Telecoms & Media 2019

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Getting The Deal Through

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Simmons & Simmons LLP

Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Telecoms & Media*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Korea.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Alexander Brown and Peter Broadhurst of Simmons & Simmons LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Introduction

Alexander Brown and Peter Broadhurst
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Continual changes to technology and the ways in which end users consume information mean that the laws in relation to the telecoms and media sectors are under constant review. The purpose of this publication is to give an overview of the framework in these areas across a wide range of different jurisdictions.

The answers to the questions posed in this publication address not only the regulatory structure in each market, but also the practical aspects of how those regulations impact on service providers and end users alike. The responses to each question highlight any key changes over the past year, as well as any proposed plans for change and future developments. In answering these questions, the responses seek to address both the legal and practical aspects of these industries.

The importance of telecoms and media for end users generally means that, for many countries, these areas are heavily regulated and are subject to detailed competition law requirements. Attention is, therefore, also given to how these restrictions on competition will impact on organisations operating in these sectors. Additionally, consideration is given to how areas of law that are not specific to these sectors, such as cybersecurity and data protection legislation, may impact on the telecoms and media sectors.

The responses to these questions avoid focusing on only one or two segments of the industries, but instead look to give an overview of a wide range of areas, from mobile communications to broadband connectivity for telecoms and newspapers to online video content for media.

At the time of writing, it is still unclear whether the UK will be able to secure a deal for its exit from the EU, or whether the once fanciful 'no deal' scenario may soon be reality. This uncertainty brings to the fore a number of consequences of 'no deal' in relation to the telecoms and media sectors, a selection of which are outlined below.

First, we have the question of whether the Commission will make an adequacy determination in respect of the UK's data protection regime prior to the UK's exit. If not, in accordance with the General Data Protection Regulation, it will then be necessary to consider the legal basis for transfers of personal data from EU member states to UK organisations wishing to receive this personal data, though contractual provisions are the most likely option.

Second, a no-deal Brexit will mean that the Audiovisual Media Services (AMS) Directive and its 'country of origin' principle will no longer apply. This means UK audiovisual media service providers may be seen to be providing services from a 'third country' and, in turn, left open to new restrictions imposed by EU member states, subject to the provisions of the European Convention on Transfrontier Television (ECTT). In some countries an Ofcom licence may leave these service providers unaffected by Brexit as a result of the ECTT, but the position is not consistent across the EU. Furthermore, for video on demand services, UK providers will need to consider criteria under the AMS Directive to determine whether any EU member state will have jurisdiction over its services.

Thirdly, although the World Trade Organisation's General Agreement on Trade in Services will enable UK operators to continue to provide cross-border telecoms services and operate within the EU, surcharge-free roaming is likely to be affected by a no-deal Brexit. This could mean EU mobile operators are no longer regulated in the costs that they can charge UK operators for providing roaming services. However, there have been indications that some UK mobile operators will continue with existing commercial arrangements with mobile operators in the EU (and beyond) to ensure existing roaming arrangements are maintained, although it must be stressed that this is a commercial matter.

Finally, Ofcom would no longer be subject to the oversight or direction of the EU Commission. Therefore, it would be free to determine which markets to review and what regulatory remedies to apply. It will be able to do so considering only the interests of the UK market and consumers, and not the wider EU market.

The above considerations are by no means an exhaustive list of the possible consequences of Brexit for the telecoms and media sectors, but we hope these provide a flavour of some of the issues to consider at a very uncertain time for the UK. We hope that you find this publication a useful starting point for understanding the structure and regulatory framework of the telecoms and media sectors across multiple jurisdictions.

Net neutrality, privacy and VoIP: tension between US federal and state enforcers

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Over the past five years, US telecommunications policy and regulation have seen profound changes in direction with respect to the regulation of net neutrality, data privacy and security, and Voice over Internet Protocol (VoIP). The cycle of actions and reactions has its roots in the lack of a contemporary statute governing US electronic communications networks – the Communications Act was last amended in 1996, before the internet was widely commercialised – and fosters continuing uncertainty and instability regarding US regulatory classifications and obligations for particular services. In response to some recent deregulatory efforts, states and even some local governments, which have a long history of disputing the dividing line between federal and state authority over telecommunications, have looked for ways to reinstitute at least some of the withdrawn protections. To illustrate the dynamic between federal and state regulators and the uncertainty and instability in the US regulatory regime, we focus on net neutrality, communications privacy and data security, and the regulatory status of VoIP services.

Parties considering deals in the telecommunications and internet space should take cognisance of continuing uncertainty and instability regarding US regulatory classifications and obligations for particular services, as well as state, and even local, regulatory structures, in addition to those of the Federal Communications Commission (FCC) and other federal government entities such as the Committee on Foreign Investment in the United States.

Uncertain and unstable regulatory categories

Applying the Communications Act, the FCC distinguishes between three mutually-exclusive categories of services: telecommunications services (standardised transmission service offerings that are subject to the most burdensome regulation as common-carrier offerings), other telecommunications (customised transmission service offerings, including many wholesale offerings, that are subject to light regulation) and information services (offerings involving a computer processing component, including internet access, that are mostly unregulated). The regulatory consequences of each category have led to prolonged efforts to classify and reclassify services, typically reflecting the political and policy preferences of the current Administration.

Mixed services and federal pre-emption

The Communications Act establishes a system of dual state and federal regulation over telephone service, giving the FCC exclusive jurisdiction over interstate services but forbidding it from regulating intrastate services. (The FCC has exclusive jurisdiction over the regulation of commercial uses of RF spectrum.) The Communications Act allows the FCC to pre-empt state regulation of a service that would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies. Disputes regarding the pre-emptive nature of FCC regulation are frequent and have increasingly focused on internet-related services, where states have frequently stepped in to regulate where federal regulation has receded.

Net neutrality

In a January 2018 order implementing an earlier vote, the FCC dramatically reversed its regulatory approach to residential broadband internet access service and net neutrality, but this was not the first change in regulatory classification for such services. In 2002, the FCC classified broadband internet access service over cable systems as an interstate information service regulated under Title I of the Communications Act, in a decision ultimately upheld by the US Supreme Court in *National Cable & Telecommunications Association v Brand X Internet Service*s, 545 US 967 (2005). In 2005, the FCC classified broadband internet access service as an information service regulated under Title I of the Communications Act. In 2015, however, the FCC adopted its Open Internet Order, reclassifying both fixed and mobile broadband internet access service as telecommunications services, imposing certain common-carrier regulatory obligations on them, and asserting jurisdiction over the exchange of traffic between providers and 'connecting networks', such as content delivery networks. It imposed what it characterised as 'net neutrality' rules, including:

- bright line rules against broadband provider blocking, throttling or entering pay-for-priority traffic arrangements;
- a general conduct standard preventing broadband providers from unreasonably interfering or disadvantaging communications between online companies and consumers; and
- oversight over broadband providers' interconnection practices for their residential networks.

Those rules were upheld by an appeals court in a decision that the US Supreme Court declined to review or vacate.

The Restoring Internet Freedom Order, which took effect on 11 June 2018, reclassified broadband as an information service – returning to a classification the FCC had applied from 2005 to 2015. The FCC also rescinded the 2015 rules against blocking, throttling, pay-for-priority arrangements and unreasonable interference and disclaimed any statutory authority for oversight over interconnection practices. The FCC retained a scaled-back version of the transparency rule, requiring broadband providers to disclose information about their service, including the extent to which the provider is engaged in blocking, throttling and paid prioritisation. The FCC concluded that this rule combined with existing antitrust and consumer protection laws would be sufficient to protect against any broadband provider conduct that would harm net neutrality. Finally, the FCC stated that it was pre-empting any state or local measures inconsistent with this federal deregulatory approach (ie, the FCC asserted that its removal of rules precluded states or localities from adopting new net neutrality rules).

The FCC's retreat from its 2015 net neutrality rules led many states to seek to put in place net neutrality protections for consumers and businesses in their states, notwithstanding the FCC's language on pre-emption. Some of these approaches use the state's power as a purchaser of services, rather than its utility regulation powers. Numerous states have signed executive orders stating that an Internet Service Provider (ISP) (ie, a broadband provider) with a government contract with the state must not block, throttle or degrade internet content and must not engage in paid prioritisation, including in some cases a prohibition on requiring consumers to pay different rates to access specific kinds of content or applications online.

Moreover, in 2018, 34 states and the District of Columbia introduced legislation to support some form of net neutrality protection for consumers in their state. These state bills range from resolutions in support of undoing the FCC's decision, to bills that would impose net neutrality conditions on broadband providers doing business with state agencies or participating in state programmes, and bills that would make broadband provider practices, such as blocking, throttling and paid prioritisation, unlawful under existing state consumer protection laws.

The FCC's pre-emption decision and these state actions evince plainly different views with respect to the line between federal and state authority to regulate net neutrality and, more generally, ISPs. As a result, this issue will be litigated from both sides. With respect to federal deregulation, 22 state attorneys general, Santa Clara County, California (the home of Silicon Valley) and the California Public Utilities Commission, are among the many parties that have already sought judicial review of the FCC's decision to scale back federal net neutrality protections and pre-empt state and local net neutrality regulation. Court challenges are also expected with respect to the state actions that impose regulations. Broadband providers or their trade associations are expected to challenge state executive orders and net neutrality legislation to forestall a patchwork of state-by-state regulation. While the outcome of both the federal litigation and any state challenge remains unclear, these net neutrality developments illustrate the US telecommunications policy dynamic of federal deregulation followed by state regulation that has recurred on several fronts.

Communications privacy and data security

As a precursor to its reversal of policy on net neutrality, the federal government has made several notable retreats in its regulation of communications privacy and data security. In April 2017, the US Congress passed, and President Trump signed, legislation to rescind regulations that the Obama-era FCC had adopted to govern broadband providers' use, disclosure and protection of subscribers' personally identifiable information. As a result of this Congressional action, it was unclear whether the FCC retained the power to adopt any replacement regulations regarding ISP privacy. The FCC's subsequent reversal of net neutrality cleared up any ambiguity on that score: by reclassifying broadband as an information service, the FCC relinquished any remaining ability it had to regulate ISPs' data privacy and security practices. Instead, at the federal level, oversight of ISPs' privacy and data security practices will fall to a different agency, the Federal Trade Commission (FTC).

This shift has a number of practical implications. The FTC has decades of experience in bringing privacy and data security-related enforcement actions, and so brings considerable substantive expertise to the table. But Congress has put very strict limits on the FTC's ability to adopt ex-ante regulations, with a few exceptions. (As at the time of writing, both houses of the US Congress have introduced legislation that would give the FTC the authority to promulgate regulations regarding ISPs' privacy and data security practices; these bills appear unlikely to pass.) As a result, we expect that the FTC will continue to act by bringing enforcement actions that react to any alleged bad practices that ISPs commit after the fact and evaluate ISP privacy and data security practices on a case-by-case basis.

The Federal Trade Commission Act, however, does not pre-empt state privacy and consumer protection laws. In most states, attorneys general already have broad authority to bring enforcement actions to protect consumers within their states from unfair or deceptive commercial practices. Many attorneys general have taken the position that certain data practices can be unfair and deceptive; more attorneys general may be considering using this general power against ISPs and voice communications providers in the near future. Accordingly, state attorneys general can and do enforce state privacy and consumer protection laws, including with respect to data security and breaches.

Moreover, legislators in many states see the FTC's current authority as insufficient to protect broadband subscribers' privacy. Before Congress rescinded the FCC's ISP privacy rules, only two states (Minnesota and Nevada) had laws on the books that regulated ISPs' privacy and data security practices. Since Congress's rescission, a majority of states and the District of Columbia have introduced legislation designed to limit ISPs' ability to collect or disclose subscribers' personal information without express permission or impose data security requirements on ISPs' treatment of subscribers' personal information. Certain local governments have been even more aggressive. Regulators in Seattle adopted a rule requiring ISPs who have been granted franchise authority (ie, an authorisation to utilise public rights of way controlled by the local government) to operate in the city to notify and get opt-in permission from subscribers before disclosing subscribers' personal information, such as their web browsing histories, to a third party. The township of Falls, Pennsylvania adopted a similar measure, although companies who currently have a franchise agreement to operate in the city are entitled to delayed implementation.

In a less-publicised change, through the same legislation that rolled back the FCC's broadband privacy rules, Congress also significantly curtailed federal regulation of privacy and data security for voice communications by rescinding updates to the FCC's voice privacy rules. Under these updates, the FCC would have limited voice providers' use of virtually any personally identifiable information collected from subscribers. As a result of Congressional action, however, the FCC's voice privacy rules only cover a relatively narrow segment of subscriber data known as customer proprietary network information (CPNI). Subscriber name, contact information, social security number, birthday and other forms of personal data do not qualify as CPNI – and, thus, are not subject to FCC regulations. Ten states and the District of Columbia are considering legislation or regulations that would limit voice communications providers' data practices with respect to any personally identifiable information, not just CPNI.

If ISP-specific or voice-communication-provider-specific laws pass in a given state, communications companies can expect to come under scrutiny for their privacy practices and, in some instances, face enforcement action. Even absent the passage of specific legislation, however, state attorneys general may increase their focus on communications privacy.

Broad-based federal consumer data privacy and security legislation could overtake the recent reduction in federal oversight of communications privacy. The US has traditionally had specific federal rules only for relatively narrow categories of information, such as certain types of financial information held by financial institutions and healthcare information held by certain types of entities. Consumer advocates have for many, many years pushed for baseline consumer data privacy and security legislation, which would mandate certain minimum protections that would apply to all personally identifiable information that entities gather from consumers, including communications-related data. In the wake of several high-profile data-related events, including the Cambridge Analytica controversy, some members of Congress are renewing calls

for such baseline legislation. At the time of writing, it is difficult to assess the likelihood that legislation will garner significant support.

VoIP

Unlike net neutrality and consumer privacy and data security, the latest developments with respect to state regulation of VoIP are not the result of new federal deregulatory actions. Instead, they are the latest phase in a long-running tussle between some state public utility commissions and VoIP providers as to whether VoIP providers must comply with at least some state regulations applicable to traditional telephone companies. In general, stretching back to 2004, the FCC has preferred to chart a nationwide course for what is termed 'interconnected VoIP' – a VoIP service capable of placing calls to and receiving calls from traditional, circuit-switched telephones. The FCC has selectively imposed on interconnected VoIP a variety of regulatory duties, including emergency calling, consumer privacy, law enforcement access, intercarrier compensation payments, universal service and other regulatory fees, and service discontinuance regulation. However, the FCC has done so without classifying interconnected VoIP as either a 'telecommunications service' subject to common-carrier duties, or as an 'information service' that cannot be subject to common-carrier duties.

While it has been clear since 2007 that the FCC has pre-empted state regulation of 'nomadic' interconnected VoIP – which is usually an 'over-the-top' service delivered over an internet access service – the law has been less clear with respect to 'fixed' interconnected VoIP. Unlike nomadic services, which can change locations, fixed VoIP services are usually facilities-based and provided from a fixed, known location. In 2013, the Vermont Supreme Court upheld a Vermont Public Service Board ruling that a company providing a fixed interconnected VoIP service was a 'telecommunications service' under state law, although it remanded for further consideration as to whether the service was a telecommunications service or information service under federal law. In February 2018, the Vermont Public Service Board concluded that fixed interconnected VoIP was also a telecommunications service under federal law, and not pre-empted, although it continues to consider the extent of state regulation of fixed interconnected VoIP. In 2015, the Minnesota Public Utilities Commission held that a fixed interconnected VoIP service provided by a cable company was a local telephone service under state law, and thus subject to state regulation, and was not pre-empted by federal regulations. In 2017, a US federal court in Minnesota concluded that the Minnesota Public Utilities Commission was wrong, and that the cable provider's fixed interconnected VoIP service was an 'information service' under federal law, and that state regulation was therefore pre-empted. An appeal to the US federal appeals court followed.

As of this writing, that case remains pending before the federal appeals court. The court could decide that fixed interconnected VoIP is a telecommunications service, an information service, not pre-empted regardless or classification, or, as the FCC has suggested, pre-empted regardless of classification. While a federal court classification decision that fixed interconnected VoIP was a telecommunication service or that state regulation was not pre-empted would not necessarily preclude a future FCC decision reaching a different conclusion – as occurred previously with respect to the classification of broadband internet access – it could create greater regulatory uncertainty in those states in which legislatures have not removed VoIP from the jurisdiction of state regulatory commissions. Of particular significance for parties contemplating a transaction, if the court rules that fixed interconnected VoIP is a telecommunications service for which state regulation is not pre-empted, state prior approval of transactions involving transfer of control could be required, depending upon which state is involved. Depending upon the state's processes, because the FCC does not require prior approval of transfer of control of interconnected VoIP providers, this could lengthen the period needed between signing a deal and close.

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Conclusion

These are just three examples of the ongoing push and pull between federal and state telecommunications regulation in the United States. Whenever the FCC has acted to deregulate, proponents of a particular regulation have turned to the states. This tension over the respective federal and state or local roles is not limited to deregulation, however. Over the coming years, it is likely that this tension will continue to play out, including in areas such as wireless tower siting for 5G. The FCC has made it clear that it views 5G deployment as a priority and that it seeks to streamline the barriers to erecting the thousands of small cells needed to densify wireless networks for 5G, especially in urban areas. Existing statutes give the FCC some limited authority to pre-empt local restrictions or failures to act with respect to tower siting applications.

Brazil

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

In Brazil, the fundamental law that governs the telecommunications sector is Law No. 9,472/1997, the General Telecommunications Law (GTL or Telecoms Act). The GTL provides the legal structure of telecoms services, defines the general principles governing the telecoms services, and has created the Brazilian Telecoms Agency (Anatel).

Anatel is the agency responsible for the regulation of the telecoms sector, including the granting of licences and authorisations for the exploitation of services. Licensing is regulated by Law No. 13,116/2015, which also provides the general rules applicable to the process of installation and sharing of telecoms infrastructure.

Cable TV is also regulated by Law No. 12,485/2011, which aims to foster competition, creates quotas for Brazilian content and regulates issues related to the Contribution to the Development of the Brazilian Film Industry (Condecine). The Brazilian film agency (Ancine), which was created by Provisional Measure No. 2,228-1/2001, has authority over the editorial activities involved in the cable TV industry, such as production and programming.

Further, the Civil Rights Framework for the Internet – or Internet Act – (Law No. 12,965/2014), as well as its regulation (Decree No. 8,771/2016), establishes principles, guarantees, rights and duties for the use of the internet in Brazil, as well as guidelines for state-oriented action with respect to such matters.

Regarding foreign ownership restrictions, article 1 of Decree No. 2,617/1998 provides that concessions, permissions and authorisations for the exploitation of telecoms services of public interest (which comprise fixed and mobile telecoms, paid TV and broadband internet) may be granted or issued only to companies that meet the following requirements:

- the company must be incorporated in accordance with Brazilian law and must have its headquarters and management in Brazil; and
- the majority of its quotas or shares with voting rights have to be owned directly by either natural persons resident in Brazil or companies governed by Brazilian law and with their headquarters and administration in Brazil.

In other words, the limitation imposed on foreign entities is the direct control of companies that hold concessions, permission and authorisations to exploit telecommunication services, except for TV broadcasters. Indirect control of such companies by foreign entities is not prohibited, as evidenced by the large international telecoms groups holding possessions in Brazil.

Law 10,610/2002 forbids foreign ownership that exceeds 30 per cent of the capital stock and the voting capital of news companies and broadcasting companies (radio and TV). The control and management of these companies must be exercised exclusively by Brazilians, born or naturalised for more than 10 years. In addition, foreign equity participation in these companies must be done indirectly through a Brazilian company incorporated in accordance with Brazilian law.

For more information about broadcasting, see question 17.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The GTL provides that telecom services are classified in services of collective interest and private interest. Also, telecom services may be rendered under a public or a private regime.

