
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

SEVENTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

Seventh Edition

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LAW BUSINESS RESEARCH LTD

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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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www.TheLawReviews.co.uk

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ISBN 978-1-910813-33-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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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

AJUMOGOBIA & OKEKE

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

BAKER & McKENZIE.WONG & LEOW

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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EDITOR'S PREFACE

This fully updated seventh edition of *The Technology, Media and Telecommunications Review* provides an overview of evolving legal constructs in 28 jurisdictions around the world. It is intended as a business-focused framework for both start-ups and established companies, as well as an overview for those interested in examining evolving law and policy in the rapidly changing TMT sector.

Broadband connectivity and wireless services continue to drive law and policy in this sector. The disruptive effect of new technologies and new ways of communicating creates challenges around the world as regulators seek to facilitate the deployment of state-of-the-art communications infrastructure to all citizens and also to use the limited radio spectrum more efficiently than before. At the same time, technological innovation makes it commercially practical to use large segments of 'higher' parts of the radio spectrum for the first time. Moreover, the global nature of TMT companies compels them to address these issues in different ways than before.

A host of new demands, such as the developing 'Internet of Things,' the need for broadband service to aeroplanes, vessels, motor vehicles and trains, and the general desire for faster and better mobile broadband service no matter where we go, create pressures on the existing spectrum environment. Regulators are being forced to both (1) 'reform' existing spectrum bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs, and (2) facilitate spectrum sharing between different services in ways previously not contemplated. Many important issues are being studied as part of the preparation for the next World Radio-communication Conference to be held in 2019. No doubt, this conference will lead to changes in long-standing radio spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Legacy terrestrial telecommunications networks designed primarily for voice are being upgraded to support the broadband applications of tomorrow that will extend economic benefits, educational opportunities and medical services throughout the world. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital

information, entertainment and educational services now delivered over broadband. Many governments are re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation also lead to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector. Similarly, many global companies now are able to focus their regulatory activities outside their traditional home, and in jurisdictions that provide the most accommodating terms and conditions.

Changes in the TMT ecosystem, including increased opportunities to distribute video content over broadband networks, have led to policy focuses on issues such as 'network neutrality' – the goal of providing some type of stability for the provision of the important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented has profound effects on the balance of power in the sector, and also raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers and to facilitate their new businesses.

The following chapters describe these types of developments around the world, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka

Latham & Watkins LLP

Washington, DC

October 2016

Chapter 24

SPAIN

*Pablo González-Espejo*¹

I OVERVIEW

This chapter provides a general overview of the electronic communications, audiovisual and internet access regulations in Spain. Given the complexity and constant evolution of these sectors, this summary is not intended to be comprehensive, but simply to outline the main aspects of the regulations, as well as recent news and trends.

i Electronic communications

Following the trend of other European countries, during 2016, the consolidation of the electronic communications market in Spain through mergers and acquisitions has nearly been completed, with the acquisition in 2016 of Yoigo and Pepephone by Más Móvil, giving rise to the fourth telecom operator in Spain (together with Telefónica, Vodafone and Orange). This consolidation process has resulted in the convergence of fixed and mobile operators (e.g., Orange and Jazztel, Vodafone and ONO) or broadband and pay-TV operators (e.g., Telefónica and DTS), giving operators more capacity to foster technological development. On top of that, over-the-top services have significantly increased their market share and alternative audiovisual platforms are growing fast, replacing traditional means of accessing content.

As regards the regulatory framework, although the new General Telecommunications Law² – which has been the main piece of legislation governing the telecoms sector since 2014 – provided for the development of its own ancillary regulations, most of the former Law's ancillary regulations are still in force as no regulation developing or extending the current General Telecommunications Law has been approved yet due to the substantial slowdown of the legislative activity as a result of the lack of government since December 2015. As an exception, in May 2015 the government passed Royal Decree 381/2015 on measures

1 Pablo González-Espejo is a partner at Uría Menéndez.

2 Law 9/2014.

against unauthorised traffic (both for the lack of an original authorisation or licence for the use of numbering and for the subsequent undue use of the numbering) and irregular traffic for fraudulent purposes. This regulation provides for operators' notification obligations to the State Secretariat for Telecommunications and Information Society (SETSI). In September 2016, the government also passed Royal Decree 330/2016, which implements Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks. A draft royal decree regarding the use of the radio-electric public domain was published in 2015 but remains on hold due to the lack of government.

