

THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

TWELFTH EDITION

Editor  
Matthew T Murchison

THE LAWREVIEWS

THE

# TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

TWELFTH EDITION

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This article was first published in December 2021

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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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ISBN 978-1-83862-834-5

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

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

ANANTLAW

BAGUS ENRICO AND PARTNERS

BAKER MCKENZIE

CEDAR WHITE BRADLEY

CLEARY GOTTlieb STEEN & HAMILTON LLP

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# PREFACE

This volume marks the 12th edition of *The Technology, Media and Telecommunications Review*, which has been fully updated to provide an overview of evolving legal and policy activity in this arena across 25 jurisdictions around the world. This publication continues to occupy a unique space in the literature on TMT issues. Rather than serving a traditional legal treatise, this Review aims to provide a practical, business-focused survey of these issues, along with insights into how this legal and policy landscape in the TMT arena continues to evolve from year to year.

In 2021, the ongoing covid-19 pandemic has continued to loom large over legal and policy developments in this sector. As the threat of infection has continued to affect how we live, work and interact, the importance of connectivity has never been greater or more obvious. For many businesses, remote working has been the rule rather than the exception since March 2020, and may well persist in some form well after the pandemic is over. Many schools switched to distance learning formats during the pandemic. Tele-health is on the rise as doctors check in on patients via videoconference. Even tasks as mundane as grocery shopping have shifted online. And broadband connectivity, where available, has made it all possible.

The experience of covid-19 has, in turn, continued to reshape policymakers' understanding of the TMT arena. The shift to remote working and distance learning has stress-tested broadband networks across the world – providing a 'natural experiment' for determining whether existing policies have yielded robust systems capable of handling substantial increases in internet traffic. At the same time, the pandemic has prompted new initiatives to ensure, improve and expand broadband connectivity for consumers going forward. In various jurisdictions, policymakers are moving forward with subsidy programmes and other efforts to spur the deployment of advanced networks more deeply into unserved and underserved areas. Regulators also have taken steps to preserve internet access where it already exists, including by exploring mandates prohibiting disconnection of customers or requiring certain rates for low-income consumers – measures that, where adopted, sometimes have sparked fresh legal challenges and policy debates over the relative merits of government intervention and market-based solutions.

New technologies likewise have required new approaches and perspectives of policymakers. A notable example is the ongoing deployment of 5G wireless networks, as regulators continue to look for ways to facilitate such deployment. These initiatives take a variety of forms, and frequently include efforts to free up more spectrum resources, including by adopting new rules for sharing spectrum and by reallocating spectrum from one use to another. Multiple jurisdictions have continued to auction off wireless licences in bands newly designated for 5G deployment, capitalising on service providers' strong demand for



expanded access for spectrum. The planned deployment of new satellite broadband services, including multiple large satellite constellations in low-earth orbit, also continues to be a focus of regulatory interest across the world.

Meanwhile, long-running policy battles over the delivery of content over broadband networks continue to simmer in various jurisdictions, and new fronts have opened on related issues involving the content moderation policies of social media companies and other online platforms. Policymakers continue to grapple with questions about network neutrality, the principle being that consumers should benefit from an ‘open internet’ where bits are transmitted in a non-discriminatory manner, without regard for their source, ownership or destination. While the basic principle has been around for well over a decade, unresolved issues remain, including whether newer kinds of network management practices implicate such concerns, and whether efforts to promote a healthy internet ecosystem are best served by light-touch, market-based regimes or by more intrusive government interventions. In the United States, the light-touch approach reinstated in 2018 seems fairly certain to be revisited at the federal level, and certain states are continuing to claim an ability to impose their own restrictions on internet service providers. Regulators around the world have begun taking more aggressive enforcement action against internet service providers’ zero rating plans, which exempt certain data from counting against a customer’s usage allowance. Regulators in Asia are grappling with similar policy questions. In addition, these neutrality principles, usually debated in the context of broadband networks, are now spilling over to the content side, where social media companies are facing increased scrutiny over claims of discriminatory practices in moderating content appearing on their platforms. Indeed, some jurisdictions are considering measures that not only would rescind immunities these platforms have traditionally enjoyed for their content moderation practices, but also would require increased transparency and potentially even impose anti-discrimination mandates or other consumer protections. In short, while the balance of power between broadband network operators and online content providers historically has turned on the degree of regulation of the former, both sides’ practices are now very much in the spotlight.

The following country-specific chapters describe these and other developments in the TMT arena, including updates on privacy and data security, regulation of traditional video and voice services, and media ownership. On the issue of foreign ownership in particular, communications policymakers have increasingly incorporated national security considerations into their decision-making.

Thanks to all of our contributors for their insightful contributions to this publication. I hope readers will find this 12th edition of *The Technology, Media and Telecommunications Review* as helpful as I have found this publication each year.

**Matthew T Murchison**

Latham & Watkins LLP

Washington, DC

November 2021

# SPAIN

*Pablo González-Espejo*<sup>1</sup>

## 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 consolidation process of the electronic communications market in Spain through mergers and acquisitions, which took place in the past decade and resulted in the convergence of fixed and mobile operators (e.g., Orange and Jazztel, Vodafone and ONO, Yoigo, Pepephone and Más Móvil), and broadband and pay-TV operators (e.g., Telefónica and DTS), the Spanish market has continued a process of deep transformation due to the convergence of technologies, devices and platforms. On top of that, OTT services have significantly increased their market share, as evidenced by:

- a* a new European regulation on the protection of natural persons with regard to the processing of personal data that applies, among other things, to OTT and IoT services addressed to end users in the European Union (EU); and
- b* a new Directive to amend the Audiovisual Media Services Directive<sup>2</sup> which, among other things, establishes specific rules that, inter alia, are intended to create a level playing field with the traditional linear and non-linear audiovisual services, as alternative audiovisual platforms are growing fast replacing traditional means of accessing content (e.g., Netflix, HBO, Amazon, Sky, Huawei and Apple's audiovisual platforms have entered the Spanish market since 2015, and recently surpassed traditional paid television operators' market share).

