Moreover, 50 per cent of that quota must be reserved for European works in any of the official Spanish languages. 10 per cent of annual broadcasting time must be reserved for independent producers, and half of this 10 per cent must have been produced in the past five years. With respect to non-linear audio-visual services over which a service provider has editorial responsibility, 30 per cent of the catalogue of programmes must be reserved for European audiovisual productions and half of that 30 per cent for European audio-visual productions in any of the official Spanish languages.

Financing obligation

TV service providers whose programming includes full-length feature films, television films and series, documentaries, animated series or short movies produced less than seven years ago, must contribute, on a yearly basis, 5 per cent of the total income from the previous fiscal year (6 per cent for public broadcasters), according to its accounts, to the pre-financing of the production of certain audio-visual works such as, among others, full-length feature films, television films and series, documentaries, animated series and short films. This contribution must comply with the following rules:

- a 60 per cent of the 5 per cent must be used for full-length feature films:
 - of which 50 per cent must be used for works of independent producers; and
 - of which 60 per cent must be used for works which original language is one of the existing official languages in Spain; and
- b the remaining 40 per cent of the 5 per cent can be used for television films or television series or miniseries.

In April 2010 the Spanish Constitutional Court admitted a claim against the 5 per cent quota obligation. No decision has been issued yet.

Payment obligations

According to the RTVE Financing Law,⁹ since September 2009 private audio-visual communication services operators must pay 1.5 per cent of their television and other audiovisual communication services revenue on a yearly basis for the financing of the public broadcaster RTVE once advertising was banned in RTVE's broadcasting.

Advertising restrictions

While there are no specific advertising restrictions on radio services (other than those set out in the Spanish General Advertising Law),¹⁰ TV service providers must fulfil certain advertising-related obligations, which include the obligation to broadcast a maximum of 12 minutes of commercials per hour. The General Audio-visual Law has been developed by Royal Decree 1624/2011 on certain aspects of television commercial communication (self-promotion, telepromotion and sponsorship).

Other content-related obligations

There are also specific content-related restrictions, among which those intended for the protection of children are of utmost importance. First, audio-visual services providers must not use children's voices and images without the consent of their parents or legal guardians. Secondly, the broadcasting of content that may seriously impair the development of minors (e.g., pornography or gratuitous acts of violence) is forbidden, and other contents that may also be harmful for minors (such as gambling) may only be broadcasted within certain time slots. The law also establishes reinforced protection for certain time slots that are considered to be accessible by children. Furthermore, in order to facilitate parental control, all the audio-visual service providers must use a digital encryption to classify the content and TV service providers must use an age rating system according to the guidelines issued by the relevant authorities.

Disabled persons

There are further obligations (i.e., subtitling, audio-description and deaf sign language quotas) aimed at guaranteeing access to TV services by disabled persons.

ii Digital switchover

The digital switchover (the analogue switch-off and subsequent transition from analogue to digital broadcasting) took place in Spain in April 2010 with an increase of available channels as the switchover entailed the attribution of full multiplexes (i.e., the granting of four channels each) to each of the then existing-private TV broadcasters (apart from the multiplexes reserved for the publicly owned nationwide and regional TV stations). However, as detailed in Section I.ii, *supra*, a Spanish Supreme Court ruling of 27 November 2012 annulled the resolution of the Spanish Council of Ministers that attributed such digital multiplex to each of the existing private TV broadcasters. The final effects of this ruling on the ability of DTT broadcasters to continue the exploitation of the current DTT channels remain uncertain.

9 Law 8/2009 of 28 August on the financing of the Spanish Radio and Television Corporation.

10 Law 34/1988 of 11 November on advertising.

iii Internet-delivered video content

The most relevant legal development with an impact on internet-delivered video content services is the implementation of the procedure for the monitoring and closure of websites by the Intellectual Property Commission (see Section I.iii, *supra*). The main goal of this procedure is to increase the level of protection and security granted in Spain to content owners on the internet, including owners of internet-delivered video content.