Telecom services provided under a public regime are those understood as universal, which cannot be interrupted (for example, fixed phone). Such services may be provided through concession or permission. Therefore, there are specific obligations for providers of services under a public regime, related specifically to the continuity and universalisation of the services. For telecom services of private interest, on the other hand, Anatel grants a simple authorisation. Moreover, there is a cross-ownership rule that prevents companies exploring the same telecom service in both public and private regimes, except if they are in different areas.

Concessions are granted by Anatel through a bidding process, regulated by the GTL. Also, it can only be granted to companies incorporated under Brazilian Law, with headquarters and administration in Brazil, with the sole purpose of providing telecom services. The term of the concession may be up to 20 years with the possibility of renewal for an equal additional period.

Authorisations, on the other hand, are granted by Anatel through an administrative proceeding where the party interested has to demonstrate its financial and technical capacity to provide the telecom service it is applying for. The price charged for authorisations can go from approximately US$100 to US$2,200, depending on the service. For services under the public regime, periodic fees are charged according to Anatel's regulation.

Fixed phone services are considered services of collective interest, and are rendered under a public regime.

Mobile phones, on the other hand, are considered services of collective interest but are rendered under a private regime – once the authorisation is granted, providers can use the necessary radio frequencies for 15 years, renewable for an equal additional period. For 3G and 4G technologies, concessions are granted through a bidding process. In 2012, Anatel promoted a bidding procedure of 2,500MHz for 4G networks, and the providers Vivo, Tim, Claro, Oi, Sky and Sunrise acquired the frequencies.

The deployment of 5G networks is still in progress in Brazil, and the goal is to start the last phase of implementation during 2019 (the estimated year for full deployment is 2020).

As for satellites, according to the GTL, providing space capacity is not a telecoms service itself. However, Anatel is responsible for providing satellite exploitation rights to companies, whereby the satellite operators can only provide space capacity to entities who own concessions, permission or authorisation to utilise telecom services.

Anatel may grant satellite exploitation rights to foreign entities as long as a public consultation is carried out to confer the exploitation rights to the applicant. Nonetheless, the party must fulfil some requirements to guarantee the correct use of the satellite, such as the appointment of a representative in Brazil (which must be a Brazilian company) and to only offer the use of such satellite to authorised parties.

Anatel, through its Resolution 220/2000, protects Brazilian companies that exploit satellite services, giving preference to such Brazilian companies whenever it offers equivalent conditions to those offered by foreign entities. Such equivalence is measured by means of terms, price and technical parameters.

To obtain the right to exploit satellites, the interested party must file a requirement before Anatel, specifying the target area and the conditions for the use of the satellite. If there is more than one party interested, Anatel will set up an auction or public procurement. Such auction or public procurement will not be mandatory if unnecessary, meaning if there is only one interested party, or if there is enough space for all interested parties.

As for public Wi-Fi services, Decree No. 7,175/2010 provides the National Broadband Plan, which aims to promote and spread the use and supply of goods, information and communication technology services. The National Broadband Plan is an attempt to increase access to broadband internet connection services, especially in the areas less served in terms of technology, promoting 'digital inclusion'. Nonetheless, there are no concrete plans for a broad public Wi-Fi project in Brazil.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

According to the GTL, the spectrum of radio frequencies is classified as a public asset, and the use of radio frequencies is conditioned to the execution of auctions if there is more than one party interested in the same radio frequency band.

The authorisation for the use of radio frequencies granted by Anatel is, as a general rule, not transferable, as provided for in the Resolution No. 671/2016 issued by Anatel. However, is it possible to transfer the concession agreement itself, which will also depend on Anatel's consent, in which case the parties will be obligated to present the pertinent documents to the Agency. Therefore, sublicensing the authorisation is forbidden.

According to the Regulation for the Use of Radio Frequency Spectrum (Resolution No. 671/2016, Anatel), the attribution of radio frequency bands consists of the inclusion of such bands on radio frequency band attribution charts for the use of one or more communications services.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Generally speaking, all communications markets and segments are subject to ex-ante regulation, either by Anatel or the Administrative Counsel for Economic Defence (CADE).

According to Anatel's Resolution No. 101/1999, for instance, Anatel must previously analyse control changes in companies or other relevant corporate restructurings.

Law No. 12.529/2011, in turn, gives CADE jurisdiction to previously analyse and approve or reprove certain transactions that could present a risk for the balance of competition in the market.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There are no rules regarding structural or functional separation between an operator's network and service activities in Brazil.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

Currently, the only service subject to a public regime, and, therefore, subject to obligations of continuity and universality, is the fixed telephone service. Such obligations do not apply either to broadband or to any other services.

The General Plan of Goals for Universalisation of Services (Decree No. 7512/2011) established a series of obligations for fixed telephony providers and public authorities to grant the population general access to fixed telephony. In recent years, however, the relevance of fixed telephony has been questioned, and the focus changed to internet – nowadays, many believe that internet universality is more important than fixed telephony, which is gradually being abandoned.

Law No. 9,998/2000 has created the Universal Fund for Telecoms Services, dedicated to help operators of fixed telephone services to comply with its universalisation obligations.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

Numbers are allocated according to Resolution No. 86/1998 (fixed telephony) and Resolution No. 301/2002 (mobile), both issued by Anatel.

Portability is allowed, according to Anatel's Resolution No. 460/2007. However, portability is only permitted within operators of the same service (ie, mobile-to-mobile or fixed-to-fixed).

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

Resolution No. 632/2014, issued by Anatel, regulates consumers' rights before telecom services renderers. According to the Resolution, consumers have the right to access adequate information about contract conditions, payment methods, cases of service suspension, among others. The aforementioned Resolution provides a long list of obligations with which telecom services providers need to comply regarding consumers. Moreover, all obligations set forth in the Consumer Defence Code (Law No. 8,078/1990) fully apply to telecom services.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The Internet Act, which provides the rules regarding the use of the internet in Brazil, also addresses net neutrality, which was established as one of the principles of the internet. According to the Act, internet providers responsible for the transmission, switching and routing of data have the obligation to treat data packets without distinction based on content, origin and destination, service, terminal or application. As a corollary, bandwidth 'throttling' is not permitted.

Decree No. 8.771, enacted on 11 May 2016, regulated the exceptions to net neutrality, establishing that traffic discrimination or degradation can only occur owing to technical requirements indispensable to the service provision and the prioritisation of emergency services. The indispensable technical requirements indicated in the Decree are those related to net security and network congestion.

In any case of exception to net neutrality, however, the service provider shall adopt transparent measures to provide the user with the proper information and reasoning regarding the data transmission discrimination or degradation, in accessible language. According to section 9, subsection 2 of Law No. 12.965/2014, the provider shall also:

- abstain from causing damage to the users;
- act with transparency, proportionality and isonomy;
- inform the user in advance about the measures adopted, including those related to net security; and
- offer services in non-discriminatory conditions and abstain from anticompetitive conduct.

Despite the fact that article 9 of Decree No. 8,771/2016 prevents agreements between internet services providers (ISPs) that prioritise data packages, there have been several ISPs that offered a zero rating for specific applications such as WhatsApp. The discussion regarding zero rating in Brazil is still far from over.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There are no specific regulations about digital platforms in Brazil.

Nonetheless, the Internet Act (Law No. 12,965/2014), which is better explained in question 12, establishes principles, guarantees, rights and obligations concerning the use of the internet in Brazil, including for internet connection access providers and internet application providers.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

NGA networks are still not subject to any specific regulation in Brazil, although new generation networks (especially the Internet of Things – IoT through the National IoT Plan) are becoming a reality. The government has been trying to foster broadband internet penetration since at least 2010, when Decree No. 7,175/2010 was enacted, which created the National Broadband Plan. Moreover, there is also a movement towards fostering 3G and 4G bands, which are offered annually by Anatel in bidding processes.

In 2016, several discussions regarding 3G and 4G bands took place, especially because of Draft Law No. 79/2016, which proposes a certain number of changes in the GTL. One of the changes, which hampered the progress of the draft law and led to its suspension, was the possibility of telecom service providers limiting fixed internet broadband. Currently, the Draft Law is being analysed by the Senate, and it is not possible to estimate when it is going to be voted.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

Data protection is primarily guaranteed by the Brazilian Federal Constitution, which provides the inviolability of personal data and respect of privacy.

Data protection is also the object of the Internet Act (Law No. 12.965/2014). According to the Act, the party responsible for collecting and processing such data (the ISP) may not communicate it to third parties without voluntary, express and informed consent of the owner of the data. Moreover, the ISP must observe certain strict principles, and the disclosure of personal data to third parties is only allowed under judicial order.

The Internet Act devotes several articles to user privacy. Not only is the disclosure of personal data restricted to judicial orders, but also authorities must appoint the legal basis for the request to access such data, except certain basic information such as personal qualification, filiation and address requested by administrative authorities. However, even for such basic information, current legislation requires annual publication by the authorities of reports containing statistics on personal data requests. This is an innovation brought in by Decree No. 8.771, enacted on 11 May 2016, which also regulated other matters from the Internet Act, such as net neutrality.

The Internet Act is applicable to any and all ISPs that provide services in Brazil, even if the service provider is a foreign entity.

The most relevant regulation regarding data protection, however, is Law No. 13.709/2018, the General Law for Personal Data Protection (GLPD). The GLPD, inspired by the European GDPR, aims to protect primarily the individual's personal data in the Brazilian territory or personal data from Brazilian citizens processed by foreign companies. The GLDP sets several obligations for companies and agencies regarding the treatment of personal data. It is still in its *vacatio legis* period, and the validity and enforcement of the Law shall start in August 2020.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Brazil lacks a specific regulation about cybersecurity. However, Law No. 12,737/2012 provides that it is a felony to invade any computing device whether or not connected to the internet, by circumventing security mechanisms to obtain, alter or destroy data, or to install any program, virus, or other functionality to obtain unlawful gain without the consent of the owner of such device. The penalty for this crime is imprisonment and fines. The length of imprisonment and the amount of the fines depend on the outcome of the criminal proceedings.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

GLDP provides some guidelines regarding big data (such as the use of anonymised data); however, it will be enforceable only after August 2020. Companies are obligated, notwithstanding that, to comply with the Internet Act.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Brazilian legislation does not require that data remain stored within its jurisdiction.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The most relevant discussions in telecommunications regulation currently are related to Draft Law No. 79/2016, which proposes a certain number of changes to the GTL. One of the changes, which hampered the progress of the draft law and led to its suspension, was the possibility of telecom service providers limiting broadband fixed internet. Anatel first adopted the position that such limitation was necessary to guarantee better service provision by companies; after a lot of external pressure, however, Anatel publicly reviewed its position and stated that a limitation of that kind would be illegal.

Another relevant change brought by the draft law is regarding the extinction of services rendered under public regime (currently only fixed telephony) and the adoption of a fully private regime, in which the provision of all telecoms services would only need to be authorised by Anatel.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

Broadcasting services are regulated by Law No. 4.117/1962 (the Brazilian Telecommunications Code – not to be confused with the General Telecommunications Law) and related decrees, especially Decree No. 52.795/1963.

Radio frequencies, as explained above, are public assets, which the government, through Anatel, licenses to private parties that wish to provide broadcasting services. It is worth stating that, apart from technical issues related to radio frequencies, Anatel does not have authority over broadcasters.

The concessions are valid for 10 years for radio broadcasting and 15 years for TV, renewable for equal periods successively, according to change proposed by the recent Law No. 13.424/2017.

The main regulatory frameworks for cable TV are the General Telecommunications Law (Law No. 9,472/1997) and the SeAC Law (Law No. 12.485/2011). The legislation provides the principles to be followed by cable TV providers and sets up cross-ownership restrictions.

Law No. 12.485/2011 also conceptualises and regulates the activities included in the audiovisual communication field, which are production and programming (regulated by Ancine), as well as packaging and distribution (regulated by Anatel).

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Article 222 of the Brazilian Constitution states that the ownership of news and broadcasting companies is exclusive to native Brazilians or naturalised Brazilians who have been citizens for at least 10 years, or to legal entities incorporated according to Brazilian laws, with headquarters in Brazil. In any case, at least 70 per cent of such companies' total and voting capital must be owned, directly or indirectly, by native Brazilians or by naturalised Brazilians for more than 10 years, who shall manage the companies and control the programming.

Law No. 10,610/2002 also prevents foreign ownership exceeding 30 per cent of the capital stock and the voting capital of news and broadcasting companies.

Regarding cross-ownership of media companies, Law No. 12.485/2011 expressly forbids radio and TV broadcasters, producers and programmers to control or own more than 50 per cent of the total and voting shares of collective interest telecommunications services providers. In turn, the latter are forbidden to own or control more than 30 per cent of the total and voting shares of radio and TV broadcasters, producers and programmers.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The GTL provides that the granting of licences is subject to a bidding process conducted by the Ministry of Communications. To obtain the authorisation to use a radio frequency, the interested party must comply with all requirements of the bidding process and pay a public price, which varies from 400 reais to 9,000 reais, and depends on several features, such as bandwidth, term, number of inhabitants in the targeted area, among other things. It is important to note that radio frequency licences are valid for a certain period, after which the party must pay the public price again to continue using the band. After the bidding, Congress has to approve the licence. There is no timetable provided by law.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

SeAC Law (Law No. 12.485/2011), which regulates the cable TV sector, imposes local content quotas of at least 210 minutes at prime time to certain cable TV channels, half of whose programmes must be produced by independent Brazilian producers. Moreover, the same law imposes quotas for local cable TV channels that have to be offered by the cable TV operators and programmers.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

In Brazil, there are both governmental rules and self-regulation rules regarding broadcast media advertising. When it comes to self-regulation, the National Publicity Self-Regulation Board (CONAR), established in 1980, provides the enforcement of the Advertisement Self-Regulation Brazilian Code, dealing with litigation and disputes regarding consumers and broadcasters.

Under the Brazilian Telecommunications Code (Law No. 4.117/1962), the time dedicated to broadcast of commercial advertisements of broadcasting concessionaires and permissionaires cannot exceed 25 per cent of its daily programming.

Law No. 9.294/1996 also imposes a series of limitations regarding advertising of specific products such as tobacco, alcoholic beverages, medication, treatments and others.

When it comes to online advertising, however, there are no regulations other than those mentioned in the Advertisement Self-Regulation

Brazilian Code, which states that all advertising on the internet should be made with special care, with a more restrictive interpretation of all rules that may apply to it. Therefore, as with other advertising, internet advertising should respect the Consumer Defence Code and all rules enforced by CONAR.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Law No. 12.485/11 establishes, in article 32, a list of channels that all programmers must offer in their packages, including open TV channels and governmental channels, among others. There are no mechanisms for financing the costs of such obligations, and the providers must deliver the mandatory channel at their expense, except if proven that the fulfilment of these obligations is impracticable by the provider.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

There is no specific regulation for new media content and its delivery. Nonetheless, Congress is discussing two bills to regulate the video on demand (VOD) market, especially subscription VOD delivered through the internet.

Furthermore, on 16 May 2017, Ancine concluded its analysis of the regulation of VOD, concluding that there should be a specific law for its regulation, and a definition of the service should be established.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover from analogue to digital started with Decree No. 5,820/2006, which was altered by Decree No. 8.061/2013, which provided that the Ministry of Communications would establish the time frame for the switchover. In 2016, the state of São Paulo took the first steps towards making all TV broadcasting digital. On 29 March 2017, the analogue broadcasting signal was shut down in São Paulo city and in 37 other cities around it. On 9 January 2019, analogue signal was switched off in 80 cities, and currently 1,379 cities (around 128 million people) have already switched to digital broadcasting. The complete transition of the remaining 4,191 cities, however, is estimated for 2023, but around 60 per cent of the population already have access to digital broadcasting.

After the switchover, the radio frequencies freed up (700MHz) will have their use designated to mobile networks, improving 4G-based services.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

Anatel is the competent authority for regulating technical aspects related to the radio frequencies dedicated to each telecommunication service. However, there is no specific discipline regarding how each broadcaster uses the spectrum.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There is no specific legislation regarding media plurality in Brazil. SeAC Law (Law No. 12.485/2011), which regulates cable TV, provides that the diversity of cultures, sources of information, production and programming is one of its principles (article 3, II).

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

As mentioned in question 23, Ancine is likely to propose the regulation of VOD, including the service provided by ISPs over the top, such as Netflix, Amazon Prime and HBO-GO.

Optical fibre should become the main technology for Brazil's fixed broadband accesses in the next few years. During the past two years, optical fibre accumulated net additions of 3.9 million accesses, while xDSL accesses shrank by 1.1 million.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

As described above, GTL has created the Brazilian Telecoms Agency (Anatel), which is the agency responsible for the sector's regulation, including the granting of licences and authorisations for the exploitation of telecom services. It is responsible for all telecoms services regulation, including the technical aspects related to radio frequencies.

The Brazilian Film Agency (Ancine) also regulates the sector, having authority over the film industry, editorial activities involved in the cable TV industry, such as producing and programming, and gaming, among others.

Broadcasters are subject to the control of the Ministry of Communications.

Law No. 12,529/2011, which regulates competition, is fully applicable to the telecoms sector. CADE is competent to analyse antitrust matters related to the telecom sector, such as anticompetitive conduct and mergers.

In the specific case of mergers, telecom providers, as well as companies in other markets, are only obligated to submit the operation to CADE's approval if certain conditions are fulfilled, such as an income at least above 750 million reais for one party, and at least 75 million reais for the other party. Anatel may also analyse the competition aspects of a certain merger when the parties submit the operation for the agency's prior approval.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

The decisions of the regulators can always be challenged in federal courts, as universal access to the judiciary is a fundamental right guaranteed by the Brazilian Federal Constitution.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

Mergers and acquisitions in the telecom market, as long as they imply the transfer of the telecom provider's control, are subject to Anatel's approval, according to Resolution No. 101/1999, as described above.

The parties involved in the operation must request Anatel's previous approval for the transfer of control, along with the documents required by the Resolution referred to above. Anatel will analyse the request and authorise, or not, the operation.

Additionally, as described in question 28, CADE is also competent to analyse such operations, if the conditions provided in Law No. 12,529/2011 and Interministerial Ordinance No. 994 are fulfilled.

The last big merger analysed by CADE was the acquisition of 21st Century Fox by The Walt Disney Company (the *Disney/Fox* merger). The transaction was first announced in December 2017, but CADE only issued its final decision on 29 March 2019, approving the merger with a major restriction: Disney has until the end of 2019 to sell the Fox Sports channel. The decision was based on a possible harm to competition identified in the sports channels market, as Fox owned Fox Sports and Disney owns ESPN, two major sports TV channels in Brazil, both focused on the transmission of sports competitions. The buyer of the channel is not known yet, but there are ongoing negotiations.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

In connection with the regulatory framework for the communications sector in Chile, the primary law to take into account is the General Telecommunications Law (GTL), which mainly rules on the following matters.

Its general rules contain a concept of telecommunications, the principle of free and equal access to telecoms, a classification of telecommunications services, a general regulatory framework for the installation, operation and exploitation of such services and rules for the interpretation, application and control of the GTL and its complementary rules; telecoms concessions, permits and licences needed to provide telecoms services and the requirements and procedures applicable to their granting; tariffing procedures for certain telecoms services; the fees for the use of spectrum; and breaches and sanctions.

The Ministry of Transport and Telecommunications (MTT) through the Undersecretary of Telecommunications (Subtel) is in charge of proposing and developing telecoms policies in Chile, which must then be approved by the President. Subtel's policy development procedure is the standard procedure contemplated in Chilean law for the issuance of any regulation. Telecoms policies, therefore, are established by the authority through the issuance of supreme decrees, exempt decrees or exempt resolutions. Although the telecoms authorities are not obliged to do so, they often issue notices of inquiry or notices of proposed rulemaking and consider the opinion of the general public and market players before adopting new policies.