As regards the regulatory framework, although the General Telecommunications Law,<sup>3</sup> which has been the main piece of legislation governing the telecoms sector since 2014, provided for the development of its own implementing regulations, most of the former Law's ancillary regulations are still in force. As an exception, in February 2017 the government passed Royal

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

2 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (New Audiovisual Media Services Directive).

3 Law 9/2014.

Decree 123/2017 of 24 February on the regulation of the use of the radio spectrum, which sets out the general regime for the use of spectrum and repealed the 2008 Royal Decree in this regard. Additionally, Royal Decree 381/2015 on measures against unauthorised traffic and irregular traffic for fraudulent purposes, and Royal Decree 330/2016, which implements Directive 2014/61/EU on measures to reduce the cost of deploying high-speed ECNs,<sup>4</sup> were issued in 2016.

Additionally, the approval of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC), which repeals most of the EU prior regulation on this matter will cause a substantial revision of the Spanish electronic communications regulations as a whole. In fact, a draft of a new General Telecommunications Law (draft GTL 2020),<sup>5</sup> which is intended to transpose the EECC, was issued on 11 September 2020. However, although the government's public consultation process ended in October 2020, the draft GTL 2020 is yet to be approved.

In compliance with its periodic duty to analyse the electronic communications markets, the National Markets and Competition Commission (NMCC) has followed the deregulation tendency of other European countries and begun its fourth review and analysis of the electronic communications markets. In particular, in January 2017 the NMCC issued a resolution on Markets 1/2007 and 2/2007 (Markets 1 and 2), lifting Telefónica's obligations as a holder of significant market power on the retail market for access to fixed telephony as the requirements to be a relevant market subject to *ex ante* regulation are no longer being met. However, regarding the wholesale market for call origination in the fixed network, the NMCC still considers that the wholesale market is not really competitive and imposes certain obligations on Telefónica (including providing separate accounts, non-discrimination and transparency measures, etc.). In addition, in April 2017 the NMCC issued a resolution to deregulate access to mobile network markets (Market 15), lifting the obligation on the main three network operators (Telefónica, Vodafone and Orange) to provide virtual mobile operators (OMVs) with reasonable access to their mobile infrastructure on the basis that, according to the NMCC, this market is already competitive. Moreover, throughout 2017, the NMCC reviewed Telefónica's main reference offers and prices as an operator designated as having significant market power, including disaggregated virtual access to the fibre optic loop, the new broadband ethernet service, the wholesale offer for access to manholes and conduits, and the reference offer for leased lines. Finally, in October 2021, the NMCC approved a resolution regarding the wholesale broadband markets (Markets 3a and 3b), which, among other things, increases the geographic area in which these markets are considered competitive (now covering 67 per cent of the Spanish population), and lifts Telefónica's current access obligations (as operator with a significant market power).

In the context of its duties as referred to above, the NMCC has also issued several recent resolutions regarding the regulation of the telecommunications market:

- a Resolution ANME/DTSA/002/17/M2-2014 approving the definition and analysis of the market of termination of vocal calls in individual mobile networks (Market 2/2014);

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4 This Royal Decree has been further developed by Order ECE/529/2019, of 26 April, setting up the Unique Point of Information therein established for the purpose of reducing the cost of deploying high-speed ECNs.

5 Transposition of the EECC to national regimes was due by 21 December 2020.

- b* Resolution ANME/DTSA/001/17 approving the definition and analysis of the wholesale leased trunk line market;
- c* Resolution ANME/DTSA/001/19 listing the operators who shall be considered as principal in the fixed and mobile telephone services in the national market;
- d* Resolution ANME/DTSA/001/18/M18-2003, approving the definition and analysis of the wholesale market for the television broadcasting transmission service; and
- e* Resolution ANME/DTSA/003/18/M1-2014 approving the definition and analysis of the wholesale market of termination of calls in individual public telephone networks available at a fixed location.

Since the publication of the Spanish Digital Agenda in February 2013, the Ministry of Economy and Enterprise (MINEE) published several reports that have kept the original agenda up to date and address final users of telecommunication services. In August 2017, the MINEE opened a public consultation to obtain feedback on the drafting of a Digital Strategy for an Intelligent Spain, the preliminary results of which were released in November 2017. In July 2020, the Ministry of Economic Affairs and Digital Transformation (MAETD) published the Digital Spain 2025 Plan, which updates the Spanish Digital Agenda (2013), and contains substantial measures to boost the digital transformation of the country in the next four years, including the development of a competitive 5G infrastructure, and the enactment of new legislation on the telecommunications and audiovisual sectors. The Recovery, Transformation and Resilience Plan – which the government issued in April 2021, and which contains a detailed agenda of the investments to be made in relation to the ‘Next Generation EU’ funds – also promotes these sectors.

