

Technology, Media and Telecommunications: Spain

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Introduction

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 MásMóvil) and broadband and pay-TV operators (e.g., Telefónica and DTS), the Spanish market has continued a process of deep transformation as a result of the convergence of technologies, devices and platforms. On top of that, over-the-top (OTT) services have significantly increased their market share, as evidenced by:

- a. the European regulation on the protection of natural persons with regard to the processing of personal data (i.e., EU Regulation on the protection of natural persons with regard to the processing of personal data (GDPR) that applies, among other things, to OTT and internet of things (IoT) services addressed to end users in the European Union (EU)); and
- b. a new Directive to amend the Audio-visual Media Services Directive² which, among other things, establishes specific rules intended to create a level playing field between the traditional linear and non-linear audiovisual services, as alternative audiovisual platforms are growing fast and replacing traditional means of accessing content (e.g., Netflix, HBO, Amazon, Sky, Disney, DAZN, Huawei and Apple's audiovisual platforms have all entered the Spanish market since 2015, and recently surpassed traditional paid television operators' market share).

As regards the regulatory framework, and following the approval of the European Electronic Communications Code (EECC),³ which repeals most of the EU's prior regulation on this matter; the Spanish parliament passed in June 2022 a new General Telecommunications Law⁴ (GTL), which transposes the EECC and repeals the previous GTL,⁵ which had been the main piece of legislation governing the telecoms sector since 2014. Although the new GTL and the previous GTL provide for the development of their own implementing regulations, most of the 2004 Law's ancillary regulations are still in force. As an exception, in February 2017 the government passed Royal 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.

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. In particular:

- a. in April 2017 it 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;
- b. in October 2021, the NMCC approved a resolution regarding the wholesale broadband markets, which, among other things, increased the geographic area in which these markets are considered competitive (now covering 67 per cent of the Spanish population), and lifted Telefónica's current access obligations (as operator with a significant market power) in that area; and
- c. in April 2023, it lifted the ex-ante obligations imposed on all operators regarding the provision of mobile termination services (Market 2/2014).

However, there are certain markets and geographical areas that are not considered as competitive yet by the NMCC and in which it imposes certain obligations on Telefónica (including providing separate accounts, non-discrimination and transparency measures, etc.), such as the wholesale broadband market in certain geographical areas.

With regard to the radioelectric spectrum, and complying with the European mandate regarding the liberalisation of the 800MHz band (the first digital dividend), in March 2015 the Ministry of Economic Affairs and Digital Transformation (MAETD, and formerly the MINEE) announced the conclusion of the liberalisation process in favour of telecom operators for the provision of long-term evolution (LTE) and 4G services. Additionally, following Decision (EU) 2017/899 on the use of the 470–790MHz band, which sought to promote the development of a 5G network and the improvement of mobile connections (the second digital dividend), on 21 June 2019 the Spanish government passed Royal Decree 391/2019 approving the new National Technical Plan for digital terrestrial television (DTTV) and the regulation of certain aspects of the liberalisation of the second digital dividend. Among other things, this Royal Decree regulated how the 700MHz band was to be liberalised and how the radio-electric channels and the new digital multiplexors (MUXs) were to 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. Within the last couple of years, the government has continued its advance in the aforementioned liberalisation process by (1) reorganising the 3400–3800MHz band to enable a more efficient deployment of 5G broadband services; and (2) awarding 12 concessions for the provision of 5G services in the 26GHz band.

Finally, in 2022 the MAETD published the Digital Spain 2026 Plan, which updates the Digital Spain 2025 Plan, and contains substantial measures to boost the digital transformation of the country in the next three 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.

ii Audio-visual

The main recent change in the audiovisual market has been the implementation of the New Audio-visual Media Services Directive, which took place in July 2022 through the new General Audio-visual Law⁶ (GAL) and which repeals the previous national regulation on audiovisual media services dated 2010. As in the case of the new GTL, and although the new GAL provides for its own ancillary regulations, the former GAL's regulations are still in place. The new GAL has introduced several changes to reflect the increasing importance of OTT services and, in general, has updated and modernised the legal framework which applies to such a dynamic sector.

In relation to the allocation of the spectrum for audiovisual purposes, 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 first 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 standard definition (SD) and three high definition (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 addition, and after the liberalisation of the 700MHz band, the Spanish government passed a new technical plan for DTTV which changed the band used to provide these services to the 470–694MHz band.