Telecoms concessions may be granted only to private or public legal entities duly incorporated and domiciled in Chile. There is no restriction or limitation, however, on the participation or ownership of foreign investors in Chilean telecoms concessionaires, provided their investments comply with Chilean laws and regulations. For exceptions and more information on this issue, see question 18.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

As a general rule, to provide any telecommunications services, it is necessary to obtain a concession, permit or licence from the telecommunications authority, which are granted to the interested party on a 'first come, first served' basis. However, if there is a technical rule that allows only a limited number of concessions or permits of a certain service (eg, mobile networks and other wireless services), the relevant concessions and permits shall be granted through a public bid process.

The GTL classifies the different telecommunications services by describing their purpose (rather than its features, capabilities or platforms through which they are supplied), each of which may have different specific regulations and requirements. The classification of telecommunications services according to the GTL includes the following:

- public telecommunications services (PTS), which are services destined to satisfy the telecommunications needs of the community in general (fix telephony, mobile telephony and data, trunking, etc). These services must be designed to be interconnected with other PTS;
- limited telecommunications services (LTS), which are services aimed at satisfying specific telecommunications needs of determined companies, entities or persons who have previously requested and agreed the provisions of the services. These kind of services may not give access to public telecommunications networks;
- intermediate telecommunications services (ITS), which are services provided through facilities and networks, aimed at satisfying the transmission and switching needs of other telecommunications concessionaires or permissionaires or at providing long-distance telephone services to the general community; and
- complementary telecommunications services (CTS), which are not telecommunications services in the strict sense of the definition but are additional features provided by PTS concessionaries or any other third party through the connection of equipment to the public networks.

Fixed and mobile terrestrial and satellite services are generally considered by Chilean telecoms regulations as public, intermediate or limited telecoms services, as the case may be. Therefore, except for the technical rules established specifically for each of them and for the circumstance where, in certain conditions, the tariffs of fixed local telephone services may be set by the authorities, all such services are subject to the general rules contained in the GTL and its ancillary and complementary regulations.

The installation, operation and exploitation of PTS and ITS require the prior obtaining of a concession granted through a supreme decree issued by the MTT. These concessions have a 30-year term and may be renewed for equal periods at the request of the corresponding concessionaire. Only legal entities duly incorporated and domiciled in Chile may be granted this kind of concession (there is no restriction, however, for these entities to be partially or wholly owned by foreign capital).

The installation, operation and exploitation of LTS require the prior obtaining of a permit granted through an exempt resolution issued by Subtel. These permits have a 10-year term and may also be renewed for equal periods at the request of the corresponding permissionaire. LTS permits that do not use the radio electric spectrum are granted for an indefinite period of time. However, no permit is required in the case of LTS, whose transmissions do not exceed the limits of the real estate

where they are installed or that exceed such limits using only the infrastructure of ITS concessionaries. This would be the case, for example, for public or private Wi-Fi services, as the Wi-Fi service itself (without taking into consideration the data transmission and public internet access service) would not be subject to any regulation provided that the Wi-Fi signal does not exceed the actual estate in which Wi-Fi equipment (ie, wireless routers) is located.

The installation, operation and exploitation of CTS do not require any previous concession, permit, agreement or authorisation from any PTS concessionaire or governmental authority (including Subtel). Nevertheless, the equipment that the CTS operator connects to the public networks must comply with technical regulations issued by Subtel and shall not alter the essential characteristics and capabilities of the networks to which such equipment is connected. For such reason, prior to starting the provision of complementary services, Subtel shall issue a resolution stating that the equipment of the respective CTS operator complies with the above-mentioned technical regulations. Subtel shall issue the resolution within 60 business days from the reception by Subtel of the respective request from the interested party. Otherwise it shall be understood that the respective CTS operator is authorised to start its operations by the mere effect of the law.

Even though procedures for the granting of telecoms concessions, permits and licences are clearly defined in the GTL and its regulations, the duration of such procedures depends on a series of variables that may differ from one specific case to another (particularly when there is opposition from third parties, which sometimes may need to be resolved by the courts). In standard cases, however, the granting of PTS or ITS concessions may take between six months and one year. The granting of LTS permits (ie, for cable television) may take between two and six months.

Telecoms concessions and permits are generally granted on a free basis. However, telecoms concessions and permits may be subject to auction by the telecoms authorities only in cases when the relevant concessions must be granted through a public bid process, because there is a technical rule that allows only a limited number of concessions or permits, and two or more bidders present equally suitable offers.

The GTL also provides that concessionaires, holders of LTS permits, and holders of telecoms licences that use the radio electric spectrum are subject to an official fee or duty for the use of the spectrum. This fee is charged on an annual basis according to the Collection Regulations, depending on several factors, such as type of concession, permit or licence, portion of spectrum granted and service area that has been authorised. According to the GTL, a payment delay of more than six months is punishable by Subtel with the cancellation of the corresponding concession, permit or licence.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The GTL establishes an equal and non-discriminatory right to use spectrum, but always through a telecommunications concession, permit or licence. Radio frequency (RF) concessions, permits and licences describe the specific service for which they are granted and, therefore, the spectrum is always permitted to be used for specific purposes. For details on this, see question 2.

The RFs assigned to a particular operator may not be traded or transferred separately from the concession or permit to which the respective RFs are embedded. However, there is a bill currently being discussed in the Chilean Congress that, if approved, will create a 'secondary market' for the transfer of mobile telephony radio electric spectrum. For more details, see question 16.

Telecommunications concessions (including spectrum or not) may be transferred, assigned or leased only with the previous authorisation of Subtel, which may not be denied without reasonable cause. In the case of radio broadcasting telecommunications services (RBTS) concessions, such authorisation cannot be granted within two years from the date of the legal initiation of the services under the concession.

The GTL provides that the assignee of a concession or permit is subject to the same obligations of the former owner. The assignee is bound by the technical and economic project originally submitted by the assignor to Subtel and approved by it. However, the assignee may request the amendment of technical and economic projects at any time.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

In general, the provision of any communications service, except for CTS, requires authorisation from the MTT or Subtel. The authorisation and application processes vary and depend on the type of service the applicant wants to provide. For details on this, see question 2.

The general rule regarding telecommunications tariffs or fees is that they may be freely established by the respective PTS or ITS service providers without prejudice of the agreements between such providers and their subscribers.

More specifically, four main markets or segments have to be analysed from this perspective: telephone, television, internet and radio.

Telephone

Telephony Numbering Technical Fundamental Plan

Providers of public telephone services must comply with this plan, which contains the provisions ruling numbering in the entire country for fixed and mobile telephony, complementary and other services compatible with the telephone service (services of the same type).

Law of Number Portability

The enactment of this law has given the users of fixed and mobile telephone services an important amount of information about this market, which has forced the concessionaries to offer better products and improve the quality of the service, all owing to the increase of the competition among them.

Interconnection

PTS and ITS concessionaires that render long-distance telephony services must establish and accept interconnections for the purposes of permitting subscribers and users of PTS of the same type to have communications between themselves, inside or outside the national territory. Such interconnections must be effected according to the technical rules, procedures and terms established by Subtel. New concessionaires must pay the costs and expenses necessary to interconnect, and the fees and tariffs charged (particularly access charges) shall be fixed every five years by the authorities. PTS and ITS concessionaires shall not discriminate between the services that are rendered by them in any way.

Television

Suppliers of open television broadcasting services (OTBS) need a concession granted by the National Television Council (NTC) through a public bid process, while cable television (CATV) operators need a permit granted by Subtel. For further details, see question 19. For information regarding content restriction, see question 22.

Internet

Law of Internet and Net Neutrality

Article 24H and 24I of the GTL provides that internet service providers (ISPs), which are defined as 'legal entities that render commercial connectivity services between final users or third parties' networks and internet', shall not arbitrarily block, interfere with, discriminate against, hinder or restrict the right of any internet user to utilise, send, receive or offer any content, application or lawful service through the internet. Infringements of this prohibition are punished by Subtel. Additionally, ISPs shall publish technical specifications of the service they provide.

Moreover, article 24K of the GTL sets forth that ISPs must guarantee a percentage of the average access speeds, for the different time periods of greater and lesser traffic, offered in their different commercial plans, with respect to national and international connections – wired and wireless – and must make available to users a system or application that allows the measurement of said speeds and associated technical parameters, all in accordance with the technical standard that Subtel shall enact. Regarding the latter, Subtel is currently preparing such technical standards and has been requesting Chilean ISPs and other operators certain information about their network structure, data traffic and access speeds.

Radio

There is regulation regarding the granting of RBTS concessions to foreign investors and the nationality of several executive officers of free radio broadcasting concessionaires (see question 18).

Finally, from a competition law standpoint, there are no specific telecommunications markets or segments subject to ex-ante regulation. The telecom market is governed by the general competition laws existing in Chile.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Since 10 December 2010, Law No. 20,478 has been in force, which, among other things, allows the operation of infrastructure supplier companies by modifying the concept of ITS in the GTL, including within this concept those concessionaries who only provide physical infrastructure for telecoms services. This law also simplifies the required procedure for modifying the relevant concessions regarding this type of service. The requirements for obtaining, installing, operating and exploiting such types of concession are established in a special regulation issued by the MTT by means of Supreme Decree No. 99, in force since 6 July 2012.

Regarding wireless networks, since the enactment of the Antenna Law (No. 20,599) on 11 June 2012, infrastructure sharing is strongly encouraged and sometimes even mandatory. This has opened the market for international infrastructure providers to either acquire operator-owned assets or build new infrastructure destined to host and support network equipment of multiple operators.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

There are no universal service obligations in Chile. However, universal service is obviously a goal of Chile's telecoms public policies. For example, one of the main criteria of assignment in concessions public bids is the coverage (especially in isolated or rural areas) offered by the bidders; the Digital Agenda 2020, issued in November 2015, which updates the former Digital Agenda for 2013–2020, and the National Space Policy for 2013–2020, aims to achieve universal service; and the Telecoms Development Fund contemplated in the GTL is focused on universal service.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

On 10 December 2010, Law No. 20,471 was published, which establishes the number portability right for the users of mobile telephone services as well as for the users of fixed telephone lines.

This law obligates the concessionaries of the public telephone services and the providers of complementary services connected to the public switched telephone network to implement the number portability system and to comply with the regulations to be issued for the correct operation of the system. This law further establishes that the technical implementation of number portability shall be performed by a centralised and unique database, administrated by a portability management body, an entity in charge of providing inquiry mechanisms for the consultation and administration of the database in a non-discriminatory and efficient way and in such a manner that the operational costs of the number portability system are kept to a minimum.

The financing of the number portability system has been defined by a special regulation based on a mixed and proportional system that considers the following sources.

The necessary investment costs to provide services related to number portability operation will be financed by the contributions that the public telephone service concessionaries and those concessionaires of the same type shall make according to their participation in the numbering assigned at national level; and the operating costs will be financed based on the portability transactions performed by the subscribers and users.

The law sets forth that those actions that prevent or make difficult the operation or the legitimate exercise of the rights that arise from the number portability incurred by the concessionaires of the public telephone service, by those concessionaries of the same type or by the portability management body shall be punished according to title VII of the GTL.

According to Subtel, as of 31 December 2018, 17,213,627 numbers, fixed and mobile combined, have been transferred from one operator to another since the implementation of the system.

Regarding number allocation, Subtel must answer requests for telephone numbers made by the relevant operators within a period of 30 days. Moreover, Subtel, by means of a resolution, and depending on the technology conditions and telephone number requests, shall establish the amount of digits and area codes for telephone numbers.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

On 13 June 2014, Decree No. 18 (the Telecommunications Services Regulations or TSR) was published, which set forth the new regulations for all telecommunication services. The main purpose of the TSR is to regulate the rights and obligations of the telecommunication services providers (the providers) and the subscribers and users of the same (the users).

The main topics treated in the TSR are the following.

Hiring and minimum contract provisions

Providers must assure the users the existence of an informed and transparent hiring procedure. Additionally, the contract must contain the

minimum provisions established in the TSR (eg, information regarding technical assistance, maintenance and repair services, etc).

Payment and compensation

The providers shall not charge the users for the services that have not been delivered. In the same way, providers of public voice services and ISPs shall deduct from the monthly invoice the time during which the service was suspended, interrupted or altered for any cause not attributable to the user. Should the suspension, interruption or alteration exceed 48 continuous or discontinuous hours during a month and this is not owing to force majeure or an act of God, then the provider shall also indemnify the user with the equivalent of three times the value of the daily rate for each day of suspension, interruption or alteration of the service.

In the same way, providers must deliver on a monthly basis and in paper or electronic form, at the user's choice, an invoice including the information on the supplied telecommunications services and which content and structure should comply with the TSR.

Suspension of services

The provider may suspend the relevant services if the user has not paid the invoice within five days after the payment date. The deadline for restoring the service shall be the business day following the date on which the service was duly paid.

Termination

The user can end the contract at any time at its own discretion. Non-payment of the service within 90 days from the due date of the invoice enables the provider to put an end to the contract.

The foregoing is without prejudice to the rights and remedies contained in Law No. 19,496 that regulates the Protection of Consumer Rights, and in other applicable regulations.

Subtel is empowered to request any information necessary for the exercise of its functions from the telecoms concessionaires, permissionaires and licensees including customer terms and conditions.

On 14 January 2015 the Free Choice of Cable, Internet and Telephony Services Law was enacted. The Law sets forth that the free choice of telecommunications services must be granted to users in every building. In this regard, every building must be able to allow different telecommunication operators to install their infrastructure and provide their services.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

On 26 August 2010, Law No. 20,453 was published. It sets forth the network neutrality principle in the GTL by virtue of which the ISPs shall not make any discrimination and differentiation among the information that runs through their equipment or the network infrastructure.

This law was complemented by a special regulation, published on 18 March 2011, which establishes the specific requirements that ISPs must accomplish in connection with these network neutrality legal obligations.

In this regard, according to the net neutrality law, ISPs:

- cannot arbitrarily block, interfere with, discriminate against, hinder or restrict the right of any internet user to use, send, receive or offer any content, application or legitimate service through the internet, as well as any other activity or legitimate use performed through the network. In this sense, they must provide each user with an internet service access or connectivity with the provider of internet access, as appropriate, which cannot arbitrarily distinguish content, applications or services, based on the source or ownership thereof, taking into account the different configurations of the internet connection under the current contract with users;
- cannot limit the right of a user to add or use any kind of instruments or devices on the network, provided that they are legitimate and that they do not damage or harm the network or the service quality;
- shall provide, at the expense of users who request such services, parental control services for contents against the law, morality or good customs, provided that the user is clearly and precisely informed in advance about the scope of such services; and
- shall publish on its website all information relating to the characteristics of internet access service offered, speed, link quality, differentiating between national and international connections, as well as the nature of the service and service warranties.

However, ISPs may take the measures or actions necessary for traffic and network management, in the exclusive scope of activity that has been licensed to them, provided that this is not designed to perform actions that affect or may affect free competition. ISPs shall seek to preserve user privacy, virus protection and network security. Additionally, ISPs may block access to certain content, applications or services, only at the express request of the user and at such user's own expense. This blocking cannot arbitrarily affect other providers of services and applications that are provided through the internet. Finally, according to Chilean law, a judge may order the blocking of access to internet sites or services by means of a judgment during a trial or as a temporary injunction.

For the above-mentioned reason, 'zero-rating' (understood as the lack of charging to customers for the data utilised by certain applications like social networks in limited data plans) and bandwidth 'throttling' (understood as the slowing down of internet speed for the entire service or for certain applications) have been actively addressed by Subtel, forcing the concessionaires to comply with the net neutrality law and its regulation. Regarding 'zero-rating', Subtel has issued an official interpretation on 14 April 2014 (Oficio Circular No. 40/2014) stating that offerings based on free internet with the purpose of the exclusive use of certain social networks included in the offering, with the sole condition of buying a recharge of a pre-paid plan or a mobile internet bag, shall be considered a breach of the net neutrality regulations.

However, it seems that for the past couple of years, Subtel decided to assume a more 'pro-consumer approach' on this matter. In this regard, during 2016 the Undersecretary of Telecommunications stated that net neutrality regulations are designed to sanction the zero rating offers for people that do not have a data plan. However, for people that do have a data plan, ISPs or mobile telecommunications operators would be able to discriminate and offer social networks without affecting the amount of data included in their plans. Consequently, Subtel have decided not to actively enforce the net neutrality regulations against the zero rating offers for users that have a data plan (because, among other reasons, they would be beneficial to the customers). This interpretation has been subject to debate for not taking into consideration the free competition (eg, as a hypothesis, the Telegram application could have entrance barriers to compete with the WhatsApp application if the latter has the benefit of being provided at no cost in the networks of certain concessionaires).

Moreover, in April 2018, Subtel issued an Ordinary Letter addressed to mobile telecommunications operators, stating that 'unlimited' or any equivalent concept used for the commercialisation of a service has an unequivocal meaning for the user. Therefore, services advertised as such shall not be subject to restricted terms and conditions regarding capacity, velocity, hour schedules or any equivalent matter that may generate a degradation or suspension of the service, different from the

proper technical reductions of the network capacity and those means directly related to the management of the current traffic congestion applied to the public in general.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Digital platforms have not yet been regulated. However, two new digital media bills are currently being discussed before the National Congress, which intends to modify the Press Law. The new bills aim to expand on the traditional media and press regulations and requirements for digital platforms.

Additionally, on 21 August 2018, a Tax Reform Bill promoted by the government was submitted to Congress. It is expected that this process will conclude during 2019. If passed as a new law, the reform would likely modify some relevant rules of the Chilean tax system currently in force, and provide a new Tax on Digital Services (TDS). The TDS, as regulated in this bill, is considered a specific and indirect tax, substituting any other, which levies digital services provided by individuals or foreign entities to the extent that such services are used in Chile by individuals. The main concerns regarding TDS provided in the bill are the following: (i) the tax rate (19 per cent) would be applied to the total amount of the transaction, without any deduction; (ii) a withholding mechanism would be established, falling upon the entities which issue the means of payment used in the transactions; and (iii) in the event that the users pay for the digital services with cash, the Chilean Internal Revenue Service (SII) would assess and collect the payment of the TDS directly from the foreign taxpayer that provides the digital services.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are no specific regulations on NGA networks. In this regard, the GTL and its ancillary regulations only rule over the telecommunication services, but not over the networks through which such services are provided. The services may always be rendered if the relevant operator fulfils the applicable technical regulations.

The above-mentioned structure is the result of the technology-neutral principle that inspires Chilean telecoms legislation, pursuant to which services are provided without regard to the technology used for their provision.

The GTL contemplates the creation of a Telecoms Development Fund with the purpose of promoting the increase of telecoms services coverage in poor or geographically isolated areas. The fund contemplates subsidising: projects for publicly available telephones and call centres; community 'infocentres' (these projects shall have the purpose of promoting information and communication technologies, including connection to the internet); local radio and television services; and any other project for telecoms services that may benefit the community.

During 2015, the Chilean government, acting through the Secretary of Digital Development, prepared a new programme, the Digital Agenda 2020 issued in November 2015, which updates the Digital Agenda for 2013–2020, in order to have an action plan for the coming years regarding this important matter and also to increase digital penetration throughout Chile. The Digital Agenda strategy will be based on five pillars: rights to digital development, universal connectivity, digital government, development of the digital economy, and the improvement of digital competences in education and labour.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

The GTL does not regulate a specific data protection regime applicable to the communications sector.

Furthermore, article 19(4) of the Chilean Constitution establishes the right of 'respect and protection to private and public life and to the honour of a person and his family', and also the protection of its personal data; and article 19(5) establishes the right of 'non-violation of home and of any way of private communication', setting forth that private communications and documents may only be intercepted, opened or registered in cases and manners determined by the law. Additionally, the Personal Data Protection Law establishes, as a general principle, that save for certain specific exceptions (eg, data available from sources accessible to the public), it is mandatory to obtain prior written consent of the data subject to gather and process personal data. If not, the breaching party may be forced to indemnify the data subject for any damages caused by such breach.

In fact, the TSR establishes that the user's personal data obtained by the providers can only be used for the specific purposes related to the provision of relevant service. However, under certain statutes (eg, the Criminal Procedural Code, the Anti-Terrorist Law and the Anti-Drug Law) Chilean criminal courts may instruct a telecoms operator to intercept communications from or to any person, so as to determine such person's eventual liability in criminal offences.