In compliance with the European mandate regarding the liberalisation of the 800MHz band (the first digital dividend), in March 2015 the MINEE announced the conclusion of the liberalisation process in favour of telecom operators for the provision of LTE and 4G services. Additionally, in May 2017, Decision (EU) 2017/899 on the use of the 470–790MHz band in the EU was enacted, seeking to promote the development of a 5G network and the improvement of mobile connections (the second digital dividend). Following this decision, on 29 June 2018, the Spanish government published its national roadmap for the liberalisation of the second digital dividend and, on 21 June 2019, it passed Royal Decree 391/2019 approving the new National Technical Plan for DTT and the regulation of certain aspects of the liberalisation of the second digital dividend (Royal Decree 391/2019). Among other things, this Royal Decree regulated how the 700MHz band would be liberalised and how the radio-electric channels and the new digital MUXs would be distributed among the Spanish Public Radio and Television Corporation and other licence holders. This process was completed in July 2021 with seven concessions being awarded for mobile services in the 700MHz band to the three main telecoms operators.

## **ii Audiovisual**

In September 2014, a technical plan for DTTV was passed regulating the new allocation of spectrum to DTTV 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, the government allocated six new DTTV channel licences (three SD and three HD) in October 2015 that were launched in April 2016. Those licences were challenged in court, but they were finally confirmed by the Spanish Supreme Court in a decision issued in January 2018.

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

Finally, the imminent implementation of the New Audiovisual Media Services Directive will require the amendment the current national regulation on audiovisual media services dated 2010. For these purposes, the government issued a first draft of the new General Audiovisual Law in December 2020, which was revised in July 2021 (draft GAL 2021).<sup>6</sup>

### iii Internet

Following a ruling of the Grand Chamber of the European Court of Justice (CJEU) dated 12 May 2014 on case C131/12, which involved Google and the Spanish Data Protection Agency (AEPD),<sup>7</sup> consultations and proceedings on the right to be forgotten have spread. Furthermore, as a consequence of such ruling, the right to be forgotten was included in the EU Regulation on the protection of natural persons with regard to the processing of personal data<sup>8</sup> (GDPR). Further legal development of the right to be forgotten was approved for Spain in the recent Spanish Basic Law 2/2018 on Protection of Personal Data and Guarantee of Digital Rights (the Data Protection Law).

Since its creation in December 2013, the Spanish National Institute of Cybersecurity (INCIBE) has been quite active in building digital confidence in the Spanish market, particularly and in cooperation with the AEPD, with regards to the protection of privacy and cybersecurity.

Additionally, Spain transposed the NIS Directive<sup>9</sup> into the Spanish legal system through Royal Decree-Law 12/2018 of 7 September, which Royal Decree 43/2021 of 26 January developed. This imposes specific obligations on (1) essential service providers and (2) digital service operators to promote an optimal level of cybersecurity in the sector. Moreover, a draft Cybersecurity Law, which aims to mitigate the strategic and technical security risks regarding deployment of 5G technology, was published at the end of 2020 and remains under discussion.

## II REGULATION

### i The main sources of regulation

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

- a* the General Telecommunications Law;
- b* the General Audiovisual Law;
- c* the e-Commerce Law;
- d* the GDPR and the Data Protection Law;
- e* the Data Retention Law;

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6 The deadline to implement the General Audiovisual Law was 19 September 2020, but it has not yet been approved.

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

8 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.

9 Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

- f* the National Markets and Competition Commission Law; and
- g* Royal Decree-Law 12/2018 of 7 September transposing the NIS Directive<sup>10</sup>.

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

## **ii The national regulatory authorities**

The NMCC is an independent public body in charge of supervising market competition 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: (1) to establish and supervise the fulfilment by operators of their obligations; (2) to promote fair competition and the plurality of ECSs supply, and (3) to aid 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 State Secretariat for Telecommunications and Digital Infrastructures (SETID), which is part of the MAETD, holds certain powers regarding electronic communication, audiovisual and other TMT matters, and is responsible, *inter alia*, for:

- a* proposing general policies and regulations on the electronic communications and information society;
- b* the promotion and development of TMT infrastructure and services;
- c* the management of domain names under the Spanish country code (.es);
- d* the management and control of TMT scarce resources (such as spectrum), including the processing and granting of licences for private spectrum use; and
- e* keeping the Spanish National Registry of Audiovisual Operators.

The State Secretariat for Digitalisation and Artificial Intelligence (SEDIA), which is part of the MAETD, also holds certain powers regarding digitalisation in public and private sectors.

The draft GTL 2020 and the draft GAL 2021 foresee an increase of the NMCC and MAETD's responsibilities in TMT matters.

The NMCC will now be responsible, among other things, for:

- a* imposing obligations on operators to provide access to application program interfaces (API) and electronic programming guides (EPG) in fair and reasonable conditions;
- b* assessing, and where appropriate establishing, the maximum voice termination rate (in both fixed and mobile lines);
- c* establishing the contributions that correspond to each operator in order to fund the universal service; and
- d* supervising and controlling video sharing platforms, which will fall within the GAL 2021's subjective scope.

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<sup>10</sup> As modified by Royal Decree 43/2021.

On the other hand, the MAETD will hold, inter alia, the following powers:

- a* to impose obligations on the number-independent interpersonal communication services providers (NI-ICS) to guarantee that their services are interoperable;
- b* to control access to infrastructure that can host electronic communications public networks;
- c* to verify compliance with the requirements established by law to guarantee open access to the internet for final users; and
- d* to issue and modify regulations regarding audiovisual matters.