Although there have not been new public tenders for the allocation of new licences at a national level, as the radioelectric spectrum is quite limited, there have been regional tenders throughout Spain in the past years, the most recent ones in the regions of Catalonia and Andalusia.

iii Internet

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 Spanish Data Protection Authority (AEPD), with regard to the protection of privacy and cybersecurity.

Additionally, Spain transposed the NIS Directive⁷ 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. Transposition in Spain of the NIS 2 Directive⁸ is still pending in Spain, which should happen before October 2024. This will reinforce cybersecurity duties and will expand the entities subject to specific cybersecurity duties.

In Spain, the main rules on the internet are those included in the Law 34/2002 of information society services, which implements the EU Ecommerce Directive. Some of the rules contained therein, in particular those regarding the liability of intermediaries, will be replaced by February 2024, as a result of the approval of the EU Digital Services Act. That said, certain rules of the EU Digital Services Act have already entered into force in 2023 including, for instance, information duties of online platforms as regards the number of their active users.

Finally, Royal Decree-Law 7/2022 aims to mitigate the strategic and technical security risks regarding deployment of 5G technology. Among others, this Royal Decree-Law (1) establishes certain requirements that suppliers of network elements have to comply with; and (2) allows the government to designate a supplier as a 'high-risk supplier', which implies that its products shall not be used on critical elements of 5G networks.

The year in review

The telecoms and audiovisual sectors in the past year have been marked by the implementation of two new general laws on the matter, which relevance cannot be ignored. Both the new GTL and the new GAL have transposed the main directives enacted by the EU regarding these sectors and imply a deep modernisation of the regulatory landscape. In this regard, they have (1) expanded their scope, to cover new operators or service providers, such as NI-ICS, OTT services, VOD platforms, etc.; (2) adopted measures to guarantee the flexibility and the efficient use of scarce public resources; and (3) increased the protection of end users through the update and reclassification of their rights.

With regard to the telecom sector, the year has been characterised by the merger between Orange and MásMóvil, which was announced in July 2022 and will represent a landmark in the consolidation process which started during the past decade, as the resulting company will be, upon completion of the transaction, the operator with the largest market share in the Spanish mobile services market.

Finally, 2023 has also been marked by the demands of traditional telecom operators, which try to safeguard their competitive position from the changes which OTT services have brought about, and which have repeatedly requested for the imposition of stricter regulations on OTT service providers to (1) guarantee a level playing field in the telecoms and audiovisual sectors; and (2) finance the deployment costs that are related to the expansion of the 5G technology. In that regard, the debate has been mainly focused on the need to establish a mechanism to ensure a 'fair contribution' by all digital players benefiting from digital transformation, as shown by initiatives such as the exploratory consultation on the future of the electronic communications sector and its infrastructure, launched by the European Commission in February 2023 (and which results were recently published).

Regulation

i The main sources of regulation

The main sources of regulation applicable to the technology, media and telecommunication (TMT) sector in Spain are:

- a. the General Telecommunications Law;
- b. the General Audio-visual Law;
- c. the e-Commerce Law;
- d. the GDPR and the Data Protection Law;
- e. the Data Retention Law;
- f. the National Markets and Competition Commission Law; and
- g. Royal Decree-Law 12/2018 of 7 September transposing the NIS Directive.⁹

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 main regulatory authorities in Spain are the NMCC and the MAETD.

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 electronic communication services' (ECSs) supply; and (3) to aid the resolution of disputes between operators. The NMCC has, inter alia, the power to (1) define the relevant electronic communications markets; (2) advise on the regulation of the electronic communications market; and (3) 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 GAL as well as with advertising restrictions. Finally, it has recently been granted certain supervisory powers regarding the enforcement of the Digital Markets Act¹⁰ in Spain, and it is also expected to be appointed as digital services coordinator under the Digital Services Act.¹¹

The State Secretariat for Telecommunications and Digital Infrastructures (SETID), which is part of the MAETD, also holds certain powers regarding electronic communication, audiovisual and other TMT matters, and is responsible, inter alia, for (1) proposing general policies and regulations on the electronic communications and information society; (2) the promotion and development of TMT infrastructure and services; (3) the management of domain names under the Spanish country code (.es); (4) the management and control of TMT scarce resources (such as spectrum), including the processing and granting of licences for private spectrum use; and (5) keeping the Spanish National Registry of Audio-visual Operators.