In these cases, telephone and telecoms operators shall assist the investigators with all the means necessary to intercept the targeted communications as soon as possible. For this purpose, telephone and telecoms operators shall keep at the disposal of the Public Ministry, on a confidential basis, an updated list of their authorised IP address ranges and a registry of the IP numbers of the connections made by their users during at least the preceding six months. Refusal to intercept communications when ordered by a court shall be considered a criminal offence.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

There is no specific legislation concerning cybersecurity or network security in Chile. However, there are some regulations that contain cybersecurity provisions applicable only for certain areas or purposes. For example:

- article 24 H of the GTL regarding the obligation of seeking to preserve network security for ISPs and telecommunications concessionaires;
- Law No. 19,223 on categories of informatics offences, which refers to the protection against unauthorised disclosure and certain acts classified as computer crimes;
- Decree No. 83 of 2005 issued by the Ministry General Secretariat of the Presidency, on the Confidentiality and Security of Electronic Documents for the Public Administration;
- Superintendence of Banks and Financial Institutions (SBIF) Regulations, Chapter 20-7 on outsourcing of services (RAN Chapter 20-7) regulates network security provisions in the outsourcing of services executed by financial institutions through cloud service providers; and
- SBIF Regulations, Chapter 20-8 on information concerning operational incidents (RAN Chapter 20-8) regulates the obligation for financial institutions to report incidents (including cybersecurity incidents) to the SBIF, their clients and the banking industry.

Notwithstanding the above, it is important to mention that in April 2017, the Chilean government presented a new National Policy on Cybersecurity that aims to promote and ensure a free, open, safe and resilient cyberspace by 2022. To achieve this, this policy sets several targets, including:

- the establishment of a resilient information infrastructure in the country, prepared to face and recover from cybersecurity incidents, under a risk management approach;
- the protection by the Chilean state of the citizens' rights in cyberspace;
- the development of a cybersecurity culture based on education, good practices and accountability in the management of digital technologies; and
- the promotion of the cybersecurity industry.

The above-mentioned policy seeks the implementation of an institutional structure for cybersecurity, capable of fulfilling the policy's objectives and those roles identified as essential, such as the management of inter-institutional relationships, incident management, the role of national and international points of contact, preparation of technical regulations and an advisory role in general regulations, and evaluation of measures regarding cybersecurity.

Finally, in October 2018, the President of Chile issued a Presidential Instructive on Cybersecurity. It contains emergency measures that public bodies must address, including:

- the appointment of a high level cybersecurity officer in each service;
- the application and updating of technical regulations on cybersecurity;
- internal cybersecurity measures;
- detailed review of networks, systems and public operations digital platforms;
- surveillance and analysis of the operation of the technological infrastructure of State Administrative bodies;
- compulsory report of incidents to the Coordination Center of Government Entities; and
- response to cybersecurity incidents.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

The concept of big data and the legal challenges it raises have not been addressed by the Chilean authorities yet and, therefore, no specific regulations have been issued in this regard yet and the general personal data protection regime, explained in question 12, is the only available regulation in this regard.

However, the Chilean government has been developing and promoting a Public Open Data Platform (https://datos.gob.cl/), aimed at providing access to a public database to any person. This public platform is used by the government for developing its public policies and it can also be used by anyone who is conducting investigations or analysis, or is building applications. As of today, the platform is still in an early stage of development.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no laws or any other regulations that require data to be stored locally in our country.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

One hot topic in communications regulation these days is the recently enacted regulation on Multiband Homologation and Certification of Mobile Devices. According to this new regulation, contained in Subtel's Exempt Resolution No. 1,463 of 2016, mobile devices destined for the public mobile telephony and data transmission services, to be distributed or commercialised in the Chilean market, must:

- support at least the total frequency bands that operate over one of the several technologies deployed in Chile;
- be homologated, certified and validated by an authorised entity;
- bear a distinctive sticker that should identify the capabilities of a device to operate over any of the technologies (ie, 2G, 3G, 4G, etc) and its support of a Chilean emergency alert system; and
- be registered at a central database to assure compliance with these regulations.

The purpose of this regulation is to facilitate number portability and eliminate limitations and restrictions that currently affect users' capability to switch operators, and thus remove the need to purchase different devices from different providers.

Another interesting recent development in the field is that Subtel announced a 77 per cent reduction, during the next five years, of the tariffs charged among concessionaires for the interconnection of their networks, which are known as access charges. This implies that all mobile telephony companies will pay less to interconnect their networks, thus eliminating the entrance barriers for incoming actors. Furthermore, the competition in the market will increase, and this will promote the revitalisation of fixed telephony, which will also pay less to communicate with mobile phones. Consequently, users will have access to better offers and services, and Chilean access charges will be on a par with those of OECD countries. Subtel's decrees providing these reductions should be issued and published during 2019.

There is also a bill currently being discussed in the Chilean Congress, which, if approved, will create a Superintendency of Telecommunications. This entity will be public, autonomous, non-centralised and will own and manage its own patrimony. Its main roles will be the supervision of compliance with local telecoms regulations by the operators and the imposition of administrative sanctions if such regulations are violated. (These functions are currently performed by Subtel and will be transferred to the new entity.)

Moreover, there is another bill currently being discussed in the Chilean Congress which, if approved, will create a secondary market for the transfer of mobile telephony radio electric spectrum by and among the current operators, and to achieve this, Subtel has already amended the 2G, 3G and 4G mobile concessions technical rules allowing the separation of the current spectrum band blocks into sub-bands of 10MHz each. According to the bill, the concessionaires would be able to partially assign their spectrum by means of a transfer, a lease, an assignment or a grant of right of use with the prior authorisation of Subtel, which may not be denied without reasonable cause. The new authorisation related to the relevant transfer, lease, assignment or grant of right of use, will have the same duration and obligations – applicable to the corresponding spectrum portion – as the original concession title.

Regarding mobile services, there has been a lot of expectation, in both the market players and the general public, regarding the announcement of the upcoming spectrum allocations for the deployment of 5G networks. However, there is a series of past and current events that may affect or delay this process, which are summarised below.

On 27 January 2009, the Supreme Court ruled that no operator may concentrate more than 60MHz in any band assigned for public mobile

telephony services as a consequence of the 3G public bid, which became an opportunity for new entrants. The public bid took place during 2009 and, after a public bid, Nextel (currently WOM) obtained two concessions of 30MHz each and VTR (a subsidiary of Liberty Media) obtained the remaining 30MHz, permitting the entrance of two new competitors into the market of – at the time – next generation mobile services.

In 2012, a public bid process took place in Chile for the granting of PTS concessions based on 4G technology for the provision of fixed or mobile data transmission public service (in the 2,505–2,565MHz and 2,625–2,685MHz frequency bands) and Claro, Entel and Movistar were all awarded one of the three 40MHz spectrum blocks granted through this public bid (blocks 'A', 'B' and 'C' respectively).

Later, during 2014, a new public bid process took place in Chile for the granting of PTS concessions based on 4G technology for the provision of fixed or mobile data transmission public services in the 713–748MHz and 768–803MHz frequency bands (700MHz frequency bands). Movistar, Entel and Claro were each awarded one of the three spectrum blocks granted through this public bid (blocks 'A' of 20MHz, 'B' of 30MHz and 'C' of 20MHz, respectively). In addition, on 7 November 2014, Subtel issued a technical rule reserving 20MHz of the 700MHz band in favour of the Chilean state to cover the communication needs of public safety and aid in case of catastrophes and emergencies.

Notwithstanding the foregoing, Telestar, Netline and Conadecus presented an opposition before the MTT, arguing that the limit of 60MHz established by the Supreme Court (on January 2009 in the 3G awarding process) was not being considered and enforced in the public bid process and that the bidding conditions were discriminatory. The MTT ruled in favour of the incumbents that participated in the public bid process, noting that this topic is currently being treated by the Antitrust Court and that, therefore, it is not of its competence and that the bidding conditions were fair and sufficient. Telestar appealed before the Court of Appeal of Santiago, which ruled in favour of the incumbents that participated in the public bid process, following the general reasoning of the MTT in its first instance decision. Finally, the Antitrust Court also ruled in favour of the incumbents.

However, a legal remedy was submitted by Conadecus against the Antitrust Court decision, before the Supreme Court in October 2016. After almost two years, in June 2018, the Supreme Court issued its ruling, stating that the incumbents incurred in anticompetitive conduct when participating in the 700MHz frequency bands public bid. It also stated that in order for the incumbents to have been able to participate in such bid, they would have had to: (i) previously dispose of the relevant spectrum blocks to assure that they did not exceed the 60MHz limit; or (ii) file the relevant consultation before the Antitrust Court to reanalyse such limit, based on the characteristics of the market at that time. Considering the above, the Supreme Court: (i) ordered the incumbents to dispose of an equal portion of the spectrum (in any band) obtained in the 700MHz frequency bands public bid (Entel 30MHz; and Movistar and Claro 20Mhz each); and (ii) recommended Subtel to submit a consultation before the Antitrust Court to redefine the 60MHz spectrum limit.

As a consequence of the Supreme Court's ruling, in October 2018, Subtel submitted the above-mentioned consultation proposing an increase of the spectrum limits per concessionaire and making a segmentation of the frequency bands according to their nature (low, mid-low, mid-high and high). On the other hand, the incumbents still have not disposed of any of their spectrum blocks; therefore, Conadecus initiated enforcement proceedings before the Antitrust Court. Currently, such proceedings are pending.

Almost simultaneously with the Supreme Court resolution described above, in June 2018, Subtel issued the exempt resolution No. 1289-2018, which amended several technical rules of services provided in the 3,400–3,800MHz (3.5GHz) spectrum bands. The resolution established that no other telecommunications authorisations would be granted in such frequency bands. However, it also suspended or 'froze' all the operations of all the telecommunications services that were authorised in such bands, giving the affected entities the possibility to provide their approved services in other frequency bands described in the same resolution. Subtel's decision provoked a turmoil in the telecommunications market, as it was well known that these frequency bands were under analysis for a possible future deployment of 5G technology. Thus, the main players holding concessions in such frequency bands filed legal remedies against the resolution seeking for its annulment by the courts. In October 2018, Subtel amended the resolution, partially eliminating the suspension for some of the telecommunications services originally included in such resolution. Consequently, the above-mentioned legal remedies were withdrawn by the affected operators.

Following the above, in February 2019, during the Mobile World Congress held in Barcelona, the Undersecretary of Telecommunications informed that the plan for the implementation of 5G would be starting during March of the same year, stating that Subtel would make available a 20MHz spectrum block in the 700MHz band for 5G, in line with what the authority was currently doing in the 3.5GHz band. Consequently, on 11 March, Subtel issued the exempt resolution No. 265-2019, and has made available for future public bids a 20MHz block in the 700MHz that was previously reserved in favour of the Chilean state to cover the communication needs of public safety and aid in case of catastrophes and emergencies.

There have also been some new developments in the physical infrastructure front. On March 2018, a new public bid process was announced regarding the deployment of land tracts of the Southern Fibre Optics Project. During 2017, another land tract and also submarine tract of the project were awarded. This project is part of an initiative to bring higher level connectivity to the most southern and extreme areas of the country. Finally, in connection with the above, there have been some announcements regarding new submarine cable projects. For example, Google has already started the deployment of the submarine cable that will connect the United States and Chile, which it is expected to be operative within 2019. Also, Huawei has announced that they are analysing the possibility of building a submarine cable between China and Chile. Finally, the Chilean government has announced an Asia–Chile fibre optics cable as an official project that is already being carried out and aims at selecting the cable builder provider during 2019.

In April 2018, the MTT published in the Official Gazette the Supreme Decree No. 167, which contains the regulation that rules the ways and conditions to guarantee the freedom of choice in the contracting and receiving of telecommunications services in private estates, buildings and co-owned real estate. Subsequently, Subtel issued the Exempt Resolution No. 766, which establishes the above-mentioned regulation's technical rule. These new regulations seek to apply and enforce the provisions of Law No. 20,808, which protects the freedom of choice of cable, internet and telephone services, also known as 'Duct Law', by establishing the minimal conditions of construction and design that allow for free access to telecommunications services by owners or lessees of units in private estates or building projects. The regulatory framework provided by these rules will permit telecommunications services providers to reach users that most of the time only had the chance to contract services from the only provider that originally was able to access such private states or buildings.

Finally, there are several governmental agencies currently discussing the blockchain, smart contracts and artificial intelligence technologies and its potential implications in different areas of the economy. Although the technology is young and its regulations worldwide are still unclear or at a very early stage of development, the telecommunications sector could be one of the areas affected by these revolutionary technologies. This is why new regulations could eventually arise from these discussions.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

In connection with the regulatory framework for the media sector in Chile, the main law to take into account is the National Television Council Law (NTCL), which mainly regulates the following matters:

- the duties, attributions and organisation of the NTC;
- concessions for open television broadcasting services and their granting procedure; and
- the sanctions for breaches to the law.

Regarding the institutional framework for the media sector, the main regulatory body is the NTC, which has the authority to regulate certain technical aspects of television transmissions, as well as broadcasting content.

From a technical perspective, the NTC is the entity in charge of granting, renewing and modifying OTBS concessions (not cable) and supervising that OTBS concessionaires comply with the provisions of the NTCL.

The NTC is also in charge of supervising that the content transmitted by both OTBS and CATV operators complies with the 'proper performance' requirements set forth in the NTCL. The NTC may apply sanctions only if it verifies that a violation to the NTCL has been committed, but it has no previous censorship authorities.

Even though the broadcasting sector is regulated separately from the telecoms sector, in some respects these markets are subject to a regulatory overlap. From a technical standpoint, CATV operators are subject to the GTL.

For this reason, the MTT, through Subtel, is the entity in charge of granting, renewing and modifying CATV permits and supervising that CATV operators comply with the provisions of the GTL. Subtel's supervisory authorities extend only to technical aspects of the permit holders' operations and do not include the ability to control or censor the content of their transmissions.

Subtel also manages, pursuant to the GTL, the assignment of the radio electric spectrum for broadcast operators.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

In general, there are no restrictions on the ownership and control of broadcasters. Foreign investors may participate in broadcasting activities in Chile and even be the exclusive controllers of Chilean broadcasting companies.

Any material change in the ownership of any media entity must be communicated to the National Economic Prosecutor within 30 days from its occurrence. However, in the case of media subject to the concession system granted by the state (OTBS, CATV operators, etc), the relevant change of ownership shall previously require a favourable report from the National Economic Prosecutor regarding its impact on competition, which shall be issued within 30 days from the reception of the transaction documentation. The National Economic Prosecutor must communicate its adverse reports to the Antitrust Court, and if no report is issued within the referred term, it shall be understood that the relevant change of ownership has not been subject to any kind of objection from the National Economic Prosecutor.

There are currently no regulations in relation to the cross-ownership of media companies. A new OTBS concession, however, may not be granted to entities that already hold a concession of the same nature, or that control or manage other OTBS concessionaires, whose concession has been granted by means of a public bid for the same service area. Likewise, Chilean authorities might restrict cross-ownership of media companies if, according to antitrust law, it impairs, restricts or eliminates free competition within the relevant market. Any such instances will be analysed on a case-by-case basis by the Antitrust Court. Currently there is no bill on cross-ownership, nor any plans or suggestions to change regulation applicable to this matter.

In case of RBTS concessions requested or acquired by entities controlled in more than 10 per cent by foreign investors, such RBTS concessions may be granted to or acquired by the respective entity only if it previously provides evidence that the country of origin of the foreign investors grants to Chilean citizens the same rights that they will enjoy in Chile (reciprocity).

Likewise, according to Chilean law, the chairperson, managers, administrators, legal representatives and at least the majority of the board members of the RBTS concessionaires must be Chilean citizens. The chairperson, managers, administrators, legal representatives and all the board members of OTBS concessionaires must also be Chilean citizens.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

A concession granted by means of a supreme decree issued by the NTC – through a public bid process – is necessary to provide both RBTS and OTBS services. Almost all RBTS and OTBS concessions allowed for the relevant markets within the country have been already granted and are currently in operation. Thus, the MTT or the NTC will only announce a public bid when a spot becomes available as a result of the expiry, cancellation or waiver of an existing concession. On the other hand, a permit granted by Subtel is necessary to provide CATV services.

The duration of the granting process of media concessions and permits depends on a series of variables that may differ from one specific case to another (especially when there is opposition from third parties, which may sometimes require the intervention of courts to settle such dispute). Under normal circumstances, the granting of LTS permits (ie, for CATV) may take between two and six months, while the granting of RBTS and OTBS concessions may take seven to eight months.

Regarding payable fees, the general rule is that media concessions and permits are granted on a free basis. Nevertheless, and owing to the fact that RBTS and OTBS services are granted through a public bid process, an auction may be needed to decide between equally suitable offers filed by two or more bidders.

The GTL provides, however, that the concessionaires, permissionaires and licensees that use the radio spectrum are subject to the payment of an official fee or duty, which will be collected by the state. For more information on this matter, see question 2.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

There are no current regulations on the matter. However, the NTC has the authority to determine, in a general manner, that up to 40 per cent of the transmissions of OTBS channels shall consist of domestic

productions. The National Music Law was enacted on 18 April 2015, setting forth that RBTS concessionaries must include at least 20 per cent of local content in their daily transmissions (prohibiting them from accumulating more than 50 per cent of such local content between 2am and 6am).

Other types of media not included in the above-mentioned considerations, are not subject to these regulations.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The regulation of radio and television advertising is not organic in Chile and it is covered by several legal provisions:

- advertising transmitted through OTBS or CATV must comply with the 'proper performance' requirements contained in the NTCL;
- the NTC has established that any kind of advertising of prohibited drugs is forbidden;
- the NTC has established that any kind of advertising of alcoholic beverages is forbidden during the hours allowed for minors (6am to 10pm);
- the Tobacco Law expressly prohibits advertising of tobacco products and elements of the brands related to them. In addition, the appearance of people smoking or pointing out favourable characteristics of the consumption of tobacco is forbidden for programmes broadcast live in television or radio, during hours allowed for minors. Finally, tobacco advertising in Chilean communications media by means of international signals or websites ending with '.cl' (the suffix for domain names granted in Chile) is also prohibited;
- the Consumer Protection Law prohibits false or misleading advertising;
- the Unfair Competition Law sanctions any conduct against the good faith that, through illegitimate means, is aimed at deviating customers 'from any market agent'. In such regard, among other types of conduct, the Unfair Competition Law specifically classifies as unfair competition:
    - any false or incorrect statement or information about any product, service, activity, trademark or logo of any third party, when such false or incorrect statement or information is capable of damaging the market reputation of such third party;
    - any conduct that makes use of another party's reputation and leads to confusion about its own and a third party's products and services; and
    - any comparative advertising that is not based in verifiable and genuine data;
- the Press Law grants a clarification and rectification right, by means of which every person or entity offended or unfairly alluded to (eg, through advertising) in the media, has the right to transmit or publish, as the case may be, a clarification or rectification in the same media in which the offence or unfair allusion was made, for free. Likewise, any person or entity offended or unfairly alluded to by a RBTS, OTBS or CATV operator, shall have the right – only paying or providing for the respective materials – to directly require a true copy of the relevant transmission from the operators;
- according to the Law of Voting and Scrutiny, electoral propaganda may only be transmitted during the period running from 30 to three days before the relevant election or referendum. Additionally, this Law expressly prohibits the broadcasting of electoral propaganda by CATV operators;
- the Law on Nutritional Composition of Food and its Publicity prohibits advertising, directed to people under 14 years of age, of high-calorie and high-salt products, and requires that any advertising displayed by mass media must contain a message promoting healthy lifestyle habits;
- Law No. 20,724, which came into effect on 14 February 2014, introducing amendments to the regulation of pharmacies and medications, states that advertising and other activities destined to inform the consumer of a pharmaceutical product, are only allowed for those products that can be sold without prescription, and pursuant to the provisions of the respective health registration; and
- the Regulation of the National System of Cosmetics establishes that in the advertising of such products, it is forbidden to use terms, expressions, graphics, figures, references or interpretations that go against scientific truth and lead to misrepresentation or deceit. Likewise, their advertising cannot attribute, directly or indirectly, therapeutic qualities, effects or characteristics to the products that they do not have or that are unverifiable.