As regards certain matters included in the TMT laws that relate specifically to personal data protection, such as the use of cookies and 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 hear claims concerning personal data protection 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 ECSs and the operation of networks, but formal notice must be provided to the MAETD before these activities can begin. The prior notice must include: (1) corporate and identification data and documentation; (2) a declaration of compliance with the applicable laws; (3) a description of the services that are to be provided or of the networks that are to be exploited; and (4) an approximate date of when the activity is expected to start. The MAETD has 15 days to reject a 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 MAETD will automatically register the notifying party with the General Operators Registry. Every three years, operators must notify the MAETD of their intention to continue or discontinue providing electronic communication services.

It is important to note that the draft GTL 2020 introduces changes in this regard. In particular, following the EECC, it includes in its scope, as ECSs, both number-based and number-independent interpersonal communication services (respectively, NB-ICS and NI-ICS). Furthermore, it modifies the process before the Operators Registry, among other things, by adding a communication procedure only for NI-ICS. The regime proposed by the draft implies a set of obligations that NI-ICS must comply with, such as the fulfilment of transparency requirements and paying the general operators tax.

An administrative authorisation or concession is required to make private use of the radio electric spectrum in Spain. The procedure to obtain an authorisation or concession

for spectrum use is set out in Royal Decree 123/2017,<sup>11</sup> which distinguishes between general authorisations, individual authorisations and public concessions. According to Royal Decree 123/2017, operators must submit a spectrum use application together with a technical proposal to the MAETD (through the SETID), in response to which the SETID must issue a resolution granting or rejecting the application. In general, as a prerequisite for obtaining a spectrum concession, applicants must prove their status as registered electronic communications operators; however, the SETID may limit the concessions in certain frequency bands in order to guarantee the efficient use of spectrum or when demand for the spectrum exceeds the offer. In those cases, the relevant concessions will be awarded through public tender processes.

The draft GTL 2020 establishes that the MAETD will carry out the management of the radio electronic spectrum in a harmonised manner, in coordination with other Member States of the European Union (EU), so as not to prejudice the transnational use of the spectrum at the EU level. Furthermore, it increases the MAETD's powers regarding promotion of competition in the use of the spectrum, and it grants the SETID the power to allow alternative uses of a certain band of the spectrum in case of a lack of demand.

In addition, operators interested in obtaining numbering use rights must submit an application to the MAETD, 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.

Finally, the draft GTL 2020 modifies the regulation on using the radio electric spectrum in order, among other things, to facilitate operators to share its use. It also extends the minimum and maximum duration of concessions to make private use of the radio electric public domain. In this regard, and in order to ensure that the EECC is complied with in respect of the awarding of the 700MHz frequency band, which is key for developing the 5G network and which took place in July 2021 (i.e., before the approval of the draft GTL 2020), the Spanish Government passed Royal Decree-Law 7/2021, which punctually amended the General Telecommunications Law by modifying the duration of the licences (i.e., the initial term will be, at least, 20 years, subject to minimum and maximum extensions of five and 20 years, respectively).

### ***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, DTTV 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 required 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 SETID.

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11 As modified by Royal Decree 391/2019.



The draft GAL 2021, implementing the New Audiovisual Media Services Directive, regulates online video sharing platforms (e.g., Netflix or HBO), and requires them to notify their intention to provide audiovisual services in Spain. These platforms will also be subject to an array of obligations, including advertising restrictions.

#### **iv Ownership and market access restrictions**

##### ***General***

In March 2020, an executive order was enacted<sup>12</sup> to establish a new screening mechanism for certain investments by non-EU and non-European Free Trade Association (EFTA) residents, based on public policy, public health and public security reasons (the Screening Mechanism). The Screening Mechanism aligns part of the Spanish foreign investment legal framework with Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the European Union (Regulation 2019/452). The government further modified this mechanism in November 2020 to protect certain strategic sectors affected by the covid-19 pandemic.<sup>13</sup>

In this regard, and following the regulatory changes, certain sectors subject to the Screening Mechanism could cover critical electronic and audiovisual communications service providers in Spain: (1) critical infrastructure, whether physical or virtual, including communications, media, data processing or storage; (2) critical and dual-use technologies and key technologies for industrial leadership and training; (3) sectors with access to sensitive information, including personal data, or the ability to control such information; and (4) media in general, without prejudice to the fact that audiovisual communication services defined in Law 7/2010 shall be governed by the provisions of said Law.

Given how broadly it is currently worded, any investment in a Spanish electronic communications or audiovisual services provider should be assessed from this perspective to determine whether it is subject to the Screening Mechanism.

In addition, the subjective scope of the Screening Mechanism has been transitorily extended (until 31 December 2021) to cover investments by non-Spanish EU or non-Spanish EFTA residents, as well as by Spanish companies whose beneficial ownership corresponds to the aforementioned (1) on listed companies; or (2) with a value above €500 million.

##### ***Electronic communications***

Under the General Telecommunications Law, there are no limitations – even for foreign entities – on ownership. The only limitation is imposed not on ownership but on the provision of direct ECSs by foreign (non-members of the European Economic Area) entities in Spain, with such provision requiring a reciprocal treaty.<sup>14</sup>

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

12 Royal Decree-Law 8/2020 of 17 March establishing extraordinary urgent measures to address the economic and social impact of the covid-19, as modified by Royal Decree Law 11/2020 of 31 March establishing complementary urgent social and economic measures to address the covid-19 pandemic.