In compliance with its periodic duty to analyse the electronic communications markets, in July 2016 the National Markets and Competition Commission (NMCC) issued a proposal to deregulate access to mobile network markets (market 15), that would lift the obligation on the main three network operators (Telefónica, Vodafone and Orange) to provide OMVs with reasonable access to their mobile infrastructure, on the basis that, according to the NMCC, this market is already competitive. In July 2016 the NMCC also opened a public consultation on wholesale call termination on individual public telephone networks provided at a fixed location (market 1) and wholesale voice call termination on individual mobile networks (market 2). It proposes to maintain the restrictions imposed on Telefónica in the wholesale market and to remove the few existing obligations imposed on it with regard to the retail market. Following the publication of the Spanish Digital Agenda in February 2013, during 2014 and 2015 the Ministry of Industry, Energy and Tourism (MIET) published different reports that keep the original Agenda up to date as well as address final users of telecommunication services.

In compliance with the European mandate regarding the liberalisation of the 800MHz band (digital dividend), in March 2015 the MIET announced the conclusion of the liberalisation process in favour of telecom operators for the provision of LTE/4G services.

ii Audiovisual

In September 2014, a new technical plan for DTT was passed regulating the new allocation of spectrum to DTT services and certain aspects of the release of frequencies of the digital dividend to telecom operators.

As a result of a public tender called during the first half of 2015, in October 2015, the government allocated six new DTT channel licences (three SD and three HD), which were launched in April 2016.

In November 2015, the NMCC also passed a proposal which recommends introducing certain flexibility to the 'spectrum cap' of high bandwidths if certain conditions are met.

iii Internet

Following the ruling of the Grand Chamber of the European Court of Justice dated 12 May 2014 on Case C131/12, which involved Google and the Spanish Data Protection Agency (AEPD),³ the AEPD Annual Report indicated that 370 claims were filed before the AEPD exercising the 'right to be forgotten'. Recent case law from the Spanish Supreme Court has interpreted such ruling, providing a new approach as regards the definition of the entity against which the right to be forgotten should be exercised.

3 *Google Spain, SL and Google Inc v. the Spanish Data Protection Agency and Mario Costeja González.*

Since the creation of the Spanish National Institute of Cybersecurity (INCIBE) in December 2013, it has been quite active in building digital confidence in the Spanish market.

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 Audiovisual Law;
- c* the e-Commerce Law;
- d* the Data Protection Law and its ancillary Regulation approved by Royal Decree 1720/2007 of 21 December;
- e* 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

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 and audiovisual markets. 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 define the relevant electronic communications markets, to advise on the regulation of the electronic communications market, and to exercise certain supervisory and sanctioning powers. Among its functions regarding audiovisual matters, the NMCC is in charge of monitoring compliance by TV service providers with the quota and financing obligations set out in the General Audiovisual Law as well as with advertising restrictions.

The SETSI, which is part of the MIET, holds certain powers regarding electronic communication, audiovisual and other TMT matters, and is responsible, *inter alia*, 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 keeping the Spanish Registry of the Operators.

As regards certain 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 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.

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 MIET 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 MIET 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 MIET will automatically register the notifying party with the General Operators Registry. Every three years, the operator must notify the MIET 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 MIET (through the SETSI), in response to which the 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, the 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 MIET, 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.

Audiovisual communications

The provision of audiovisual communication services is only subject to a prior notification to the relevant administrative body, be it national or regional, depending on the coverage of the service. Exceptionally, DTT services, and any other audiovisual services (including radio) that require the use of terrestrial radio waves, must obtain a licence through a public tender process called by the 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 audiovisual service provider meets all the conditions.

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

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, 3 per cent or more of the total share capital or voting rights of two or more principal operators in, *inter alia*, 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. Furthermore, no individual or legal entity may appoint, directly or indirectly, members of the management body of more than one principal operator in, *inter alia*, 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 Orders ITC/2499/2011 and IET/173/2014, establishes certain thresholds to the holding of frequencies by each operator ('spectrum cap'), and some temporary restrictions on the transfer or assignment of spectrum in certain frequency bands. As previously mentioned, the NMCC has issued a report questioning the need to maintain the spectrum cap.

Audiovisual communications

According to the General Audiovisual Law, the following requirements must be met to be granted a TV or radio licence that uses the spectrum as a means of transmission.

Natural persons and legal persons must be citizens of a country within the European Economic Area (EEA) 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 stake⁴ in more than one operator providing national television audiovisual communication services, if the average viewers of the television channels broadcast by the audiovisual communication

4 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.

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 audiovisual 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 audiovisual 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 least three different private providers of national television audiovisual 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

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 MIET 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 the SETSI. 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 the term of the assignment exceeds six months or not.

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 MIET and provided that the application specifies the intended use of the numbering rights being assigned.

Audiovisual

The General Audiovisual Law repealed the notification procedure for transfers of interests in companies holding a TV licence that use the spectrum as a means of transmission. In addition, for the first time it allows and regulates legal transactions involving audiovisual 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.

Finally, 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 that cover 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.