Pursuant to the Digital Terrestrial TV Law (DTTVL), which came into effect on 29 May 2014, the NTCL empowers the NTC to establish restrictions and limitations to the exhibition of products for which advertising is prohibited or limited under current regulations, whether in relation to its schedules of exhibition or to the qualitative aspects of its contents.

As a result of the above-mentioned lack of organic regulation regarding advertising, companies engaged in this business along with RBTS and OTBS providers created the National Council of Advertising Auto-Regulation (CONAR). As part of its activities, CONAR issued an advertising ethical code and created an arbitration court. CONAR's ethical code states that:

- advertising must be legal, decent, honest and truthful;
- advertising must be prepared with a proper sense of social responsibility, by specialised professionals who use adequate information and documentation, according to the principles of free competition related to the general practices that are used in the commercial activity sector;
- no advertisement must be exhibited in a way that diminishes public confidence in publicity;
- every advertisement activity must involve real and true competition among several products and services, that, through adequate information, will allow the public to make a free and informed choice; and
- as an activity oriented mainly towards public welfare, advertisers and agencies must adapt their actions to the economic, cultural, social and educational reality that the community has at the moment in which the relevant products and services are offered.

Most of the relevant players in the advertising business have voluntarily submitted themselves to the referred ethical code and arbitration court. This auto-regulatory approach has proven to be very successful in preventing abuse and conflicts in the advertising market. In fact, authorities have rarely been forced to take action in relation to an advertising issue.

Online advertising also lacks organic regulation, though it is subject to most of the rules referred to for non-online advertising. Nevertheless, on September 2012, the partners of an independent association that is part of a worldwide affiliate network of the Interactive Advertising Bureau (IAB), presented a new mechanism of online advertisement auto-regulation, called 'System of Trust'. The main objective of this system, established by IAB Chile, is to regulate the conduct of those who participate in the online market, and it is based on three main pillars: a code of conduct that ensures respect for user's rights; an alternative dispute resolution mechanism; and a trust trademark and logo, which the association's partners can use and be identified with.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

With the enactment of the DTTVL, OTBS concessionaires are now legally obliged to transmit – at their own cost – at least four hours of cultural programmes per week, two of which must be broadcast during prime-time viewing hours.

Additionally, the NTC now has the authority to issue general and binding rules to oblige OTBS and CATV operators to broadcast campaigns of public and social interest, which will be determined by the Ministry Secretary-General of government and approved by the NTC. These campaigns shall not last more than five weeks a year, a term that may be renewed whenever necessary under considerations of particular importance and public interest. However, OTBS and CATV operators can charge the Chilean state for broadcasting campaigns that exceed this term, including a possible renewal of the same, with rates not higher and discounts not lower than those offered by them to any commercial advertising client.

Finally, the Law of Voting and Scrutiny regulates the propaganda that different candidates or political parties may broadcast during electoral periods.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

There is no specific regulation in connection with new media content and its delivery, which differs from the one regarding traditional broadcasting media. These two kinds of content, however, are subject to the general regulations applicable in this regard (constitutional rights, criminal law, private law, etc).

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

In September 2009, Subtel communicated the decision to adopt the digital television technology standard ISDB-T with MPEG4. This standard was created in Japan and modified in Brazil. To prepare future players, Subtel granted experimental permits to transmit digital television in different regions of Chile, in order for local channels to render OTBS services with high-definition contents in new localities. In addition, and to spread this technology throughout the country, since 2009, OTBS concessionaries provisionally started transmitting digital television by means of temporary permits that were renewed every year.

After almost six years of being discussed in the National Congress, the DTTVL came into effect in May 2014, marking a historic milestone for digital technology in Chile. This new regulation is contained in Law No. 20,750, which includes amendments to the NTCL regarding the progressive digital switchover imposed by the authorities of the field. The Law provides that within five years, all of the open television signals shall be digital and must be available in all 15 regions of the country for free, a process known as 'analogue switch-off'.

During the above-mentioned five-year term, OTBS operators that are digitalised are obliged to keep on transmitting the same content through their analogue and digital signals, which demonstrates that the digital switchover will be a gradual process in Chile. For more information on the obligations to which OTBS concessionaries are now subject owing to the DTTVL, see question 25.

Regarding the reallocation of the radio frequencies that will be freed by the digital switchover, Chile has been one of the first countries of the region to deal with the spectrum allocation and the denominated 'digital dividend'. This subject is strongly related to the public bid process – which has taken place in our country – destined to grant PTS concessions based on 4G technology.

On 4 April 2015, the Television Broadcasting Plan (TBP) was updated to implement the changes made by the DTTVL. Its principal goal is to accomplish a rational and efficient use of the radio electric spectrum in the television digitalisation process establishing the technical characteristics with which the digital signals must comply. On 10 March 2017, a public bid process for the allocation of Digital OTBS concessions was launched and it made 116 new frequencies available for such services.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

Regarding OTBS services, the concession system established by the NTCL to assign the part of the spectrum required for the transmission of open television, used to restrict the utilisation of such spectrum only to the transmission of one television signal through an analogue transmission. With the enactment of the DTTVL, concessionaries will now be legally obliged to broadcast at least one signal in high definition, pursuant to the terms set forth by the authorities.

Likewise, holders of OTBS concessions in the very high frequency band can decide between maintaining such concession in the referred band, being able to transmit only one signal in analogue technology, or exercising their right to request a new concession – with their own means – in the ultra-high frequency band, set for digital television broadcasting services. In the first case, the relevant concessionaire will have 24 months from the entry into force of the amendment of the TBP (owing to the digital switchover), to amend all of its concessions to achieve the digital coverage. In the second scenario, the relevant concessionaire will have a maximum term of five years from the above-mentioned amendment to achieve digital coverage.

The DTTVL also authorises the broadcasters or holders of open television concessions to render complementary services such as multi-channelling, multi-programme, etc, over the part of the spectrum assigned to them.

In the case of satellite television services, owing to the nature of such kind of broadcasting, the permit that assigns the necessary part of the spectrum allows the permit holder to offer multi-channelling, high-definition, multi-programmes, etc, over the same.

The TBP sets forth that for every radio frequency channel of 6MHz, at least two television signals must be available (a main one and a secondary one). This rule was subject to much controversy before its approval and issuance.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The regulation of media plurality is not organic in Chile; however, the following must be taken into consideration regarding this matter.

Article 3 of the Law on Freedom of Opinion and Information and the Exercise of Journalism establishes plurality in the information system, by ensuring freedom to fund, edit, establish, operate and maintain mass media. Likewise, article 4 states that the National Budget Law will annually provide funds for the development of studies regarding

plurality in the national information system, which will be awarded by means of a public bid by the National Commission for Scientific and Technological Research.

Additionally, articles 1 and 14 of the NTCL also make reference to plurality. The first article conceives the 'proper performance' of television broadcasting services as the permanent respect for democracy, peace and plurality, among others; while the second sets out the obligation of the NTC to adopt measures and procedures to ensure the compliance of the principle of plurality in television programmes – broadcast by any channel – that contain news, opinion or political debate.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The hottest topics in media regulation are the process of implementation of digital television – owing to the recent enactment of the DTTVL – and two bills currently being discussed in the National Congress that establish amendments to the Press Law, providing a new legal concept of electronic newspapers and categorising them as mass media, regulating the digital platforms in this regard.

The above-mentioned implementation process has not been exempt from controversy, especially owing to the opposition of OTBS operators to the regulations set forth in the DTTVL, based on the high costs that must be assumed by them to comply with the new legal requirements and to achieve the digital coverage within the established terms. Bills on electronic newspapers have also been subject to discussion, mainly because their approval could over-regulate the digital media market and interfere with the right to free speech.

The amount of local content that RBTS concessionaries include in their daily transmissions has been mandatorily increased (to a minimum of 20 per cent) with the approval of the new National Music Law (see question 20).

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The antitrust authorities are the Antitrust Court (TDLC) and the National Economic Prosecutor (FNE). Both are responsible for enforcing Chile's Antitrust Law. The TDLC is an independent entity (jurisdictional) with the fundamental mission of ruling on all cases filed by the FNE or private individuals. It is also in charge of issuing specific or, occasionally, general guidelines for the enforcement of antitrust regulations. The FNE is an independent administrative agency in charge of investigating any violations of the Antitrust Law, representing the public interest and seeking the enforcement of resolutions, decisions and instructions issued and passed by the TDLC or the courts of justice in antitrust cases.

The communications regulator Subtel is a separate body from the antitrust regulators (TDLC and FNE) and there are no jurisdiction conflicts because each body has specific duties and powers. The final decisions of the antitrust authorities are subject to review by the Supreme Court of Justice ensuring the consistent application of the law.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

The GTL and the NTCL establish specific procedures under which telecoms regulators' decisions may be challenged. These procedures generally allow the possibility to appeal such decisions before the ordinary courts of justice including, ultimately, the Supreme Court.

Resolutions in connection with anticompetitive practices (including any practice affecting the telecoms and broadcasting sectors) are the responsibility of the Antitrust Court pursuant to general antitrust law. The parties or the FNE could file a special appeal before the Supreme Court, against the final resolution issued by the Antitrust Court that imposed or dismissed measures requested by the parties or the FNE or the measures contemplated in article 26 of the Antitrust Law.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

During 2017 and the first quarter of 2018, the following changes in competition law and cases were relevant to the antitrust authority:

- Law No. 20,945, which entered into force as of 1 June 2017, establishes a new pre-merger control regime by means of which concentration operations, performed by two or more economic agents, must be notified to the FNE if: the total sales in Chile by the economic agents that intend to concentrate are equal to or higher than Unidad de Fomento (UF) 1.8 million (units of account); and the sales, which have individually been performed in Chile by at least two of the economic agents that intend to concentrate the market, are equal to or higher than UF 290,000. Notwithstanding the foregoing, concentration operations that are not equal to or greater than the thresholds established by the FNE may, nevertheless, be voluntarily notified. These thresholds were determined by the FNE's Exempt Resolution N0. 667, dated 24 November 2016, and may be modified by such authority. Within 30 days from the opening of the investigation, the FNE must assess the operation and communicate its decision. The notifying parties may file a special review remedy, before the TDLC, against the FNE's resolution ordering the prohibition of the transaction.
- In September 2016, the TDLC dismissed the lawsuit filed by the National Consumer and Customer Association (Conadecus) against Telefonica, Claro and Entel PCS regarding an alleged abuse of dominant position of the incumbents. Conadecus stated that the incumbents participated in the 700MHz distribution public bid case with the purpose of grabbing radio frequency to prevent its effective and efficient use, violating the Supreme Court Ruling of 2009 regarding this subject. The TDLC dismissed the claim because it could not be stated that the incumbents hold a dominant position in the upstream market (access to mobile network) that could be transfered to the downstream market (retail commercialisation of mobile telephone services). Additionally, the TDLC pointed out that the Supreme Court Ruling did not establish a restriction to the amount of radio frequency an agent could hold (Ruling 154/2016). However, Conadecus submitted a remedy against the TDLC ruling, before the Supreme Court in October 2016. After almost two years, in June 2018, the Supreme Court issued its final ruling, stating that the incumbents incurred in anticompetitive conduct when participating in the 700MHz frequency bands public bid (see answer to question 16).
- In March 2017, the TDLC dismissed the lawsuit filed by Netline Mobile against Entel PCS and Telefonica regarding an alleged

infringement to a Supreme Court Ruling. In 2011, the Supreme Court ruled that the incumbents had to make a public offer of facilities or resale of plans to the mobile virtual networks operators based on general, uniform, objective and non-discriminatory standards. According to the TDLC: the defendants conducted public facilities offers; the conditions included in these offers had allowed the entrance of new competitors into the market; and the requirements of the offers could not be considered as discriminatory (Ruling 156/2017).

- In May 2017, the FNE initiated an investigation regarding the soft and hard blocking of mobile phone and data terminals. After carrying out a series of investigative measures, on 18 December 2017 the FNE decided to close this investigation under the condition that certain mobile phones manufacturers modified the criteria for enabling new bands on their phones and data terminals.
- In December 2017, the FNE initiated an investigation regarding domestic roaming agreements between mobile operators, as it considered that some of those agreements might generate risks of coordination that may affect the quality and coverage of licensed services, as they could discourage the deployment of networks of the operators in areas in which they operate through roaming.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The key regulations in the telecommunications sector include:

- The Telecoms Regulation promulgated by the State Council, effective in 2000, and later amended in 2014 and 2016 respectively. It renders the Ministry of Industry and Information Technology (MIIT) the authority to regulate the telecoms business, comprising basic telecoms services (BTS) and value-added telecoms services (VATS), and to grant operational licences for telecoms business.
- The Administrative Regulation for Foreign Investment in Telecoms Business promulgated by the State Council, effective in 2001, and later amended in 2008 and 2016. It sets out restrictions and criteria for foreign investment in BTS and VATS.
- The Telecommunications Business Catalogue issued by the MIIT with the latest version released in 2015. It sets out definitions and descriptions of different types of business that would be considered either BTS or VATS.
- The Foreign Investment Negative List issued by the Ministry of Commerce (MOFCOM) jointly with other government agencies with the latest version released in 2018. It sets out, among other things, restrictions on foreign investment in BTS and VATS.

These regulations reflect the undertakings given by the Chinese government in preparation for World Trade Organization (WTO) accession, allowing for previous restrictions on foreign ownership of telecoms services to be relaxed in gradual phases. By the end of 2007, the Chinese government satisfied commitment under the WTO accession by allowing foreign investors to hold up to 49 per cent interest in BTS business and up to 50 per cent interest in VATS business. In view of China's fast development of e-commerce business and other network applications, the government's confidence in domestic telecoms business has been increasing. Consequently, the government further lifted restrictions on foreign investment in a number of VATS businesses.

In 2014, the following types of VATS were further opened up to foreign investment in the Shanghai Free Trade Zone. In 2018, the government expanded this release to all Free Trade Zones in China.

VATS business	Liberation for foreign investment restrictions in telecoms business in Shanghai Free Trade Zone
Online app stores (within the scope of internet information services)	The restriction on foreign investment ratio was removed, which means the foreign investment may hold up to 100% equity in the business.
Store-and-forward services	The restriction on foreign investment ratio was removed, which means the foreign investment may hold up to 100% equity in the business.
E-commerce (within the scope of data processing and trade processing services)	Foreign investors may hold up to 55% equity in the business. Such foreign ownership restriction is further lifted to 100% and expanded such release to all over China.
Call-centre services	The restriction on foreign investment ratio was removed, which means the foreign investment may hold up to 100% equity in the business.
Domestic multi-party communications services	The restriction on foreign investment ratio was removed, which means the foreign investment may hold up to 100% equity in the business.
Internet access services	The restriction on foreign investment ratio was removed, which means the foreign investment may hold up to 100% equity in the business.
VPN Service	Foreign investors may hold up to 50% equity in the business.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Telecoms resources, as defined under the Telecoms Regulation to capture fixed telephone numbers, mobile phone numbers, radio frequencies and satellite trajectory positions used in mobile and satellite communications, are considered state-owned assets. The MIIT is the government agency that takes charge of allocating these resources. According to the Telecoms Regulation, telecoms resources can be distributed to business operators by administrative allocations and public auctions. Most of these telecoms resources are distributed via administrative allocation procedures in which:

- telecoms operators apply to the MIIT for cross-province telecoms recourses (such as cross-province telephone numbers) and international telecoms resources (such as satellite radio frequencies) or to the MIIT's local counterparts at the provincial level for intraprovince telecoms resources (such as intra-province telephone numbers); and
- the MIIT and its local counterparts (as the case may be) examine the applications and decide whether to allocate the required resources within 40 days (for intra-province telecoms resources) and 60 days (for cross-province telecoms resources).

Telecoms resources may also be applied for during the applications for telecoms operational licences, in which cases, the relevant telecoms resources will be allocated together with the issuance of telecoms operational licences.

Absent explicit rule, most local governments adopt the same 'administrative allocation procedure' in distributing public Wi-Fi resources.

In 2007, the Guangdong Telecommunication Administration Bureau (the local counterparts of the MIIT) started distributing some 'lucky' telephone numbers (including fixed line and mobile numbers) via public auctions. This practice was followed by other local counterparts of the MIIT. However, a detailed rule on public auction of telecoms resources has not been issued.

Users of telecoms resources need to pay a fee, and the fee schedule is periodically reviewed by the government. The fee rates for using telecoms resources were significantly reduced in 2017 and the fee rates for using radio frequencies were further reduced in 2018.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

During the application process for telecoms resources, including telephone numbers and radio frequencies, the applicant would need to specify the prospective usage of such resources and the schedules for deploying such resources. The MIIT or its local counterparts would examine these usages and schedules in granting telecoms resources and stipulate these usages and schedules, inter alia, as conditions for the grant of telecoms resources. According to the Telecoms Regulation, telecoms operators are required to: deploy the granted telecoms resources within the stipulated period of time; and use the telecoms resources only for the purpose for which they are granted.

According to the Telecoms Regulation and the Administrative Regulation for Radio issued by the State Council, effective in 1993, and amended in 2016, telecoms resources are not tradable, nor can they be leased to any third party (except for use by end users) without prior approval by the government.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

There is no definition of ex-ante regulation under Chinese law. Chinese law is a combination of ex-ante and ex-post regulations, and the same is true for Chinese law in the communications sector. It is unrealistic to catogorise certain types of communications law as ex-ante, or the other way round.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

At present, there is no law or regulation relating to structural or functional separation, nor is there any plan to enact such regulation. On the contrary, companies are not only allowed, but also, from a policy aspect, encouraged, to engage in both structural and functional business to achieve efficiency and to maximise the usage of telecoms resources.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

At present, there is no law or regulation imposing universal service obligations. However, the big telecoms carriers (in which the state has significant interest) have a public interest function to build and maintain telecoms infrastructure in the mid-west and other remote areas. The government also provides subsidies and other preferential treatment to encourage telecoms carriers to offer services to these mid-west and remote areas.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

According to the Administrative Measure for Telecoms Number Resource Allocation issued by the MIIT, effective in 2003, and amended in 2014, telecoms operators may apply to the MIIT or its local counterparts for telephone numbers (which are a type of telecoms resource). They are prohibited, however, from charging end users for use or selection of telephone numbers. This prohibition is not actually enforced now. It is customary for telecoms operators to charge end users a fee for selecting lucky numbers.

Because telephone numbers are resources allocated to telecoms operators, they are generally not portable among different telecoms operators. Since 2010, the government has implemented a pilot programme called 'transfer with numbers', initially at Hainan Province and Tianjin Municipality and later expanded to the Jiangxi, Hubei and Yunnan Provinces, where mobile users are allowed to switch carriers but retain their numbers. However, this programme has not been successful because:

- the government introduced this programme with the aim of allowing users of the biggest mobile carrier (being China Mobile) to switch to use China Unicom or China Telecoms so as to encourage competitions but the actual result is that more users from China Unicom and China Telecoms were switched to use China Mobile;
- most mobile users have subscribed for some type of service packages that cannot be terminated before its expiration otherwise penalties would apply; and
- some mobile users have registered the mobile number for payment settlement services and banking services and such registration needs to be redone after switching telecoms carrier, which creates difficulties when switching.