13 Royal Decree-Law 34/2020.

14 According to the NMCC (resolution CNS/D TSA/041/21), the Trade and Cooperation Agreement entered into by and among the EU and the United Kingdom on December 2020 fulfils the requisite of reciprocity and, consequently, British telecommunications operators will be allowed to directly provide ECS in Spain under the same condition as they did before Brexit.

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.

Additionally, Royal-Decree 458/2011, as amended by Ministerial Orders ITC/2499/2011 and IET/173/2014, establishes certain thresholds on the holding of frequencies by each operator (spectrum cap), and some temporary restrictions on the transfer or assignment of spectrum in certain frequency bands.

According to Royal Decree 123/2017, certain restrictions exist preventing anticompetitive hoarding from restricting the total amount of frequencies to be used by the same operator or group of operators, or providing time limits on the utilisation of the rights of use.

Finally, the draft GTL 2020 establishes certain additional obligations for operators with significant power in this regard, such as providing access services to all operators in similar terms and, in the case of vertically integrated operators, publishing their wholesale and internal transfer prices, to guarantee compliance with the no discrimination principle and to avoid cross-subsidies.

### ***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 and legal persons must be citizens of: (1) a European Economic Area (EEA) country; or (2) 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 persons cannot directly or indirectly exceed 25 per cent of their share capital, while the total non-EEA stake must be below 50 per cent of their 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 stake<sup>15</sup> in more than one operator providing national television audiovisual communication services if the average number of viewers of the television channels broadcast by the audiovisual 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 audiovisual communication

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15 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.

services when national providers, in aggregate, hold rights to use the spectrum exceeding the technical capacity corresponding to two multiplex channels; and 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 MAETD 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 123/2017, and require the prior authorisation of the MAETD or the SETID. In particular, no transfer or assignment of the spectrum can take place if it is proven that it will restrict market competition or if restrictions to prevent anticompetitive hoarding would be exceeded. The authorisation procedure differs somewhat for transfers and assignments of certain spectrum use rights (particularly, rights on the special use of public spectrum granted by general and individual authorisations or those granted as public concessions cannot be transferred). There are also different formalities that apply depending on whether the relevant title over the private use right is transferred or the right assigned. Finally, under Royal Decree 123/2017, the MAETD's or the SETID's prior authorisation is also required for transactions that entail a change in the effective control of a company which holds the spectrum use right.

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 MAETD 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 the 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 ECSs 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.

As previously mentioned, the draft GTL 2020, following the EECC, includes NI-ICS in the definition of ECSs, which are identified as internet-based services that do not connect with publicly assigned numbering resources, as well as services using numbers as mere identifiers, such as instant messaging. These new ECSs are to be subject to more moderate obligations than under the general regulation.

#### **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 ECSs 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 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.

It is important to highlight that the draft GTL 2020 intends to modify the extent of universal services by means of including a detailed list of services to which users are entitled (e.g., e-mail and online press access) and excluding some services which are outdated (e.g., public phone booths and national phone books). In addition, the draft also intends to guarantee the affordability of universal services, with the inclusion of special internet and fixed lines fees for low-income users; the establishment of a system to avoid unwarranted disconnection of service; and a prohibition on forcing low-income users to pay for non-necessary services.

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 Digital Agenda 2016 Annual Report insisted on the significance of the promotion

of high-speed networks, focused in high-speed networks (30Mb/s), ultra-fast networks (100Mb/s) and 4G, and remarked that the objectives set for 2015 by the Digital Agenda as regards the ultra-fast networks were achieved.

Additionally, in August 2017 the MAETD opened a public consultation to obtain feedback on the drafting of a Digital Strategy for an Intelligent Spain based on the results obtained from the implementation of the Digital Agenda, which preliminary results were published in November 2017. According to those results, a majority of the population (52 per cent) considered that the strategy planned by the government was accurate because it covered the areas that most concern the citizens. Finally, in the context of the above-mentioned Digital Agenda, the MAETD published Order ECE/1016/2018 of 28 September, establishing the rules for the granting of subsidies to pilots on 5G technology, followed by two calls for applications, covering a total of €65 million in subsidies.<sup>16</sup>

More recently, the MAETD published the Digital Spain 2025 Plan, which updates the Spanish Digital Agenda and seeks, among other measures, to promote the full implementation of high-speed and ultra-fast networks throughout the whole country, something which has become particularly important since the covid-19 pandemic. The strategy for promoting 5G technology, presented in December 2020 in the framework of the 2025 Digital Spain Plan, foresees a public investment of €2 billion until 2025 to promote its deployment, with a special focus on rural areas, and R+D+i; to both develop innovative pilots and projects that contribute to provide 5G connectivity to the major socio-economic drivers and generate capacities to develop 6G technology in the future.

### 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. After 2016, Telefónica ended the freezing and such retail price was fully liberalised. The NMCC has also imposed restrictions on wholesaler prices charged by Telefónica to the alternative operators for the use of its infrastructure and networks, which were updated in June 2021.

For operators with significant market power, the NMCC may impose additional obligations to ensure transparency regarding 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, price and service level offers validated by the NMCC and available to other operators, including:

- a* a reference interconnection offer (time-division multiplexing over IP);
- b* a reference offer for leased lines;
- c* disaggregated virtual access to the fibre optic loop;
- d* the new broadband ethernet service; and
- e* the wholesale offer for access to manholes and conduits.