In this regard, the new GTL and the new GAL have increased the NMCC and the MAETD's functions. The NMCC now holds the power to (1) impose obligations on operators to provide access to application program interfaces (API) and electronic programming guides (EPG) in fair and reasonable conditions; (2) assess, and where appropriate establish, the maximum voice termination rate (in both fixed and mobile lines); (3) establish the contributions that correspond to each operator to fund the universal service; and (4) supervise and control video sharing platforms. The MAETD now holds the power to (1) impose obligations on the number-independent interpersonal communication services providers (NI-ICS) to guarantee that their services are interoperable; (2) control access to infrastructure that can host electronic communications public networks; (3) verify compliance with the requirements established by law to guarantee open access to the internet for final users; and (4) issue and modify regulations regarding audiovisual matters.

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.

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, Andalusia 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 GTL, 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 GTL, 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. 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.

The new GTL, following the EECC, has introduced NI-ICS, such as instant messaging, within its scope. Although providers of NI-ICS are not considered as operators and, therefore, most of the obligations set forth by the new GTL do not apply to them, they are subject to certain requirements (inter alia, the communication of their intention to provide NI-ICS in Spain for 'statistical purposes').

With regard to the radio electric spectrum, an administrative authorisation or concession is required to make private use of it in Spain. The procedure to obtain an authorisation or concession for spectrum use is set out in Royal Decree 123/2017,¹² 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 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.

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.

Audio-visual 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, except if there is no available spectrum and there are third parties interested in obtaining a licence. Finally, 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.

Pursuant to the new GAL, the provision of certain OTT services such as online video sharing platforms (e.g., Netflix or HBO) is subject to certain obligations, including (1) the requirement to notify their intention to provide audiovisual services in Spain and (2) advertising restrictions.

iv Ownership and market access restrictions

General

The existing 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 (as amended, the Screening Mechanism) was amended and developed pursuant to Royal Decree 571/2023, which came into force on 1 September 2023. This amendment to the Screening Mechanism further aligns 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. Pursuant to the Screening Mechanism, closing of specific foreign direct investments requires prior authorisation from the Council of Ministers.¹³

Following the aforementioned regulatory changes and its practical enforcement, certain sectors subject to the Screening Mechanism could cover critical electronic and audiovisual communications service providers in Spain:

- a. critical infrastructure, whether physical or virtual, including communications, media, data processing or storage;
- b. critical and dual-use technologies and key technologies for industrial leadership and training;
- c. fundamental inputs provided by companies developing and modifying software used in the operation of critical infrastructure in the telecommunications sector for the management and operation of facilities or systems used in voice and data transmission and data processing and storage;
- d. sectors with access to sensitive information, including personal data, or the ability to control such information; and
- e. media in general, without prejudice to the fact that audiovisual communication services defined in the GAL shall be governed by the provisions of said Law.

Under the new regulations, investments in electronic-communications operators that meet any of the following requirements are always required to undergo the Screening Mechanism:

- a. those that hold a concession for the use of the public radio domain in frequency bands harmonised in accordance with EU legislation;
- b. those holding qualifying titles for the use of orbital and spectrum resources within the scope of Spanish sovereignty; or
- c. those that have been classified as operators with significant market power in any relevant market in the electronic communications sector.

Given how broadly it is worded and interpreted, 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 by Royal Decree-Law 20/2022 (until 31 December 2024) 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 new GTL, there are no limitations – even for foreign entities – on ownership. The only limitation is imposed not on ownership but on the direct provision of ECSs by foreign (non-members of the European Economic Area) entities in Spain, with such provision requiring a reciprocal treaty.¹⁴

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.

Moreover, the National Chart of Frequency Attribution establishes certain thresholds on the holding of frequencies by each operator (spectrum cap).

In the same line, Royal Decree 123/2017 imposes certain restrictions to prevent 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.

Audio-visual communications

According to the new GAL, 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 stake¹⁵ 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 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 that 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.

Audio-visual

The former GAL 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 allowed and regulated 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, 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.

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 GTL 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 GTL and its ancillary regulations, and are regulated by the e-Commerce Law.

In addition, and as previously mentioned, NI-ICS (internet-based services that do not connect with publicly assigned numbering resources, as well as services using numbers as mere identifiers) are also regulated under the new GTL, although they are subject to more moderate obligations than other type of ECS providers.

ii Universal service

The GTL 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 end users at a reasonable price and be of a certain quality, regardless of their geographical location.

The new GTL modified the previous scope of the universal service by including a list of services to which users are entitled (e.g., broadband internet access at a 10Mb/second speed) and excluding some services which are outdated (e.g., public phone booths and national phone books). In addition, it has also emphasised the affordability of universal services by including 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.