The MIIT has been urging the three mobile carriers to give more freedom for users in choosing and changing their service packages and to grant users the right to number portability. In 2019, the MIIT made a public commitment that all mobile phone users will be free to switch carriers and retain their numbers by the end of the year.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

Customer terms and conditions in telecoms services are subject to Telecoms Service Rules issued by the MIIT and effective in 2005 and the Notice on Matters Concerning Telecoms Service Agreements (the Telecoms Notice) issued by the MIIT and effective in 2017. The key rules include:

- customer terms and conditions must include, among other things, a fee schedule, service levels and ways for customers to raise complaints;

- telecoms operators must verify customers' real identities before entering into telecoms service agreements with them;
- telecoms operators must not reject entering into telecoms service agreements with those users who are eligible to receive such telecoms services;
- telecoms operators must provide services to users on a fair and non-discriminatory basis;
- telecoms operators must not change any fee schedule or service level without the consent of the customers;
- telecoms operators must notify customers of any incident that may affect the use of telecoms services; and
- telecoms operators must give customers notice at least 30 days in advance should the telecom operators cease provision of any service to which the customers subscribe.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

There is no specific regulation on net neutrality. However, the Telecoms Notice has a general provision requiring that telecoms operators provide telecoms services to users on a non-discriminatory basis. In other words, telecoms services providers should not prioritise the delivery of any data or service for specific customers. However, net neutrality is not a hot topic because the major telecoms carriers have a public function to provide telecoms services to the public and profitability is not the only pursuit.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

In China, operations of digital platforms are considered a value-added telecoms service and subject to licensing requirements under the Administrative Measure for Telecoms Business Licences issued by the MIIT and effective in 2009, and later amended in 2017. Depending on the nature of the digital platforms, additional regulations may apply.

With respect to the operation of e-commerce platforms, the e-commerce law of China (E-commerce Law) applies. The E-commerce Law is promulgated by the Standing Committee of the People's Congress of China and effective as of 1 January 2019. It is China's first comprehensive legislation governing the field of e-commerce. It sets out the definitions such as 'e-commerce operator' and 'e-commerce platform operator' and different requirements on e-commerce operators and e-commerce platform operators.

E-commerce operators are broadly defined as individuals, legal entities and organisations who carry out business activities through information networks such as the internet to sell goods or provide services, including e-commerce platforms operators, business operators on e-commerce platforms, and others selling goods or providing services on their self-operated website or other network services. The key requirements for e-commerce operators include:

- with a few exemptions such as home-made small individual businesses, all e-commerce operators are required to complete business registration and obtain the requisite sector licence where required (eg, food, drug, medical device trading), and shall disclose this licence information on its website in a notable way;
- e-commerce operators shall pay applicable tax and shall issue invoices or receipts;
- e-commerce operators shall disclose product information in a complete, truthful, accurate and timely manner;
- the goods or services provided by the e-commerce operators shall comply with requirements for personal or property safety and environment protection; and
- e-commerce operators shall comply with data protection regulations in relation to the collection and use of customer personal information.

E-commerce platform operators are defined as a legal entities or organisations that provide services, including online trading sites, trading matchmaking and information distribution in order for two or multiple trading parties to conclude transactions independently. The key requirements for e-commerce platform operators include:

- e-commerce platform operators must verify the real identity of the operators who apply to sell goods or provide services on the platform and submit the identification information and tax-related information to competent market administration and tax authorities;
- e-commerce platform operators are required to keep records of goods and services information as well as transaction records for not less than three years; and
- e-commerce platform operators will have joint and several liability with e-commerce operators, where the e-commerce platform operator knows, or should have known, that the relevant goods and services do not comply with the relevant requirements for personal or property safety or other legitimate interests of consumers, or has violated another's intellectual property rights and the e-commerce platform operator fails to take any necessary measures.

In addition to the above, the E-commerce Law also sets out the requirements in relation to e-commerce contracts, e-payment, e-commerce dispute resolution, cybersecurity measures as well as platform policies.

With respect to live-show platforms, the Administrative Rule on Internet Live-show Service (the Live-show Rule) issued by the Cyberspace Administration of China (CAC) and effective as of 2016 applies. The Live-show Rule provides for, among others, that the live show platform operators must verify the real identity of the performers before allowing them to perform on the platforms and must maintain the technical capacity and management mechanisms to block the broadcasting of illegal shows immediately upon discovering the illegality.

With respect to operation of P2P lending platforms, the Provisional Measure for Administration of Network Lending Information Intermediate Services (P2P Measure) was issued by the China Banking Regulatory Commission, the MIIT, the Ministry of Public Security and the CAC and effective in 2016. The P2P Measure requires online lending information intermediaries to register with the local financial regulatory bodies upon their establishment, include online lending information intermediary in the business scope of their business licence and obtain a telecommunication business licence from MIIT. The local financial authorities shall categorise the operators and disclose their filing information to the public. P2P lending platforms shall check borrowers' creditworthiness before allowing them to post borrowing requests on the platforms and to adopt proper measures to ensure information security. The P2P Measure also prohibits platform operators from, among other things:

- borrowing money through their P2P lending platforms for their own use or for use by their affiliates;
- directly or indirectly pooling money from borrowers;
- providing guarantees or assurance for repayment of principals or interest, or both;
- marketing lending products to those other than users registered with their platforms on a real-name basis;
- distributing banking, security, fund, insurance or trust products or tying lending products with banking, security, fund, insurance or trust products sold by third parties; or
- splitting financing projects.

In the year from 2017 to 2018, the Chinese government and relevant regulatory authorities issued various regulations governing the P2P online lending industry, including, among others, the Guidelines on Information Disclosure of the Business Activities of Online Lending Information Intermediaries, the Notice on Rectification of Cash Loan Business, the Notice on the Special Rectification and Inspection of Risk of Online Lending Intermediaries, the Notice on Conducting Compliance Inspections of Online Lending Intermediaries, the Compliance Checklist of Online Lending Information Intermediaries, or the Compliance Checklist. The main purpose is to regulate P2P industry behaviour and enhance supervision of the industry.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There is no specific regulation on 5G networks. The government, however, is encouraging the development and use of 5G technology through government subsidies. Additionally, the government encourages industrial funds to invest in 5G-related businesses.

China started testing 5G communications in 2016. The construction of a large-scale 5G network is going fast and all the big telecoms carriers and large information and communication technology companies in China are accelerating the commercial use of the 5G network.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The General Rule of Civil Law promulgated by the National People's Congress and effective in 2017 confirms that the right in personal data is a type of civil right that is protected under the laws. Various administrative regulations and measures have data protection provisions applicable specifically to the communications sector.

The Administrative Measure for Internet Email Services issued by the MIIT and effective as of 2006 prohibits sending spam emails and prohibits illegal collection and sales of personal email addresses.

The Decision on Strengthening Protection on Network Information promulgated by the Standing Committee of the People's Congress and effective as of 2013 sets out general principles on protection of personal information in an electronic form.

The Administrative Measures for Protection of Information of Telecoms Users and Internet Users (the Information Protection Measure) was issued by the MIIT and effective in 2013. The Information Protection Measure sets out relatively detailed rules on protection of personal data applicable in the telecoms business and internet business. These rules include:

- business operators must seek individuals' informed consent to the collection and use of their personal data;
- business operators must only collect and retain personal data that is necessary for providing the services;
- business operators must adopt proper technical and managerial measures to protect the safety of personal data;
- business operators must provide channels for individuals to communicate with them in relation to data privacy practices and possible data leakage; and
- should any incident occur that results in data leakage, business operators must report the case to the regulator and the affected individuals.

The Cybersecurity Law promulgated by the Standing Committee of the People's Congress of China and effective as of 1 June 2017 also sets out data protection requirements, which are detailed in question 13.

The National Standard on Information Security Technology – Personal Information Security Specification (the Specification) was issued at the end of 2017 and effective as of May 2018. The Specification is not of mandatory legal effect but provides detailed and practical guidance for market players on the best practice of data protection. The Specification covers a wide range of requirements in relation to data collection, data retention, use of data, data processing and data transfer, etc. A new draft version of the Specification was issued in February 2019 seeking public comments. This new draft version has not yet taken effect.

Additionally, according to the Legislative Planning of the 13th Standing Committee of the People's Congress of China published on the official website of the National People's Congress of China on 10 September 2018, the Personal Information Protection Law has been put on the legislation agenda.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Cybersecurity Law promulgated by the Standing Committee of the People's Congress of China became effective on 1 June 2017. The Cybersecurity Law brings in a number of cybersecurity requirements at ministerial rule level and applicable to specific business sectors onto the level of congress-made legislation and gives them wide applications; it also codifies some cybersecurity practice (eg, the blocking of illegal websites outside China).

The Cybersecurity Law is not primarily designed to regulate private behaviour; rather, it is designed to engage and authorise various government agencies to enact detailed administrative rules on cybersecurity and to enforce these rules. In summary, the Cybersecurity Law covers the following contents:

- Encouragement of cybersecurity technology development: the government would encourage the development of advanced cybersecurity technology by:
  - government subsidies;
  - improvement in intellectual property protection; and
  - formulation of national standard for cybersecurity technology.
- Cybersecurity obligations of network operators: the Cybersecurity Law imposes a number of obligations on 'network operators', which are broadly defined to include owners and administers of computer networks as well as network service providers. These obligations include:
  - to establish internal cybersecurity policies and procedures;
  - to implement proper technical measures to prevent hacks and virus as well as to monitor network operations;
  - to retain network operation records and logs for at least six months;
  - to formulate and implement contingency plans;
  - to address cyber risks known to the operators; and
  - to report any cybersecurity incident to the government and the customers affected by the incident.
- Extra burdens on critical information infrastructure operators: the Cybersecurity Law imposes extra burdens on operators of critical networks. 'Critical information infrastructure' refers to networks used in public communications, information services, energy, public transportation, water conservancy, finance, public services and electronic government as well as those networks of which the failure would possibly harm national security, national economy or public interest. These extra burdens on operators of critical information infrastructure include:

- to examine the background of administers of critical networks;
- to give training and drills to those involved in operating critical networks;
- to back up important data;
- to undergo a security screening process for procurement of network products and services if such procurement has an impact on national security;
- to enter into confidentiality and security agreements with providers of network products and services; and
- to store personal information and important data collected in China within China; a security assessment shall be conducted prior to any cross-border transfer of personal information and important data because of business needs.

- Comprehensive data protection requirements: the Cybersecurity Law expands personal data protections to all data subjects whose data is collected and stored in networks. As a result, all network operators that collect personal data are required:
  - to inform data subjects of their privacy policies;
  - to only collect data that is necessary for providing their services;
  - to seek data subjects' consent for the collection and use of personal data;
  - to adopt technical and managerial measures to protect the safety of the data they collect; and
  - to inform the government and relevant data subjects of any significant data leakage incident.
- Cooperation with the government: the Cybersecurity Law requires network operators to cooperate with the government for cybersecurity and to prevent crimes in cyberspace, including:
  - to provide technical support to the government in government inspections;
  - to verify users' real identities before providing network services and to retain such identity information; and
  - to take down and to prevent the spread of illegal information posted or transmitted by their networks.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no specific legislation on big data in China. The government, however, issued policies to encourage big-data-related business. These policies include: the Notice of Action Plan to Encourage Big Data Development issued by the State Council in 2015 and the Development Scheme for Big Data Business issued by the MIIT in 2017. Under these policies the government would:

- encourage the development of big data technology and applications;
- boost the development of big-data-related business;
- encourage the sharing of information resources among business sectors; and
- regulate big data business from a public security and national sovereignty aspect.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Under the Cybersecurity Law, personal information and other important data that operators of 'critical information infrastructures' (see question 13 for the scope of 'critical information infrastructure') collect in China must be stored in China. Under some industrial-specific regulations, the following data must be collected in China:

- population and healthcare data (including, in particular, medical records) that medical service providers generate in China;
- data about financial transactions and banking customers that banks and other financial institutions collect in China; and
- data about personal creditworthiness that credit rating institutions collect in China.

The CAC has released a draft Measures for Security Assessment of Data Exportation in 2017, which provides that:

- in principle, all personal data and important data that a network operator generates in China must be stored in China;
- if an export of data is necessary for business reasons, in normal cases, the operator must perform a security assessment by itself with assessment results filed with the government; and
- in sensitive scenarios, the security assessment must be initiated or supervised by the government.

The draft measure has not been finalised or adopted.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

With the effectiveness of the Cybersecurity Law, the government has strengthened and will continue strengthening the protection of cybersecurity and of sovereignty in cyberspace. The foreseeable government actions include:

- the government carries out cybersecurity inspections more frequently to ensure that the networks that are relevant to the national economy and public functions are reliable;
- the government would enact security standards and security assessment in relation to procurement of network device and services;
- the government would strengthen the enforcement against illegal use of VPN or proxy servers to surpass China internet control to visit sensitive websites outside of China;
- the government would finalise and adopt the Measures for Security Assessment of Data Exportation;
- the government would issue administrative rules to further identify the scope of critical information infrastructure and relevant protective measures; and
- the government would enact security standards for:
  - device and software used for networks;
  - mobile applications; and
  - data transmission and storage.

MEDIA

Regulatory and institutional structure

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

In China, the media sector is heavily regulated. The key regulator is the National Radio and Television Administration (NRTA), which was established in 2018 and replaced the original State Administration for Press, Publication, Radio, Film and Television (SAPPT). The NRTA has a broad authority to regulate business involving both traditional media and digital media. In particular, it has the authority to:

- approve the establishment of television and radio stations and to regulate television and radio broadcasting activities under the Administrative Regulation of Radio and Television issued by the State Council, effective in 1997 and amended in 2013 and 2017;
- approve the establishment of cable television stations, cable television programmes and to regulate the cable television

broadcasting activities under the Interim Measures for Cable Television Management issued by State Council, effective in 1990 and amended in 2011;
- approve the establishment of printers and to regulate the printing business under the Administrative Regulation of Printing Business issued by the State Council, effective in 2001 and later amended in 2016 and 2017;
- approve the establishment of publishers and to regulate the publication and distribution of domestic publications and import of foreign publications under the Administrative Regulation of Publication issued by the State Council, effective in 2002, and last amended in 2016;
- regulate the business about publication, production, importation, wholesale, resale and lease of audio and video products under the Administrative Regulation of Audio and Video Products issued by the State Council, effective in 2002, and amended in 2011 and 2016;
- censor and approve the production, import and public display of films under the Administrative Regulation of Films issued by the State Council and effective in 2002;
- approve and regulate the downlinking of foreign satellite TV programmes under the Administrative Regulation of Receiving Foreign TV Programs by Satellite Ground Receivers issued by the State Council, effective in 1990 and last amended in 2018; and
- regulate the information services on the internet under the Administrative Regulation of Internet Information Services by the State Council, effective in 2000 and amended in 2011.

Ownership restrictions

18 | Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

In China, foreign investment in media business is prohibited.

Foreign investors are not allowed to invest in the following business in China:
- editing, publication or production of books, newspapers or other publications;
- editing, publication or production of audio or video products or any other e-publications;
- construction or operation of radio or television stations or facilities used for transmitting radio or television programmes;
- radio or television video-on-demand business and construction of facilities on receiving foreign TV programs by satellite ground receivers;
- production, operation and import of radio or television programmes;
- film production or film distribution companies, cinema chains or import of film; and
- internet publication or provision of audio, video, news reports or other cultural products online.

Foreign investment in the following media business is highly restricted:
- foreign investment in the construction and operation of cinemas must only take the form of joint ventures in which the Chinese party must hold a controlling equity.

Licensing requirements

19 | What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Different licensing requirements apply in relation to each type of programme and the medium through which it is transmitted. Cable television programme broadcasters must obtain a television station permit and a cable television programme broadcast approval certificate from the NRTA.

Satellite television licensing

The installation of satellite-receiving equipment (to receive television programmes transmitted by foreign satellites) requires a permit issued by NRTA only to entities involved in education, scientific research, news, finance, economic and trade that need to receive satellite programmes for business reasons, hotels rated three-star or above and owners of residential or office buildings for foreigners. The following permits are required to broadcast or make available video and audio programmes via the internet:
- a permit to transmit video and audio programmes through an information network from the NRTA; and
- an internet information services licence (being a type of VATS operational licence) from the MIIT.

Video and audiovisual licensing

Any company that intends to provide an internet audiovisual programme service must obtain a licence for transmitting video and audio programmes via an information network from the NRTA. A permit must be obtained from the NRTA for video-on-demand services.

Video-on-demand programming is subject to the same censorship requirements as television programming and must consist of mainly domestic programmes.

Radio station licensing

Radio stations are also subject to a licensing regime administered by a bureau of the MIIT. Provincial radio management bureaux are responsible for licensing stations that have a broadcast range limited to one province. If the broadcast range covers more than one province or crosses a provincial border, then the licence must be issued at the national level.

These rules and regulations are silent on the fees payable and time scale for licensing. Generally speaking, in practice, no fees are required for the filing of an application and the time required for processing each type of application varies.

Foreign programmes and local content requirements

20 | Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Since 2004, Chinese television stations are permitted to broadcast foreign television programmes. Foreign television programmes include films and television dramas and animated programmes, and other programmes of an educational, scientific or cultural nature. A maximum of 25 per cent of a broadcaster's daily airtime for films and television dramas may be allocated to foreign-produced films and television dramas.

Foreign-produced films and television dramas may not be broadcast during peak time (7pm to 10pm). The permissible airtime for other foreign television programmes may not exceed 15 per cent of a station's total broadcasting time per day.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The Chinese Advertisement Law (the Advertisement Law), which was last amended in 2018, is the primary legislation on advertising in China. It contains the principle rules for making commercial advertisements in China. These principle rules include that the content of commercial advertisements shall:

- be true and contain no false or misleading information;
- be healthy and fit for Chinese culture, and respect public interest in China;
- be recognisable as an advertisement; and
- not devalue competitors' goods or services.

Under the Advertisement Law, a number of administrative measures are enacted to set out detailed rules for advertising in relation to pharmaceuticals, medical devices, food, health foods, animal remedies and agricultural chemicals.

The Administrative Measures for Broadcasting TV and Radio Advertisement issued by the SAPPT (now NRTA), effective in 2010 and its supplementary provision, effective in 2012, set out specific rules on broadcasting TV and radio advertisements. These specific rules include:

- the broadcasting of advertisements must not affect the integrity of the broadcasting of TV and radio programmes;
- the length of the advertisements must not exceed 12 minutes per hour except that, during peak times (being 11am to 1pm and 7pm to 9pm);
- the length of the advertisements must not exceed 18 minutes per each programme;
- the broadcasting of advertisements must respect public interest, for instance, advertisements for pharmaceutical products or medical devices for skin diseases, haemorrhoids, urination diseases, etc, must not be broadcast during lunch or dinner time; and
- radio and TV stations must make channels for the audience to report on illegal or improper advertising available.

Moreover, the Chinese Internet Advertisement Measure (the Internet Ad Measure) came into effect on 1 September 2016 and covers specific issues in relation to posting advertisements online. Under the Internet Ad Measure, the following advertising activities are restricted:

- advertising on the internet must be recognisable and, in particular, paid search engine advertisement must be separate from 'natural' search results;
- the posting of advertisements must not interfere with the normal internet browser, including, in particular, pop-up advertisements or the like must clearly show the 'shut-down' button and be capable of being shut down in one click;
- no advertisement is allowed to deceive users into clicking on a link; and
- including an advertisement in an email without permission from the sender is prohibited.

Additionally, the following activities are not allowed:

- blocking, screening, covering or fast-forwarding advertising duly displayed by others by using applications, devices, etc, or to provide facilities for the same;
- replacing others' advertisements with own advertisements via networks, devices, applications, etc; or
- gaining unfair benefits or infringing others' interest by using false statistics or giving out incorrect price quotes.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There is no regulation requiring radio or TV stations to broadcast any mandatory content. However, as a practical matter, because all radio and TV stations are state owned, they broadcast official news reports every day.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

The Administrative Rule on Internet Audio and Video Products issued by the SAPPT(now NRTA), effective in 2008 and amended in 2015 and the Administrative Rule on Private Internet and Directional Broadcasting Audiovisual Programme issued by SAPPT (now NRTA) govern the delivery of content on new media such as the internet, local area network, VPN, IPTV and mobile networks. Generally speaking, the rules applicable to delivery of content on new media are not very different from those applicable to traditional media. Specifically, the following rules apply:

- illegal or immoral content may not be delivered;
- with respect to the delivery of political news and commentaries, only programmes produced by TV and radio stations at district or city level or higher, or carried on China Central TV's website, may be delivered; and
- audio and video providers may not allow individuals to upload any political news or commentaries.