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 in May 2015 by the NMCC, which

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16 This initiative is framed in the 2021 National Strategy to promote 5G technology.

aims to improve the current regulations on these matters and the quality-oriented culture when providing electronic communication services. Ministerial Order IET/1090/2014 regarding the quality of services of electronic service providers was also issued in June 2014. More recently, the government issued a non-prescriptive Charter of Telecoms Users Rights in July 2021, which is to serve as a reference for future legislative proposals and covers end users' rights related to, inter alia, artificial intelligence, accessibility and free speech.

The draft GTL 2020 intends to increase the rights of end users in the context of the provision of ECSs, among other things, by adopting measures to reinforce operators' transparency obligations (such as the provision of a simplified version of their contracts and of consumer monitoring mechanisms to final users), establishing maximum duration periods (24 months) for final users contracts with ECS (with the exception of NI-ICS) and ruling packaged contracts, as well as by guaranteeing access to emergency communications and number 112. It also intends to guarantee total interoperability and end-to-end connectivity between ICS users.

The limits on unsolicited calls, emails and texts are scattered mainly among the General Telecommunications Law and its ancillary regulation (Royal Decree 424/2005<sup>17</sup>), the e-Commerce Law, the GDPR and the Data Protection Law (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, 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 or are not registered in anti-marketing lists) and that they are offered a simple and free-of-charge objection procedure.

#### **iv Privacy and data 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 ECSs 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 GDPR and the Data Protection Law, 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<sup>18</sup>. The Data Protection Law was passed in December 2018 and contains not only rules on data protection that are compatible with the GDPR but has also approved a new set of digital rights for citizens in Spain. Some of these new digital rights have a significant impact on the TMT sector, such as those limiting the use of monitoring technologies, such as geolocation

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17 Modified by Royal Decree 1517/2018 of 28 December.

18 Also, the AEPD updated its Guide on using cookies in Spain at the end of 2020 to align it to the guidelines of the European Data Protection Committee and approved the first Code of Conduct on data processing in advertising.

or CCTV, within the workplace, or those imposing additional duties on TMT companies regarding the new right to a digital will, rectification rights on digital contents or those reinforcing the scope of the right to be forgotten.

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, the NIS Directive has been implemented in Spain by Royal Decree-Law 12/2018<sup>19</sup>, of 7 September, and it includes the appointment of competent authorities (most likely, the already developed INCIBE, which is the Spanish public entity in charge of cybersecurity) and computer security incident response teams.

Cybersecurity concerns in Spain were readdressed by a reform of the Spanish Criminal Code in March 2015 (effectively in force since July 2015) and a reform of the Criminal Procedure Code in October 2015. Among other developments, these amendments provide for the possibility of police officers disguising themselves on the internet to obtain evidence of remote registrations of computer hardware and for the regulation of technological investigation measures in criminal proceedings. Additionally, the draft of the Cybersecurity Law will also try to address these concerns by implementing technical mechanisms to mitigate risks.

Finally, INCIBE has been quite active in building digital confidence by, among other activities, publishing various guidelines and reports since June 2015 (the most recent of which were published in May 2021) regarding, inter alia:

- a* the secure storage of information, digital identities and online reputation;
- b* how to manage an information leak;
- c* cybersecurity in e-commerce and in remote work;
- d* secure deletion of data;
- e* cybersecurity in telework; and
- f* secure installation and use of IoT devices.

## IV SPECTRUM POLICY

### i Development

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

As indicated above, the draft GTL 2020 introduces some major changes on spectrum policy, in order to facilitate its sharing, and to promote investment, transnational coordination and effective competition. It also develops the previous regulation regarding the conditions under which concessions of private use are extended, and includes the precautionary principle in the determination of unique levels of tolerable radio emissions. Royal Decree 123/2017, inter alia, is intended to make spectrum use and its assignment more flexible, as well as to promote services and technological neutrality. Particularly, it clarifies the different types of use of spectrum (i.e., common, special and private) and titles granting the use of spectrum depending on said types. This Royal Decree is aimed at adapting regulations regarding the use of the radio spectrum to the General Telecommunications Law. Royal Decree 123/2017 also foresees the possibility of sharing the right of use over the radio spectrum among various

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19 Developed by Royal Decree 43/2021.

titleholders in the same geographical area and seeks to simplify certain administrative procedures that, along with the mutualisation of exclusive rights of use, aim to make use of the spectrum more efficient and flexible.

The possibility of sharing the use right over the radio spectrum has been further developed by the draft GTL 2020. In particular, the document grants the MAETD the power to impose operators the obligation to share the use of active and passive infrastructure (only when justified and when the possibility has been expressly allowed in the spectrum use authorisation).

Another key piece of legislation is the National Chart of Frequency Attribution (last updated in July 2020<sup>20</sup>), which allocates frequency bands to the different categories of services in accordance with technical characteristics.

Additionally, as further described below, Royal Decree 391/2019 regulates a subsequent liberalisation of spectrum and how the radio-electric channels and the new digital MUXs will be distributed.

## **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 first digital dividend), previously reserved for TV services broadcast through the former analogue system, for ECSs (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 in Section I.i, in March 2015 the MINEE 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 imposed 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 DTTV services and electronic communication services in accordance with EU recommendations. In November 2015, the NMCC approved a proposal that recommends introducing certain flexibility to the spectrum cap currently applicable in high bandwidths if certain conditions are met.