In addition, to reinforce the development and use in Spain of internet and broadband services, the MAETD has published several reports and issued several calls for application for subsidies. In particular, the MAETD published the Digital Spain 2026 Plan, which updates the Spanish Digital Agenda (issued in 2013) 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 2026 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 last regulated retail price that was in place (i.e., the maintenance fee for telephone line rental) was liberalised by the former telecommunications market commission (CMT; currently integrated in the NMCC) as a result of the review of the market for access to the public telephone network at a fixed location carried out in December 2012. After 2016, Telefónica ended the freezing and this retail price was fully liberalised. However, as mentioned before, the NMCC has imposed restrictions on certain wholesale prices charged by Telefónica to the alternative operators for the use of its infrastructure and networks, which were last updated in April 2023.¹⁶

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 GTL, and developed by Royal Decree 899/2009. 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.

It must be taken into account that the new GTL has increased the rights of end users in the context of the provision of ECSs, among other things, by (1) adopting measures to reinforce operators' transparency obligations (such as the provision of a simplified version of their contracts and of consumer monitoring mechanisms to end users); (2) establishing maximum duration periods (24 months) for end users contracts with ECS providers (with the exception of NI-ICS); and (3) regulating 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 GTL and its ancillary regulation (Royal Decree 424/2005),¹⁷ 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.¹⁸ The Data Protection Law was passed in December 2018 and contains not only rules on data protection that are compatible with the GDPR but also 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 (e.g., geolocation 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 12/2018,¹⁹ of 7 September, and it includes the appointment of competent authorities (the Interior Ministry and the National Security Council) and computer security incident response teams. Transposition of the NIS 2 Directive is still pending in Spain.

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.

Finally, INCIBE (which is the Spanish public entity in charge of supervising cybersecurity issues) 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 November 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.

Spectrum policy

i Development

The radio electric 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 GTL.

As indicated above, the new GTL has introduced some major changes on spectrum policy, 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 the titles granting the use of spectrum depending on said types.

Royal Decree 123/2017 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 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 new GTL. In particular, it 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 regarding the spectrum is the National Chart of Frequency Attribution (last updated in June 2023),²⁰ which allocates frequency bands to the different categories of services in accordance with technical characteristics.

Additionally, Royal Decree 391/2019 regulates a subsequent liberalisation of spectrum and how the radio-electric channels and the new digital MUXs were to be distributed, with such distribution finally taking place in July 2021, as further described below.

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.

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 were to 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 had to meet. The current number of MUXs (and their coverages) on the sub-700MHz band has been maintained, as well as the offer of DTTV channels. This Royal Decree also states that the DTTV service shall 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, 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 in July 2021. The tender process ended with the award of three blocks of the band to the three operators in Spain,²¹ which is a major step for 5G deployment in Spain.

Also, 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.

Finally, as set out in Section III.ii, the Digital Spain 2026 Plan highlights the need to optimise spectrum use in Spain 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 next generation access (NGA) networks.

iii Broadband and next-generation mobile spectrum use

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

iv Spectrum auctions and fees

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 practice, this has been the main path through which private rights to use the spectrum have been granted, because of the scarcity of the resource.

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 GTL. 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.

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.

Media

i Restrictions on the provision of service

As a general rule, audiovisual service providers enjoy programming freedom; however, the GAL 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.

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 have also been imposed on subscription-based video on demand providers, such as Netflix, as they are included in the subjective scope of the new GAL. 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. Seventy per cent of such percentage shall be destined to financing independent producers. 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 GAL 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 new GAL has also (1) extended this obligation to subscription-based video on demand providers, which must use part of their revenue in Spain to finance European audiovisual works; and (2) reinforced the promotion of European audiovisual works by increasing investment obligations.

Payment obligation

According to the RTVE Financing Law²² 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 Court of Justice of the European Union, although the court confirmed on November 2016 that the European Commission's authorisation of such financing obligation is compliant with EU legislation (case C-449/14 P).

Several changes have been introduced in this regard by the new GAL, 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;²³ and
- c. imposing on subscription-based video-on-demand providers the obligation to contribute to the financing of the public broadcaster 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),²⁴ TV service providers must fulfil certain advertising-related obligations, which for linear services include the obligation to broadcast a maximum of 144 minutes of commercials between 6am and 6pm, and a maximum of 72 minutes of commercials between 6pm and 12pm.