On 30 June 2017, China Netcasting Services Association (CNSA) issued the General Rules for Internet Audio-Video Content Censorship, which provide detailed rules for examining contents transmitted online. On 9 January 2019, CNSA also issued a Management Specification for Network Short Video Platform and the Standard Rules for Network Short Video Content. These rules are not sources of law but bind CNSA members as self-disciplinary rules.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Digital television was launched in China in 2003. The original plan was that analogue services would be switched off in 2015, but this was later postponed to 2020. The SAPPT (now NRTA) is to install modems that switch digital signals to analogue signals in every home where traditional televisions are still used and the SAPPT (now NRTA) ordered, before said task is achieved, at least six analogue channels will be made available to the audience free of charge. The delay in switching off means that analogue services will continue occupying the 700MHz radio frequency.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

Specific licence terms and directions from regulators will prescribe the use that may be made of the allotted spectrum.

Media plurality

26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Media plurality is not a concept available in China. On the contrary, as a policy, media in China are encouraged to follow the 'main theme' (meaning pro-establishment) and promote 'positive energy' (meaning merits).

Key trends and expected changes

27 | Provide a summary of key emerging trends and hot topics in media regulation in your country.

Alongside the implementation of the Cybersecurity Law, the government strengthened the censorship of online content, especially against content posted on social media platforms. A number of government actions include:

- social media platform operators are ordered to review the content posted by users and to block illegal content and shut down those accounts that are routinely used for posting illegal content; and
- social media platform operators that do not have a licence to transmit audio and video products are ordered to shut down the channels by which individuals can upload audio and video products for public broadcast.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 | Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

In the Chinese regulatory regime, the MIIT regulates the telecoms business, including BTS and VATS. The NRTA regulates the media business, including the traditional publication business and the publication of audio and video products. The convergence of internet, mobile networks and cable TV networks created conflict in jurisdictions between MIIT and the NRTA, both of which claimed to have powers to operate IPTV business and other businesses involving a converged network. The conflict was preliminarily resolved in 2013 when the State Council directed that the MIIT must focus on the regulations of the channels for content and the SAPPT (now NRTA) must focus on the regulation of the content itself.

Before China's national institutional reform in March 2018, the antitrust regulators in China were the Anti-monopoly Bureau under the MOFCOM, which is responsible for merger control, the State Administration for Industry and Commerce (SAIC), which is responsible for non-price-related violations of the antitrust law, and the National Development and Reform Commission (NDRC), which is responsible for price-related violation of the antitrust law. After national institutional reform in China, MOFCOM and NDRC survived but were released of any antitrust powers. SAIC was integrated into the State Administration for Market Regulation (SAMR) and SAMR will act as the sole antitrust authority in China. The competition regulatory regime is separate from other industry regulatory regimes such as communications or media.

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Appeal procedure

29 | How can decisions of the regulators be challenged and on what bases?

Generally speaking, there are two ways to appeal on an administrative decision, either from the MIIT (or its local counterparts) or the NRTA (or its local counterparts): one is administrative review and the other is judicial review.

In brief, an administrative review is an internal procedure under which a decision of an authority exercising administrative powers is reviewed at a more senior level within the authority or by a higher competent authority. The review is designed to be an evaluation of the legality and 'appropriateness' of the administrative decision. The review can cover a number of specified administrative acts, including the amount of a fine, revocation of a licence and suspension of business.

A judicial review is a review by the courts. The review focuses more on legality (both from procedural and substantive aspects) but seldom covers 'appropriateness', as the administrative system is considered to have broad discretion in making decisions.

For some cases, administrative review must be pursued before applying for judicial review and for some cases, you can either apply for administrative review first and then file a lawsuit if you are unsatisfied with the decision of administrative review, or you can apply for judicial review directly.

Competition law developments

30 | Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The Chinese Antitrust Law sits on three pillars: merger control; prohibition on market abuses; and prohibitions on monopolistic agreements. Currently, cases in the communications and media sectors are limited because the antitrust law enforcement focuses on traditional business. However, the Chinese government has started to pay more attention to the unfair competition and antitrust issues in new media areas. A 'seminar on fair competition and antitrust in the digital economy era' was held at the end of 2018. SAMR, some anti-trust experts and the representatives from the judicial system and universities attended this seminar.

Cyprus

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The Telecommunications Services Law (Cap 302) used to be the principal legislative act in the communications sector in Cyprus from 1954 to 2003. During this time, the market was operating on a monopoly basis by the Cyprus Telecommunication Authority (CYTA). CYTA was, thus, both the regulator and the sole service provider for telecommunications in Cyprus.

With the accession of Cyprus to the EU and the following liberalisation of the market, the Law on the Regulation of Electronic Communications and Postal Services No. 112(I)/2004 (RECPS Law) was enacted. The RECPS Law implemented the EU regulatory framework in Cyprus. It also established the Office of the Commissioner of Electronic Communications and Postal Regulation (OCECPR) as the new national regulatory authority for the communications sector. The Commissioner is appointed by the Council of Ministers for a period not exceeding six years and heads the office.

The Commissioner can adopt regulations setting out rules for specific matters by virtue of powers delegated to him or her by the RECPS Law.

There are no rules restricting foreign ownership that apply to communications services.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

According to Order No. 851/2004 of the OCECPR, a general authorisation is sufficient for any activity of electronic communications that concerns the creation, installation, operation, administration, exploitation and provision of networks or services of electronic communications, except where individual numbers are required, or radio frequencies are involved.

In accordance with section 38 of the RECPS Law, a person who wishes to provide an electronic communications network or an electronic communications service is required to notify the Commissioner, providing among others the following information: the name of the notifying undertaking, including in the case of a body corporate, the company registration number, the names, addresses and contact numbers of relevant contact persons, a short description of the network or service, and the estimated date of commencement of the service.

Applicants must be established legal entities in Cyprus. According to section 40(1) of the RECPS Law, an undertaking operating pursuant to a general authorisation may:

- provide electronic communications networks or services, as described in its notification; and
- apply for the necessary rights to be granted by the competent authorities, including the Commissioner, to install facilities on, over, or under public or private property for the purposes of providing public communications networks or electronic communications networks other than those supplied to the public.

Regarding fees, in the case of new applicants, in relation to which no income information is yet available, there is a minimum initial fee of €850 for registration. The OCECPR may consider any income projections submitted with the application.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Rights for the use of radio frequencies do not fall within the scope of general authorisation granted by the OCECPR and require separate authorisation by the Department of Electronic Communications of the Ministry of Transport, Communications and Works. The relevant law is the Radiocommunications Law No. 146(I)/2002.

This department is responsible for the development of the National Frequency Plan, authorisation for the use of radio spectrum and monitoring of spectrum usage. Once frequencies are allocated, the service provision is subject to the Commissioner's power and regulation.

The Director of the Department of Electronic Communications of the Ministry of Transport, Communications and Works defines by Order the framework under which authorised undertakings may transfer or lease their personal rights of use of spectrum in the zones defined by the European Commission. Nevertheless, he or she must ensure that competition is not distorted by any transfer or accumulation of rights of spectrum use.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The Commissioner can impose ex-ante regulatory obligations to undertakings that have been defined as having a dominant position in a market. The definition of an undertaking having a dominant position in a market follows the finding by the Commissioner that in a relevant market there is absence of effective competition. The relevant markets, as well as the procedure of specifying further relevant markets, and the process of analysing the status of competition in a relevant market is outlined by the Commissioner in relevant Orders.

Subsequently, the Commissioner proceeds with the imposition of reasonable regulatory obligations that are proportionate to the following aims:

- the promotion of competition in the provision of networks and services of electronic communications and relevant facilities and services by:
- ensuring that users, including disadvantaged users, earn the largest benefit as regards choice, price and quality;
- ensuring that there is neither distortion, nor limitation of competition in the field of electronic communications; and
- encouraging effective investments towards infrastructure, supporting innovation and encouraging effective use, and ensuring the substantial management of numbering sources; and
- contribution to the development of the internal market.

In August 2016, the Supreme Court of Cyprus on review of an earlier decision confirmed the annulment of OCECPR's Order dated 10 June 2011. The Order targeted CYTA and concerned ex-ante regulatory obligations in relation to CYTA's operation in the market of publicly available local or international calling services provided under fixed connection to household and non-household consumers.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

According to article 60A of the RECPS Law, when the Commissioner finds that the obligations of transparency and impartiality fail to ensure the effective competitiveness and that significant long-term competition problems or market failures persist with regard to the wholesale supply of certain access products, he or she may, as an exceptional measure, impose an obligation on vertically integrated undertakings to transfer activities related to the wholesale provision of related access products to an operational unit that works independently.

This operational unit will provide access products and services for all operations, including other operational units of the parent company, with the same time limits, terms and conditions, including those that concern price levels, as well as through the same systems and procedures. If the Commissioner intends to impose an obligation of functional separation, he or she must submit an application to the European Commission.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

According to article 108 of the RECPS Law, the OCECPR ensures that basic services are provided to all final users in Cypriot territory, in the qualitative level that is defined, towards all users, irrespective of their geographic location, and considering the particular national circumstances, at an affordable price. These services constitute collectively the concept of universal service in Cyprus.

The Commissioner determines by Order one or more undertakings who will be subject to the obligation to provide universal service for a specific time. In case the above-mentioned undertakings request financing for the net cost of their obligations, they may submit a written application to the Commissioner. The application must be accompanied by all the supporting information that can be reasonably requested by the Commissioner to prove that the costs create an unfair burden.

Currently, the provision of universal service constitutes an obligation of CYTA, which has been designated as the provider of universal service by virtue of a relevant Order by the Commissioner.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

Where it is deemed by the Commissioner to be necessary to grant individual rights to use numbers from the Numbering Plan of the Republic of Cyprus, these rights are provided by decision of the Commissioner following a written request according to the procedures described in a relevant Order issued by the Commissioner. The Commissioner will issue rights of use for numbers or a series of numbers to providers of electronic communications networks or services for their own use and for further allocation to their subscribers.

When adopting a decision, the Commissioner shall take into consideration international numbering regulations and shall ensure adequate flexibility in the Numbering Plan of the Republic of Cyprus to establish a numbering plan that may facilitate the introduction of new electronic services, the permanency of numbering arrangements and the provision to rights of use of numbers in a non-discriminatory and transparent manner. The Commissioner shall ensure the publication of open, transparent and non-discriminatory procedures for the provision of rights of use.

Telephone numbers in Cyprus adopted a closed telephone numbering plan on 1 December 2001. As a result, for landline phone numbers the digit 2 followed by the old area code was affixed to the subscriber number, and for mobile phones 9 was affixed to the phone number. The plan is also used in Akrotiri and Dhekelia.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

Customer terms and conditions for the provision of electronic communications networks and services are subject both to general consumer protection legislation and to sector-specific regulation and particularly to the General Authorisation Regulation of the OCECPR, which defines the minimum content of such terms and conditions.

Net neutrality

9 | Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Cyprus adopted a bill transposing the requirements on penalties in Regulation (EC) No. 2015/2120 at the beginning of 2016 and notified these measures to the Commission on 26 April 2016, just before the deadline of 30 April 2016. In particular, the law lays down penalties for infringements of articles 3, 4 and 5 of the Regulation. Maximum fines would be €170,000 for any infringements of these articles. As in the rules on roaming, these fines can be doubled for recurring offences and the OCECPR can withdraw the general authorisation of the offending provider. Secondary legislation supporting the implementation of the transparency measures was published on 3 March 2017. The OCECPR has the necessary powers to monitor and enforce open internet provisions.

There are no ongoing net neutrality investigations.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no legislation or regulation specifically addressing digital platforms.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The current regulatory framework is supporting investments in NGA networks, on the basis of a combination of symmetric and asymmetric regulatory measures.

Symmetric regulatory measures include:

- co-installations, including channels and webs;
- rights of way; and
- in-building wiring, supported by tools such as GIS mapping, and the coverage map of broadband networks and services provided per provider.

Asymmetric regulatory measures include:

- bit stream access (including the obligation for multicasting);
- leased lines (including backhaul from terminal stations of international underwater cables); and
- virtual access.

Moreover, a framework exists for the installation of radio stations (webs and antennas) to facilitate the deployment of wireless networks. Through this framework, overlapping of responsibilities is avoided, the transparency and effectiveness of the installation procedure authorisation and operation of radio stations is ensured, and public health is protected.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

In Cyprus, data protection is governed by the Processing of Personal Data (Protection of Individuals) Law of 2001, which transposes the provisions of EU Directive 95/46/EC.

In addition, the RECPS Law sets out certain provisions in relation to data protection in the communications sector. Section 98A stipulates that the provider of publicly available electronic communications services must take the necessary technical and organisational measures to safeguard the security of its services. In light of the Processing of Personal Data Law of 2001, these measures must at least:

- ensure that access to personal data can be granted only to authorised staff for strictly legally approved reasons;
- protect stored or transferred personal data from accidental or unlawful destruction, accidental loss or alteration and from non-authorised or unlawful storing, processing, access or publication; and
- ensure the application of security policy in relation to the processing of personal data.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Towards the aim of cybersecurity, several specific actions and policies have been promoted on the national level:

- in 2006, the Ministry of Communications and Works approved a policy document, through which a number of specific actions in the area of network and information security are promoted, via OCECPR: the formation of Computer Emergency Response Teams (CERTs and CSIRTs), the creation of an institutional framework for the security and integrity of information infrastructures, and the raising of awareness of all stakeholders and Cypriot society about relevant security matters;
- in 2010, upon recommendations by OCECPR that were received favourably by the European Union Agency for Network and Information Security (ENISA), the Ministry of Communications and Works approved a detailed policy document regarding the operation of a governmental and an academic CERT. The Cypriot CERTs are being formed with the extension potential to cover the private business sector at a later stage. The founding of the CERTs has been formalised via secondary legislation PI358/2010; and
- in 2012, new provisions were introduced into the RECPS Law that stemmed from the new EU Regulatory Framework for Electronic Communications and that covered matters related to network and information security.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There are currently no specific laws or regulations in place that govern big data in Cyprus.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Section 9 of the Processing of Personal Data Law of 2001 provides that transmission of data that has undergone processing or is intended for processing after its transmission to any country shall be permitted after a licence from the Office of the Commissioner for Personal Data Protection. The Data Protection Commissioner shall issue the licence only if he or she considers that the said country ensures an adequate level of protection. For this purpose, the Commissioner must take into consideration the nature of the data, the purposes and duration of the processing, the relevant general and special rules of law, the codes of conduct and the security measures for the protection of data, as well as the level of protection in the countries of origin, transmission and final destination of the data.

The transmission of personal data to a country that does not ensure an adequate level of protection is permitted exceptionally after a licence from the Data Protection Commissioner, subject to several strict conditions.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Cyprus has successfully exploited its strategic location to establish an attractive international business centre with global connections. This is partly owing to the support of an advanced communications infrastructure.

Cyprus has a fully digital network with reliable high-speed international connectivity via eight fibre optic submarine cables, including the world's longest optical submarine telecommunications cable, SEA-MEWE-3, which links directly with South East Asia, the Middle East and the rest of Western Europe. Fixed broadband coverage is provided universally, and competition among various cable and DSL operators has resulted in a good offering of high-speed and cost-effective broadband access services throughout the island.

A key development in support of Cyprus' digital strategy is the creation of the country's first-ever Science and Technology Park (STP) in Pentakomo, near Limassol. The project will create applied research and development centres as well as office and support facilities tailored for science and technology companies.

The planned STP provides strategic investors with an interesting opportunity to finance, design, build and manage a landmark project.

Global demand for bandwidth is growing at an incredible 40 per cent per year, with key drivers being the increase in cloud computing, data transfer and storage, as well as the Internet of Things (IoT). As more data and applications are allocated to the cloud, global cloud IP traffic is expected to quadruple by 2019, according to Cisco's 'Global Cloud Index: Forecast and Methodology, 2014–2019'.

In addition, global data centre IP traffic is set to grow threefold over the next five years, as more companies begin utilising data centres to cut costs and streamline workflows. This in turn will increase the demand on networks to ensure seamless and secure transfers between data centres and business locations. The more connected devices that hit the market, the greater the need for bandwidth. A recent report from McKinsey revealed that IoT could have a potential annual economic impact of between US$4 trillion and US$11 trillion by 2025 for factories, large retail operations and cities.

Lastly, recognising that the information and communications technology (ICT) industry is a catalyst to increase productivity and economic growth, Cyprus launched its 'Digital Strategy' in 2012, which is in line with the Digital Agenda for Europe and promotes the use of ICT in all sectors of the economy.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

Broadcasting in Cyprus is regulated by the Radio and Television Broadcasters Law of 1998 (the Law). The Law has been amended accordingly to transpose Directive No. 2010/13/EC (the Audiovisual Media Services Directive, AVMS Directive) to national legislation.

The Cyprus Radio Television Authority (CRTA) is the independent body responsible for the regulation and control of radio and television matters. For the better application of the Law, the CRTA has issued the Radio and Television Stations Regulations of 2000. The regulations relate, among others, to the licensing, structure and monitoring of television or radio broadcasts.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

According to section 16 of the Law, a licence for a broadcasting service can be granted only to the following operators:

- a company registered under the Companies Law or a corresponding law of an EU member state;
- a general or limited partnership registered under the General and Limited Partnerships Law or a corresponding law of an EU member state;
- a legal person of public law that has been incorporated in the Republic or an EU member state; or
- a natural person who is a national of the Republic or a national of an EU member state (only for the operation of a television broadcaster of small local coverage).

An EU national or a company registered under a law of an EU member state must fulfil all the terms and conditions in force for a Cypriot national or company, and maintain a stable and effective link with the economy of an EU member state. Regarding companies specifically, they must maintain their place of business in an EU member state and be registered in the register of the Registrar of Companies of the Republic.

An alien can only acquire company shares not exceeding 5 per cent of its total share capital, while the share capital of a company that belongs to aliens cannot exceed 25 per cent of its total share capital.

In relation to cross-ownership of media companies, section 19(4)(a) of the Law prohibits the granting of a licence for a radio broadcaster to a natural person or company, holding or controlling in any way a share percentage over 5 per cent in a publishing house, newspaper or magazine, or a percentage over 5 per cent in a television broadcaster of national coverage. The provision applies, vice versa, to television broadcasters.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The CRTA Regulations of 2000 have been issued by virtue of section 51 of the Radio and Television Broadcasters Law, and they set out rules pertaining, among others, to the licensing of broadcasters.

According to section 3 of the CRTA Regulations, a licence application must be submitted to the CRTA and is made up of three parts: a description of the applicant, the proposed service and the proposed technical means and financing. The CRTA in its evaluation takes into consideration factors such as the resume of the directors and staff; the goals of the proposed service and the means to achieve them; the quality, length, content and type of the programmes; and the financial viability of the broadcaster.

An application is evaluated as complete, incomplete or not satisfactory. In case of the latter, the application is rejected. The applicants of incomplete applications are informed in writing by the CRTA and are obliged to send additional information in a month from the date of receipt of the letter by the CRTA.

Irrespective of the outcome, the fees payable for applications for licence are not returned and they are the following:

- for a television broadcaster of national coverage: €5,100;
- for a television broadcaster of local coverage: €850;
- for a radio broadcaster of national coverage: €3,417;
- for a radio broadcaster of local coverage: €1,708.60; and
- for a radio broadcaster of small local coverage: €341.72.

A licence is valid for a period of 10 years in the case of a television broadcaster and for a period of seven years in the case of a radio broadcaster.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

According to section 27 of the Radio and Television Broadcasters Law, the majority of television broadcasting time must be reserved for European works, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping. In addition, at least 10 per cent of transmission time – excluding the above – or 10 per cent of programming budget must be reserved for European works created by producers who are independent of television broadcasters.