Also, as set out in Section III.ii, a plan developing the Spanish Digital Agenda was approved by the government in February 2013, whose specific plans were updated in June 2014, and which was recently replaced by the Digital Spain 2025 Plan. This plan highlights the need to optimise spectrum use in Spain in order to achieve full deployment of 5G networks. To achieve this goal, the plan proposes certain measures:

- a* to promote co-investment between public administration and private companies;
- b* to liberalise the 700MHz band (which took place in July 2021, as explained below);
- c* to increase the flexibility in its use, such as access to ultra-fast mobile broadband; and
- d* to evaluate the spectrum needs for an effective development of the NGA networks.

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20 The government presented, on April 2021, a draft order approving a new National Chart of Frequency Attribution, which was positively assessed by the NMCC, and which tries to promote the development of the 5G network in Spain. However, the document has not been approved yet.



As mentioned in Section I.i, in May 2017, Decision (EU) 2017/899 on the use of the 470–790MHz band in the EU was enacted seeking to promote the development of a 5G network and the improvement of mobile connections (the second digital dividend). Following this decision, Royal Decree 391/2019 further regulates a subsequent liberalisation of spectrum and how the radio-electric channels and the new digital MUXs will be distributed among the Spanish Public Radio and Television Corporation and other licence holders, obligations of minimum range of reception and the technical specifications that the television services have to meet. The current number of MUXs (and their coverages) on the sub-700MHz band will be maintained, as well as the offer of DTT channels. This Royal Decree also states that the DTT service will be offered in the sub-700MHz band and that the 700MHz band shall not be used by audiovisual communication service providers after 30 June 2020, in order to make it available for the 5G mobile services from that date onwards.

On the same date, the Spanish government approved Royal Decree 392/2019, which regulates the direct granting of subsidies to compensate the costs in the reception of or access to television audiovisual communication services in buildings, as a consequence of the liberalisation of frequency bands in the 694–790MHz range (the second digital dividend).

As a result of the covid-19 pandemic, the Spanish government pushed back the date of liberalisation of the 700MHz band, which finally took place on July 2021. The tender process ended with the award of three blocks of the band to the three main operators in Spain<sup>21</sup>, which is a major step for 5G deployment in Spain.

Finally, Royal Decree 579/2019, dated 11 October 2019, further established subsidies for public audiovisual communication service providers to compensate costs for the simultaneous and transitory distribution of their television channels during the liberalisation of frequencies in the 694–790MHz range.

### **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.

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 mainly depend 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.

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21 The licences will be granted for an initial term of 20 years subject to a 20-year extension.

## 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.

This regulation will soon be modified as per the implementation in Spain of the New Audiovisual Media Services Directive through the draft GAL 2021, as it addresses some of these issues. The main restrictions and obligations currently imposed on TV service providers and the changes the new draft GAL 2021 is expected to introduce are explained below.

#### *Quota obligations*

At least 51 per cent of annual broadcasting time (excluding, inter alia, 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 of European works, 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 must be in any of the official Spanish languages.

These obligations will also affect subscription-based video on demand providers, such as Netflix, as they are included in the subjective scope of the draft GAL 2021. It imposes on them the obligation to dedicate part of their programming content to European audiovisual works.

#### *Financing obligations*

TV service providers whose programming includes full-length feature films, television films and series, documentaries, animated series or short films 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 their 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. 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.

The General Audiovisual Law has been developed by Royal Decree 988/2015 and Royal Decree 241/2019 of 5 April, which regulate the legal regime applicable to financing obligations for European audiovisual works.

The draft GAL 2021 also extends this obligation to subscription-based video on demand providers, which must use part of their revenue in Spain to finance European audiovisual works, and reinforces the promotion of European audiovisual works by increasing investment obligations.

### ***Payment obligation***

According to the RTVE Financing Law<sup>22</sup> and Royal Decree 1004/2010, 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, since advertising was banned from RTVE's broadcasting. This obligation was challenged by one of the Spanish audiovisual operators (DTS Distribuidora de Televisión Digital, SA) before the CJEU. By a decision dated 10 November 2016, the CJEU confirmed that the European Commission's authorisation of such financing obligation is compliant with EU legislation (case C-449/14 P).

In this regard, the draft GAL 2021 introduces certain key changes for the sector by modifying Law 8/2009, including:

- a* the possibility of enabling new sources of income for RTVE, so that it can obtain revenue from advertising (e.g., sponsorship or advertising on its digital contents);
- b* removing telecoms operators' direct contributions to date;<sup>23</sup> and
- c* imposing on subscription-based video on demand providers the obligation to contribute to the financing of the public broadcaster in order to guarantee a level playing field between traditional and new audiovisual service providers.

### ***Advertising restrictions***

While there are no specific advertising restrictions on radio services (other than those set out in the General Advertising Law),<sup>24</sup> TV service providers must fulfil certain advertising-related obligations, which for linear services 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, tele promotion and sponsorship).

However, the draft GAL 2021 will modify this regulation by introducing additional advertising restrictions in terms of broadcasting scheduling to certain controversial matters such as alcoholic beverages or esoterism.

Additionally, the Spanish government has recently published Royal Decree 958/2020 of 3 November on commercial gambling communications. This new regulation has substantially restricted advertising gaming activities in audiovisual communication services.

### ***Other content-related restrictions and obligations***

There are also specific content-related restrictions, including those intended to protect children that are of the utmost importance.

First, audiovisual services providers must not use children's voices and images without their, consent or that of their parents' or legal guardians.