The former GAL was developed by Royal Decree 1624/2011 on certain aspects of television commercial communication (self-promotion, tele promotion and sponsorship), which continues to be applicable. In addition, the new GAL introduced additional advertising restrictions in terms of broadcasting scheduling to certain controversial matters such as alcoholic beverages or esoterism. Finally, the Spanish government published Royal Decree 958/2020 of 3 November on commercial gambling communications. This 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.

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 new GAL has reinstated 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 Audio-visual 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 GAL with regard 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 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 new GAL has developed, such as setting a minimum percentage of accessible content that must be provided. These obligations have also been imposed on new audiovisual services' providers (e.g., pay linear TV and on demand and non-linear providers).

ii Non-linear services

Stand-alone non-linear services (e.g., video-on-demand (VOD) streaming services) in 2023 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.

15 February 2024

The consolidation of web-based streaming services opened a debate regarding the providers that operate in Spain under the EU freedom to provide services rules, as will apply, while others may be subject to the e-Commerce Law.

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The European Commission took the lead on this issue by launching the Proposal for a Directive that led to the passing of the New Audio-visual Media Services Directive, which established specific rules addressing these kinds of services and which has been fully transposed by the new GAL, 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 Video sharing platform services

The new GAL regulates new audiovisual media services, including video sharing platform services. Accordingly, video-sharing platform services providers have certain obligations, some of which are the following: registration with the MAETD, compliance with certain general principles of the GAL, adoption of measures to protect users and minors, advertising obligations and contribution to the financing of RTVE.

In addition, the new GAL imposes on 'users of special interest' who use video sharing platform services (i.e., influencers and streamers) some of the obligations that apply to video sharing platform services providers. For these purposes, 'users of special interest' are those users established in Spain as per the requirements of the GAL who, through electronic communications networks, make available to a significant part of the general public (potentially having a clear influence on them) audiovisual content for which they have editorial responsibility and for which they obtain significant revenues. The provisions of the new GAL on users of special interest will, however, enter into force once the relevant regulation regarding the requirements to be met to be considered a 'user of special interest' is approved. Once this regulation is approved, users of special interest will have to comply with the following obligations: register with the MAETD, comply with the GAL general principles, protect minors and advertising obligations.

Outlook and conclusions

Looking ahead, the steps taken by the Spanish legislator in transposing the EECC and the new Audio-visual Media Services Directive, while simultaneously passing a five-year plan to boost digitalisation, by means of the Digital Spain 2026 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 new GTL has introduced substantial changes in the telecom sector, establishing more flexible rules and obligations, in a process which is substantially leading to the deregulation of the sector by the NMCC. Additionally, it has updated a regulation which, considering the great importance that telecommunications have gained during the past years and particularly during the health crisis caused by covid-19, demanded a substantial reform.

Finally, the intense consolidation process in the telecoms and audiovisual market experienced in recent years has significantly reduced the number of players in the market. Following these transactions, the already consolidated operators are in the process of bringing about fast technological developments to reduce the division between telecommunications, platforms and content. In this regard, the relevance of the Orange and MásMóvil merger cannot be ignored, as the decrease in the number of big operators will certainly affect the market in a manner yet to be seen, and which will certainly depend on the potential remedies to be imposed by competition authorities. However, the remedies imposed by competition authorities on Orange and MásMóvil are yet to be determined, making it difficult to assess the resulting landscape.

Footnotes

¹ Pablo González-Espejo and Ignacio Klingenberg are both partners 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 (Audio-visual Media Services Directive) in view of changing market realities (New Audio-visual Media Services Directive).

³ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

⁴ Law 11/2022.

⁵ Law 9/2014.

⁶ Law 13/2022.

⁷ 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.

⁸ Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148.

⁹ As modified by Royal Decree 43/2021.

¹⁰ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828.

¹¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC.

¹² As modified by Royal Decree 391/2019.

¹³ If the value of the investment in Spain is below €5 million, the Directorate General on International Trade and Investments will grant the authorisation.

¹⁴ According to the NMCC (resolution CNS/DTSA/041/21), the Trade and Cooperation Agreement entered into by and among the EU and the United Kingdom in 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.

¹⁵ That is, a direct or indirect holding of (1) 3 per cent of the share capital; (2) 30 per cent of the voting rights; or (3) 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.

¹⁶ Resolution OFE/DTSA/004/22.

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

¹⁸ Also, the AEPD updated its Guide on using cookies in Spain in July 2023 to align it to the guidelines of the European Data Protection Committee and in 2020 it approved the first Code of Conduct on data processing in advertising.

¹⁹ Developed by Royal Decree 43/2021.

²⁰ Ministerial Order ETD/625/2023.

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

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.