In recent months, certain internet-delivered video content services (e.g., VoD streaming services) have been launched in Spain, although these services are not yet fully established among Spanish users and the market is still taking off.

iv Mobile services

The provision of mobile television audio-visual services and other ancillary services has been specifically regulated in the General Audio-visual Law. According to this regulation, the provision of mobile television services requires operators to obtain a licence on the same terms as those set out for general audio-visual services detailed in Section II.iii, *supra*. The main goal of this regulation was to foster the development of these mobile services by ensuring, for instance, the assignment of spectrum and by promoting the creation of adapted contents. In spite of these efforts, there has been no real market development of these services to date.

VI THE YEAR IN REVIEW

As detailed above, the most significant development in electronic communications over the past few months has been the creation of the NMCC and the approval of a plan to develop the Spanish Digital Agenda to strengthen certain aspects of the TMT market, such as the deployment of new generation networks and a more efficient use of the spectrum.

Regarding the audio-visual sector, although no major laws have been passed in recent months, there are very significant developments in course mainly resulting from the enforcement of the Spanish Supreme Court ruling of 27 November 2012 annulling a resolution of the Spanish Council of Ministers of 16 July 2010, which attributed one digital multiplex to each of the Spanish nationwide DTT service providers.

VII CONCLUSIONS AND OUTLOOK

Looking ahead, there are certain events that may have an impact on the Spanish TMT market in the coming months, such the announced approval of an amendment of the General Telecommunications Law. In the near future, the Digital Dividend procedure should also be completed with a more clear-cut outline of the Spanish TV sector.

Finally, there are also strong signs of potential corporate transactions taking place and involving both fixed and mobile operators. During 2013, the sale process of Xfera (Yoigo) was finally discontinued but it seems that, following the market trend worldwide, concentration of existing operators is likely to take place in the coming months.

Appendix 1

ABOUT THE AUTHORS

PABLO GONZÁLEZ-ESPEJO

Uría Menéndez

Pablo González-Espejo is a lawyer based in the Madrid office of Uría Menéndez. He joined the firm in 1994 and was made partner in 2004. In 1999, he opened Uría Menéndez's Sao Paulo office, which he headed until September 2003. He advised foreign investors in Brazil and was one of the first foreign lawyers to be registered with the Brazilian Bar Association. Since returning to the firm's Madrid office in October 2003, Pablo has focused his practice mainly on commercial and company law, in the audiovisual, telecommunications, sports and IT sectors.

He advises companies on regulatory and commercial matters. He is regularly involved in major transactions advising businesses and investors in acquisitions, IPOs, joint ventures and outsourcing projects. His international experience includes cross-border deals, especially in Latin America.

Pablo also heads the sports law practice group at Uría Menéndez, advising sports clubs, leagues and athletes. He has taken part in international arbitrations before the CAS and is part of the team of experts that drafted a White Paper to reform Spanish professional sports.

He is considered a leading practitioner in M&A, new technologies, telecommunications, media and sports by the most prestigious legal directories, such as *Chambers*, *PLC Which Lawyer?* and *Best Lawyers in Spain*.

LETICIA LÓPEZ-LAPUENTE

Uría Menéndez

Leticia López-Lapuente is a lawyer in the Madrid office of Uría Menéndez. She joined the firm in 2004. She focuses her practice on commercial and corporate law, especially on the internet, software, e-commerce and technology sectors. She also advises on privacy law issues.

Leticia provides clients in these sectors day-to-day advice on regulatory, corporate and commercial matters, including the drafting and negotiation of contracts, M&A, privacy advice, consumer protection and e-commerce issues, corporate house-keeping, public procurement and RFP procedures, dealings with public authorities, etc.

She has been involved in major transactions and assisted businesses and investors in these sectors, including a two-year secondment to a leading international software group, where she was responsible for IT consulting and support services contracting, the implementation of intra-group compliance policies in Spain, and legal training for employees; and a six-month secondment to a national telecommunications services operator where she advised on commercial contracts, adoption of privacy policies and electronic communications regulatory issues.

URÍA MENÉNDEZ

Príncipe de Vergara 187

Plaza de Rodrigo Uría

28002 Madrid

Spain

Tel: +34 915 860 409

Fax: +34 915 860 080

pablo.gonzalezspejo@uria.com

leticia.lopez-lapuente@uria.com

www.uria.com