According to the new General Telecommunications Law, the availability of functional access to the internet, allowing bandwidth communications at a downlink speed of at least 1Mb/s, is part of the universal service. The Law has empowered the government to review this speed taking into account the market conditions as well as the social, economic and technological developments.

In order to reinforce the development and use in Spain of internet and broadband services, the government and the old Telecommunication Market Commission (CMT) 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. By the same token, the Spanish Digital Agenda 2015 annual report (July 2015) insists on the significance of the promotion of high-speed networks, and remarks that the national programme for the extension of broadband, with aid to high-speed networks (30Mb/s) and ultra-fast networks (100Mb/s), since 2015 has materialised only through subsidies and not through soft loans.

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 maintenance fee for telephone line rental) was liberalised as a result of the review of the market for access to the public telephone network at a fixed location carried out by the CMT in December 2012. However, Telefónica undertook to freeze this fee at €13.97 (plus

CPI increases) until 2016 (it is currently €14.38). The NMCC has also imposed restrictions on wholesaler prices charged by Telefónica to the alternative operators for the use of its infrastructures and networks.

For operators with significant market power, the NMCC may impose additional obligations 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, *inter alia*, a reference interconnection offer (OIR) and a reference leased lines offer (ORLA), validated by the NMCC 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 and the Improvement of the Telecommunication Users Support Plan published on May 2015 by the NMCC, which aims to improve the current regulations on these matters; improve the quality-oriented culture when providing electronic communication services; and develop the inspection plan for 2015–2016. Ministerial Order IET/1090/2014 regarding the quality of services of electronic service providers was also issued in June 2014.

Regarding the limits to unsolicited calls, emails and texts, these are scattered mainly among the General Telecommunications Law and its ancillary regulation (Royal Decree 424/2005), the e-Commerce Law, the Data Protections Law and its ancillary regulation (regarding individuals), and the Consumers and Users Defence Law.

As a general rule, direct marketing activities require the subject's prior and informed consent. This consent must be explicit if the direct marketing is sent by e-communication means, by fax or email, or through automated calling systems.

Regarding unsolicited calls for commercial purposes, when not carried out through fax, email or through automated calling systems, these may be carried out provided that recipients have not objected to them (e.g., upon the collection of the data, when the recipients have avoided appearing in telephone directories) and that they are offered with a simple and free-of-charge objection procedure.

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 regulation (Royal Decree 1720/2007), although all the other TMT rules referred to in this chapter 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.

With regard to cybersecurity, Directive (EU) 2016/1148 of 6 July 2016 is pending implementation in Spain and will include the appointment of competent authorities (most likely, the already developed INCIBE) and computer security incident response teams. Cybersecurity concerns in Spain have been readdressed by a reform of the Spanish Criminal

Code on March 2015 (effectively in force since July 2015) and a reform of the Criminal Procedure Code on October 2015. Among other developments, these amendments provide for the possibility of police officers disguising themselves on the internet in order to obtain evidence, for remote registrations of computer hardware and they regulate technological investigation measures in criminal proceedings.

Finally, the Spanish public entity in charge of cybersecurity, INCIBE, has been quite active in building digital confidence, by, among other activities, publishing various guidelines and reports between June 2015 and May 2016 regarding the secure storage of information, digital identity and online reputation, how to manage an information leak; cybersecurity in e-commerce; and how to manage risks related to security measures.

IV SPECTRUM POLICY

i Development

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

Royal Decree 863/2008, *inter alia*, intended to make spectrum use and its assignment more flexible, with the aim of creating a secondary market for spectrum. There is a draft royal decree (currently on hold due to the lack of a national government) that aims to adapt regulations regarding the use of the radio spectrum to the General Telecommunications Law and, in particular, to the technology neutrality principle. The draft also foresees the possibility of sharing the right of use over the radio spectrum among various titleholders in the same geographical area and seeks to simplify certain administrative procedures, which, along with the mutualisation of exclusive rights of use, aim to make use of the spectrum more efficient and flexible.

Another key piece of legislation is the National Chart of Frequency Attribution (last updated in 2015), which allocates frequency bands to the different categories of services in accordance with 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 and was intended to enable a more efficient use of the spectrum according to the current spectrum uses. As set out on Section I.i., *supra*, in March 2015 the MIET announced the conclusion of this liberalisation process.

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. Royal Decree 805/2014 approved a new technical plan for digital television, reallocating bandwidth for DTT services and electronic communication services in accordance with EU recommendations.

Also, in November 2015, the NMCC approved a proposal which recommends introducing certain flexibility to the spectrum cap currently applicable in high bandwidths if certain conditions are met.

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 and updated in June 2014. This plan highlights the need to optimise spectrum use in Spain. In order to achieve this goal, the plan proposes certain measures:

- a* to increase the flexibility in its use, such as access to ultra-fast mobile broadband;
- b* to facilitate and simplify the regulation of the management and use of the spectrum by encouraging, for instance, the secondary market;
- c* to review the current use of spectrum to identify those frequency bands that are underused; or
- d* 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 assignment 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.