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

23 Operators will still have to contribute to its financing by paying a fee for using the spectrum that amounts to €480 million per year.

24 Law 34/1988 of 11 November on advertising.

Second, the broadcasting of content that may seriously impair the development of minors (e.g., pornography or gratuitous acts of violence) is forbidden, and other content 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. In this regard, the draft GAL 2021 reinstates the afternoon reinforced protection slot in free-to-air TV. Furthermore, to facilitate parental control, all audiovisual service providers must use digital encryption to classify their content, and TV service providers must use an age rating system according to the guidelines issued by the relevant authorities. In July 2015, the NMCC published the Guiding Criteria for the Classification of Audiovisual Content, which indicate content that is harmful, and on the other hand beneficial, to minors. Under the Criteria, and depending on the content of a programme, a grade is given that ranges from 'for all audiences' to 'not suitable for minors under 18 years old'.

With regard to sports content, additionally to the provisions of the General Audiovisual Law with regards to exclusivity agreements for the broadcasting of relevant sport events, Royal Decree-Law 5/2015 sets out the rules for the commercialisation of certain Spanish football content, and establishes the criteria to distribute the relevant income among organisers and participants in various competitions. This Royal Decree has been recently modified by Royal Decree-Law 15/2020 and Royal Decree-Law 15/2021 to include urgent complementary measures to support the economy and employment in order to facilitate the transfer of private resources generated by football to public policies related to the promotion of sports practice.

The NMCC also supervises the enforcement of these content restrictions in the audiovisual communication market. In fulfilling this duty, it has been exercising its sanctioning powers very intensively since 2016 and up to the present date against TV services providers for breaching the Advertising Law and the Guiding Criteria for the Classification of Audiovisual Content.

### ***Disabled persons***

Further obligations (i.e., subtitling, audio-description and deaf sign language quotas) are included and aimed at ensuring disabled people have the widest possible access to TV services, which the draft GAL 2021 will develop, such as setting a minimum percentage of accessible content that must be provided. These obligations will apply to new providers (e.g., pay linear TV and on demand/non-linear providers).

### **ii Non-linear services**

Stand-alone non-linear services (e.g., VOD streaming services) in 2021 are fully consolidated among Spanish users and the market as a whole. In some cases, these services operate independently, while in others they operate through market arrangements with telecom companies.

The consolidation of web-based streaming services opened a debate, still not fully settled, regarding the law applicable to providers that operate in Spain under the EU freedom to provide services rules, as for some issues the General Audiovisual Law will apply, while others may be subject to the e-Commerce Law.

The European Commission took the lead on this issue by launching the Proposal for a Directive that led to the passing of the New Audiovisual Media Services Directive, which established specific rules addressing these kinds of services. The draft GAL 2021 will finally

transpose the Directive, which aims to guarantee a level playing field between OTT platforms and current audiovisual service providers by imposing new obligations on non-linear services (e.g., in relation to protecting minors and the public interest).

### **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 as detailed in Section II.iii.

## **VI THE YEAR IN REVIEW**

The most significant development in the telecoms sector in the past year has been the progress made in deploying the 5G mobile services. In this regard, the 700MHz band liberalisation process concluded in July 2021 and the tender process in relation to the 3.5 GHz band, which ended in February 2021, have been fundamental in fulfilling the government's plans and have cleared the path for future steps. In addition, the NMCC's resolution easing the obligations on Telefónica in the wholesale broadband market proves that the fibre market is increasingly competitive. Finally, the telecoms sector's consolidation has continued through MasMóvil's successful takeover of Euskaltel.

Regarding the audiovisual sector, although no major laws have been passed in recent months, the relevance of the draft GAL 2021 cannot be ignored. This draft law, which will implement the New Audiovisual Media Services Directive, provides new rules that will apply to both OTTs and traditional telecoms operators, and will establish further separate regulation for video sharing platforms. These modifications respond to the demands of traditional telecom operators, which try to safeguard their competitive position from the changes new services have brought about.

As regards OMVs, the NMCC has deregulated their market on the basis that it has already achieved a reasonable level of competitiveness. The deregulation involves removing the obligation for the main three network operators (Telefónica, Vodafone and Orange) to provide OMVs with reasonable access to their mobile infrastructure.

However, this year has been marked by the impact of covid-19, which delayed the development of the second digital dividend but has made the TMT sector even more important than it used to be in the general economic context. It is yet to be seen what the pandemic's long-term impact on the TMT market will be.

## **VII CONCLUSIONS AND OUTLOOK**

Looking ahead, the steps taken and pending to be taken by the Spanish legislator in transposing the EECC and the new Audiovisual Media Services Directive, while simultaneously updating the 2013 Digital Agenda with a five-year plan to boost digitalisation, by means of the Digital Spain 2025 Plan, will cause major changes to the TMT regulatory landscape in the near future. In addition, the impact of the 'Next Generation EU' funds is yet to be seen, although it might change the previous landscape.

The content of the draft GTL 2020 already evidences the substantial nature of the changes that the electronic communications sector will experience in Spain upon its approval,

which directly connect with the great importance that telecommunications have gained during the past years and particularly during the health crisis caused by covid-19 that we have been suffering during the past months and which has not been overcome yet.

Finally, the intense consolidation process in the telecoms and audiovisual market experienced in recent years has reduced significantly the number of players in the market. Following these transactions, the already consolidated operators are in the process of bringing about fast technological developments in order to reduce the division between telecommunications, platforms and content.

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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.

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ISBN 978-1-83862-834-5