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, 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, audiovisual service providers enjoy programming freedom; however, the General Audiovisual Law establishes certain service obligations and restrictions to protect other general interests such as those of consumers, children's rights, cultural and linguistic diversity, and political pluralism in the news. 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) 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. Regarding annual broadcasting time, 10 per cent 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 audiovisual 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 audiovisual 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 audiovisual works such as full-length feature films, television films and series, documentaries, animated series and short films. Recent judgments of the Spanish Constitutional Court, in case STC 035/2016 dated 3 March 2016, and of the Supreme Court in case STS 1665/2016 dated 7 July 2016, have confirmed the legality of this obligation on the grounds that it does not violate the principle of freedom of individual enterprise.

Payment obligations

According to the RTVE Financing Law,⁵ since September 2009 private audiovisual communication services operators must pay 1.5 per cent (for pay-TV) and 3 per cent (for free-to-air TV) 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 from 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),⁶ 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 Audiovisual 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 the utmost importance. First, audiovisual 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 broadcast within certain time slots. The law also establishes reinforced protection for certain time slots that are considered to be accessible by children. Furthermore, to facilitate parental control, all audiovisual service providers must use digital encryption to classify the content, and TV service providers must

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

6 Law 34/1988 of 11 November on advertising.

use an age rating system according to the guidelines issued by the relevant authorities. Along with this line, in July 2015 the NMCC published the Guiding Criteria for the Classification of Audiovisual Contents, in which contents harmful and, on the other hand, beneficial to minors are indicated and, depending on the content of the programme, a grade is deemed ranging from 'for all audiences' to 'not suitable for minors under 18 years old'.

The NMCC is also in charge of supervising the enforcement of these content restrictions in the audiovisual communication market. To fulfil this duty, the NMCC has exercised its sanctioning powers very intensively in 2015 and 2016 against TV services providers for breaching the Advertising Law and the Guiding Criteria for the Classification of Audiovisual Contents.

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 Non-linear services

Non-linear services (e.g., VoD streaming services) are in 2016 fully consolidated among Spanish users and the market as a whole. In some cases, these services are operating independently while in others they operate through market arrangements with telecom companies.

The consolidation of web-based streaming services has opened a debate regarding the law applicable to providers that operate in Spain under the EU freedom to provide services rules. Thus far, the NMCC has not issued any specific instructions in this regard.

iii Mobile services

The provision of mobile television audiovisual services and other ancillary services has been specifically regulated in the General Audiovisual 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 audiovisual services detailed in Section II.iii, *supra*.

VI THE YEAR IN REVIEW

The most significant development in electronic communications over the past few years has been the approval of the new General Telecommunications Law. Further development of this Law is expected to be resumed once a government takes office.

Regarding the audiovisual sector, although no major laws have been passed in recent months, the allocation of six DTT channels (three SD and three HD) in October 2015, which commenced broadcasting in April 2016, has entailed a significant change in the competitive private television landscape. This year has also been marked by the NMCC's very intense sanctioning activity in the audiovisual sector, which has mainly been for breaches of the Advertising Law and the Guiding Criteria for the Classification of Audiovisual Contents.

From a market perspective, the recently closed acquisition by Másmóvil of Pepephone and Yoigo (creating the fourth operator in Spain) Vodafone's acquisition of ONO, Orange's acquisition of Jazztel, and Telefónica's acquisition of DTS have put an end for the moment to the consolidation of electronic communications and pay-TV markets, following the trend seen in other European Union countries.

However, the sector is far from being calm, as the main operators have already reacted against OTTs claiming further regulation of these services in line with traditional telecom operators, to try to safeguard their competitive position.

As regards to virtual mobile operators (OMV), the NMCC has proposed the deregulation of their market on the basis that it has already achieved a reasonable level of competitiveness. The deregulation would involve the removal of the obligation for the main three network operators (Telefónica, Vodafone and Orange) to provide OMVs with reasonable access to their mobile infrastructure. Next year will probably see final decision from the legislator on this issue.

VII CONCLUSIONS AND OUTLOOK

Looking ahead, and despite the apparent state of calm in the market (at least in terms of legislative activity), there are certain events that will have a significant impact on the Spanish TMT market in the coming months, such as the review of market 15 (OMVs), the move against OTTs and the development of further regulations once the government takes office.

Finally, the intense consolidation process in the telecoms and audiovisual market experimented in recent years has reduced significantly the number of players in the market. As a result of these transactions, it is expected that the already consolidated operators use their joint efforts to bring about fast technological developments, in a context where the division between platforms and contents is becoming increasingly unclear.

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 São 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, he 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.

Mr González-Espejo 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*.

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