These principles apply similarly to audiovisual media services providers offering on-demand services (non-linear). Section 3(2)(a) of the Law stipulates that the said providers must promote, where practicable and by appropriate means, the production of and the access to,

European works. Towards that end, they must include, at any moment, in the list of works accessible to consumers, titles of European works at a percentage of at least 20 per cent.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Television advertising and teleshopping is broadly regulated by the Law and it follows the guidelines of the AVMS Directive.

Section 33(2) provides for the timing of television advertising or teleshopping and introduces minimum intervals of thirty minutes between commercials and transmission of films, news programmes and children's programmes. In any case, television advertising cannot exceed 20 per cent of the time within a given clock hour.

Television advertising during religious services is prohibited. The same applies to the advertising of medicinal products and medical treatments available only on prescription or subject to a marketing authorisation, as well as to broadcasts of programmes on gambling and online casino games.

Aiming to protect socially sensitive groups, the Law also contains restrictive provisions with regard to the advertising of alcoholic beverages, children's toys, betting and gambling shops, and tele-services spots of inappropriate content.

Finally, there are provisions targeted at political advertisements. Paid political advertisements must be clearly distinguished as such by use of an optical and acoustic warning. Television or radio broadcasters must offer political advertisements subject to the same economic or other conditions to all candidates, and the total available time for political advertisements throughout the pre-election period for each candidate must not exceed 100 minutes.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There are no must-carry rules in Cyprus.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

Section 14(f) of the Law provides for a special type of media service providers' licence, in respect of video-on-demand services that provide audiovisual services by choice.

Part VIIIA of the Law entails provisions applicable only to on-demand audiovisual services. The provisions focus on the protection of minors from content that could impair their physical, mental or moral development and on the requirement for inclusion of European works in the list of works accessible to consumers.

During his speech at the 27 November 2017 workshop on fake news, the then Governmental Spokesperson of Cyprus, Nicos Christodoulides, claimed that the government was preparing a new legal framework, which could be completed in the first months of 2018. According to the Spokesperson, the new legal framework would provide for the registration of the whole media scene in a register, covering the internet as well, to tackle the spreading of fake news. Since then there has not been any concrete alteration to the above.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The Republic of Cyprus switched over to digital broadcasting on 1 July 2011 and all broadcasters ceased their analogue transmission.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

There are no restrictions as to how a broadcaster can use their spectrum.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

One of the assessment criteria of applications submitted for the granting of a licence is the ability and the commitment of the applicant to ensure pluralism in their programmes and broadcasts, and the greatest possible access thereto.

Section 26 of the Law provides that the broadcasts of each licensed television or radio broadcaster must be governed by the principles of objectivity, completeness and timeliness of information, high quality, plurality and the greatest possible access of the public and its bodies and respect to the personality, repute and private life of the individual. Additionally, the principles of respect to the ideals of democracy and human rights and of safeguarding the national identity and cultural heritage of the people of Cyprus are mentioned.

Among the responsibilities of the CRTA is to draw up a report every three years on the development of pluralism in media service providers, which it must submit to the Council of Ministers and House of Representatives, and a summary of which must be published in at least two daily newspapers.

The Media Pluralism Monitor, which is a tool that has been developed by the Centre for Media Pluralism and Media Freedom, found that in 2016 the state of freedom of expression and media pluralism in Cyprus was rather positive. However, it observed that while media are generally independent from political control, they frequently reflect the owners' political agendas and they are vulnerable to increasing influences by commercial interests.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

There have been no changes in the media regulatory framework in Cyprus since the digital switchover in 2011. However, the Ninth Constitutional Amendment No. 69 (I)/2016, which allows interference with privacy in the interest of transparency and the fight against corruption, could have an effect on the way media access sources and report information.

Furthermore, as mentioned above, the Governmental Spokesperson had proclaimed in November 2017 the preparation of a new legal framework regarding media. There has been no further update on the issue to date.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The CRTA is the regulatory body for radio and television broadcasts in Cyprus. The OCECPR is the competent authority for the communications sector.

The communications regulator (OCECPR) is a separate body from the broadcasting (CRTA) or antitrust regulator. The independent authority responsible for the latter is the Commission for the Protection of Competition (CPC), which has the exclusive competence for the harmonious operation of the market, within the rules of fair competition.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

The CRTA, OCECPR and CPR are all independent authorities, and as such, their decisions take effect without any other approval. They are subject only to judicial review by virtue of section 146 of the Constitution of the Republic of Cyprus (as amended by the Eighth Constitutional Amendment 130(I)/2015), which provides the possibility for recourse to the Administrative Court in case an administrative decision, act or omission is deemed contrary to the Constitution.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The CPR decided on 29 May 2017 that the acquisition of the share capital of TeleSign Holdings Inc by the telecommunication services company Belgacom International Carrier Services SA was compatible with the operation of the competition in the market, and hence, it did not oppose the notified concentration.

On 1 February 2018, the Administrative Court decided on case No. 488/2014 whereby it rejected the CYTA recourse against the CPR, thus validating the decision of the CPR dated 26 February 2014. The latter decision concerned the €390,000 fine of the CYTA. The fine came as a result of anticompetitive practices by the CYTA, and in particular the blocking of overpriced calls from users of prepaid mobile telephony to the detriment of consumers.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The regulatory framework for the communications sector is laid down by Act No. 127/2005 on Electronic Communications and the change of related laws (Act on Electronic Communications) as amended. The Act on Electronic Communications fully implements the EU regulatory framework into Czech law.

The main purposes of the regulation imposed by the Act on Electronic Communications are:

- to substitute for any missing effects of economic competition;
- to provide conditions for appropriate functioning of economic competition; and
- to provide conditions for the protection of users and other market actors until a fully competitive environment is achieved.

The Ministry of Industry and Trade is the relevant governmental department responsible for the telecoms and media sector. However, the Czech Telecommunication Office (CTO) is the Czech National regulatory authority.

There are no foreign ownership restrictions applicable to communication services.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Regardless of whether the services are fixed, mobile or satellite, the Czech law imposes on natural and legal persons who intend to perform communication activity, which constitutes business activity in electronic communications, the obligation to comply with the general terms and conditions laid down by the Act on Electronic Communications, which are as follows:

- for natural persons, to be over 18 years of age;
- for natural persons, full legal capacity; and
- for natural and legal persons, integrity.

In addition to the general terms and conditions, natural and legal persons who intend to perform communication activity are obliged to notify the CTO thereof in writing in advance by delivering a properly and fully completed 'Notification of communication activity' form. This must be done in the Czech language. Natural and legal persons have to send the completed 'Notification of communication activity' form to the regional department of the CTO, depending on the address of the place of business of a natural person or the registered office of a legal person. The CTO issues the person who provided notification of communication activity with a certificate to confirm that this person has submitted notification within one week of the date of delivery of notification. It also assigns to the natural person an identification number, if one has not already been assigned.

Authorisation to undertake business is established for the notifying person on the date of delivery of complete notification of communication activity, which is deemed as business activity in electronic communications that meets the particulars laid down in the Act on Electronic Communications.

Natural and legal persons pay administrative fees into the income account of the regional department of the CTO, depending on the place of residence of the natural person or the registered office of the legal person at which it provides notification of communication activity. All contact data required for the payment of administrative fees is provided to the business undertaking by the locally competent regional departments of the CTO. An administrative fee of 1,000 koruna is collected for the issue of a certificate of notification of communication activity.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The CTO generally specifies the permitted use of the allocated spectrum either by general authorisation or by individual licences.

General authorisation is a measure of a general nature issued by the CTO that determines the conditions of undertaking communication activities relating to all or certain types of electronic communication networks and services and to operating devices. The CTO is authorised to issue general authorisation for the use of radio frequencies for which no individual licence needs to be awarded.

Radio frequencies that cannot be used based on the general authorisation can only be used based on individual authorisation to use radio frequencies, unless the law provides otherwise.

An entity holding an authorisation for the use of radio frequencies may transfer the authorisation or lease rights arising from the authorisation to another entity, unless otherwise stated in the decision on granting the authorisation for the use of radio frequencies.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

As of April 2019, the following markets are subject to ex-ante regulation by the CTO:

- wholesale voice call termination in fixed, publicly accessible telephone networks; and
- wholesale voice call termination in mobile, publicly accessible telephone networks.

For both of these markets, the CTO may impose on undertakings the following remedies under conditions specified in the Act on Electronic Communications:

- non-discrimination;
- transparency;
- accounting separation;
- access to network facilities and network functions;
- price control and cost accounting for access;
- structural or functional separation; and
- interconnection.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

The Act on Electronic Communications empowers the CTO, subject to the previous approval of the European Commission, to require a vertically integrated company to separate or transfer its activities related to the provision of wholesale access services to a separate business unit (imposing a functional separation obligation). The Act on Electronic Communications also allows the company to undertake a voluntary functional separation.

The term 'structural separation' is used in the Act on Electronic Communications for a related topic: the undertaking providing public communications networks or publicly available electronic communications services, which possesses special or exclusive rights in respect of the provision of services in other industries in the Czech Republic or in another member state of the EU, shall (i) maintain separate cost and revenue accounting in respect of the activities relating to the provision of those networks or those electronic communications services, or (ii) provide structural separation of the activities associated with the provision of those networks or those electronic communications services.

However, structural separation obligation does not apply to an undertaking whose annual turnover in the activities associated with the provision of networks or publicly accessible electronic communications services is lower than €50 million expressed in koruna.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Under the Act on Electronic Communications, universal service is a minimum set of services that is available under the same conditions to all users at an affordable price and in the set quality. Universal service is defined at a European level by the Universal Service Directive, which has been transposed in the Czech Republic in the Act on Electronic Communications.

Within the universal service, the CTO may impose on undertakings the obligation to provide the following services:

- connection at a fixed point to the public telephone network;
- access at a fixed point to the publicly available telephone service;
- regular issuance of telephone directories containing the numbers of the subscribers to the publicly available telephone service, and end users' access to those directories;
- telephone directory enquiry service, available to end users, to provide information about the telephone numbers of the subscribers to the publicly available telephone service;
- public pay telephone services;
- access for disabled persons to the publicly available telephone service at the same level of quality as the access enjoyed by all other end users, based on, in particular, specially provided terminal equipment; and
- additional services to those referred to in clauses (i) and (ii) in question 5; such additional services being:
  - phased payment of the price for the establishment of connection to the public telephone network for consumers;
  - free selective barring of outgoing calls for the subscribers, the sending of premium text or multimedia messages or, where technically feasible, access to similar high cost services or calls to specified subscriber number types;
  - free itemised billing of the price for consumers;
  - providing information at the request of the participant on lower prices or more favourable pricing plans and the conditions under which they are applied when such information is available; and
  - controlling party expenses associated with the use of publicly available telephone services, including free notification to the consumer in the event of unusual or excessive use of this service.

One part of a universal service, the obligation to provide 'special prices' is also imposed, allowing people with special social needs to choose prices or price plans that differ from the price plans provided under normal commercial conditions so that such people have access to and can use partial services and a publicly available telephone service.

The universal service between 2006 and 2009 was financed from two sources: the universal service fund and the state budget. The state budget has been the only source of financing since 2010.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

As regards the number allocation scheme, the CTO administers numbers for electronic communication networks and services using a numbering plan to ensure the administration and purposeful use of numbers, sequences and costs, addresses and names (with the exception of internet addresses) (hereinafter referred to as 'numbers'). The numbers from numbering plans may only be used based on authorisation to use numbers.

Based on an application lodged with the CTO, the CTO decides on the awarding of authorisation to use numbers to any business undertaking providing a public communication network or providing a publicly available electronic communication service according to general authorisation or using such network or service in accordance with the terms and conditions ensuring the purposeful use of numbers. In the case of authorisation to use numbers connected to private communication networks, the CTO is also authorised to award such authorisation to a legal person that is not a business undertaking according to the first sentence of this paragraph. In the case of harmonised European numbers, the CTO decides on the award of authorisation to business undertakings that provide a public communication network or provide a publicly available electronic communication service or to a legal person not undertaking business whose activity corresponds to the purpose for which these numbers are reserved.

Concerning the number portability regime, an undertaking providing a public communications network or providing a publicly available electronic communications service is obliged, on request, to let subscribers retain their numbers when changing services providers, both in the case of geographical telephone numbers within the specified area and in the case of non-geographical telephone numbers anywhere in the territory of the state.

This obligation does not apply to telephone number portability between fixed and mobile public telephone networks.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

The Act on Electronic Communications sets out a large number of essential requirements that all the contracts for the provision of a publicly available electronic communications service or connection to a public communications network must contain (eg, detailed information about the prices, information about the dates and methods of billing and payment, information about end user rights, the validity period of the contract and the period for its withdrawal, contractual fines, etc).

The Act on Electronic Communications does not explicitly limit the form or the extent of the contractual documentation. It only stipulates that in the relevant agreement, all the statutory requirements must always be provided in a comprehensible, complete and easily accessible manner.

Besides the Act on Electronic Communications, generally applicable consumer protection legislation will also apply in the communications sector. This would most importantly include Act No. 89/2012, the Civil Code, as amended, and Act No. 634/1992, on Consumer Protection, as amended.

Net neutrality

9 | Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

As of 30 April 2016, the provisions of the TSM (Regulation of the European Parliament and of the Council (EU) No. 2015/2120) entered into force, which lays down measures concerning open internet. On 30 August 2016, the Body of European Regulators for Electronic Communications (BEREC) issued 'BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules'.

In relation to the above-mentioned, in the Czech Republic (whether by the CTO or other public administration body) no additional requirements regarding transparency or provision of information have been set to providers of internet access service after the entry into force of the TSM. However, on 23 March 2017, the CTO published a document ('Statement of Czech Telecommunication Office to selected questions on open internet access and to European net neutrality rules') in which it explains its approach to the application of selected rules, which, according to the BEREC Guidelines, require individual assessment by national regulators. In particular, it concerns specification of data transmission speeds and of significant continuous, regularly recurring deviations (in both fixed and mobile networks). However, this document is not legally binding.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There are no specific regulations yet or any enforcement initiatives relating to digital platforms in the Czech Republic.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are no specific regulations regarding obligations applicable to NGA networks. The CTO expects that the regulatory framework will be created on the EU level and then implemented in coordination with various international and national partners. The CTO will aim to ensure the accessibility of the radio spectrum and the unification and optimisation of the conditions of use.

Between 2013 and 2016, the CTO conducted a national broadband mapping exercise to map the existence of the NGA infrastructure.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The Act on Electronic Communications details a set of specific data protection rules applicable to the communications sector, while the rights and obligations relating to personal data protection not regulated in this Act are subject to the general regime under Regulation (EU) 2016/679 of the European Parliament, the General Data Protection Regulation and a new Data Processing Act, which was submitted for publication in the Collection of Laws on 16 April 2019. The Act on Electronic Communications governs, inter alia, the company's obligation to secure the protection of personal, traffic and location data and the confidentiality of communications or its information duties.

However, the CTO does not have any regulatory competence in this area. The authority responsible for enforcement of obligations in personal data protection in the Czech Republic is the Office for Personal Data Protection.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The area of cybersecurity is governed by Act No. 181/2014, on Cyber Security and Change of Related Acts, which regulates the rights and obligations of natural and legal persons and competence and power of public authorities in the field of cybersecurity. The Act on Electronic Communications then does not provide for a specific cybersecurity regime applicable to the communications sectors.

As for network security, the Act on Electronic Communications sets out the rules governing security and integrity of the electronic communications networks and services. In this part the Act imposes an obligation on the undertaking providing the public communications network to ensure the integrity and security of its network. In this regard, the undertaking is obliged to implement network plans issued by the CTO.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Apart from the General Data Protection Regulation, there is no specific legislation or regulatory initiative concerning big data in the Czech Republic. Nevertheless, the Office for Personal Data Protection is aware of the fact that it will have to devote more attention to this regulatory area owing to its high-risk potential for misuse.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no such laws or regulations in the Czech Republic.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The CTO has announced that it is preparing a new auction of broadcasting right to frequencies 700MHz for cellular networks and 3.5GHz for internet connection. The auction should take place in the second half of 2019 and the winners should be announced in 2020. The CTO intends to set up conditions for the entry of a new service provider to the market, including restrictions imposed on the current service providers. However, if no application is submitted by a new competitor, it is expected that the current service providers will acquire the frequencies. The frequency blocks should be awarded for a period of 15 years.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The key law regarding the media sector in the Czech Republic is Act No. 231/2001, as amended, on the Operation of Radio and Television Broadcasting and Act No. 132/2010 as amended, on On-Demand Audiovisual Media Service.

The Operation of Radio and Television Broadcasting Act governs the state administration in the field of radio and television broadcasting as defined in its section 2, subsection 1, paragraph a, as communication of programmes and another parts of broadcasting, including services directly linked to the programme, to the public through electronic communications networks in unencoded or encoded form for simultaneous viewing of programmes and other parts of broadcasting.

The On-Demand Audiovisual Media Service Act governs provision of audiovisual media services as defined in section 2, subsection 1, paragraph a, as an information society service that is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes to inform, entertain or educate, and that allows viewing of the programmes in the moment chosen by the user and on his or her individual demand based on the catalogue of programmes.

Further laws are as follows:

- Act No. 127/2005 as amended, on Electronic Communications;
- Act No. 480/2004 as amended, on Information Society Services;
- Act No. 348/2005 as amended, on Radio and Television Charges;
- Act No. 483/1991 as amended, on Czech Television;
- Act No. 484/1991 as amended, on Czech Radio; and
- Act No. 40/1995 as amended, on Regulation of Advertisement.

The central state administration body for radio and television broadcasting is the Council for Radio and Television Broadcasting (the Council). The Council supervises and develops the plurality of the programme offers and information in the broadcasting area, grants the licences for broadcasting operation, monitors content of broadcasting, etc.

The CTO supervises the use of radio spectrum. The CTO determines the technical parameters and conditions for the use of the radio spectrum for radio communication services (ie, it is in charge of frequency planning).

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Czech legislation does not contain any restrictions on ownership of media services by a foreign person.

In 2017 an amendment to Act No. 159/2006 on Conflict of Interests was passed. The main change concerns a restriction on ownership of the media. A public office holder is prohibited from being a provider of television or radio broadcasting, being a publisher of periodicals, or being a member or a controlling person of a legal person who is a provider of television or radio broadcasting or publisher of periodicals.

Regarding cross-ownership of media, the Czech legal regulation does not contain any specific rules or prohibition of cross-ownership of printed and online media. There are some regulations regarding cross-ownership of television and radio broadcasting, as follows:

- A provider of nationwide analogue radio broadcasting shall not hold any ownership interest in another nationwide analogue radio broadcasting provider (the same rule applies to providers of analogue television broadcasting).
- A provider of nationwide analogue television broadcasting shall not merge with a provider of nationwide analogue television broadcasting in some cases (the same rule applies to providers of radio broadcasting).
- A provider of nationwide digital television broadcasting shall not hold any ownership interest in another provider of nationwide television broadcasting.
- A provider of nationwide digital radio broadcasting shall not hold any ownership interest in another provider of nationwide radio broadcasting.
- A provider of nationwide television broadcasting shall not merge with a provider of nationwide digital television broadcasting in some cases.
- A provider of nationwide radio broadcasting shall not merge with a provider of nationwide digital radio broadcasting in some cases.
- A provider of nationwide digital radio broadcasting shall not merge with a provider of nationwide digital radio broadcasting (the same rule applies to providers of digital radio broadcasting).

It should also be noted that the Council evaluates transparency of ownership of applicants in the licensing procedure.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The licensing requirements for broadcasting are set down in the Operation of Radio and Television Broadcasting Act.

The licensing procedure is initiated upon either the applicant's or the Council's incentive. The Council shall request a statement from the CTO prior to initiation of the licensing procedure. The requirements for participation in a licensing procedure, provided the applicant is a legal entity, are as follows: the applicant shall fulfil the conditions for the conduct of business and, if the applicant is a joint-stock company, the shares shall be issued in the form of registered shares. Provided the applicant is a natural person, the applicant shall be endowed with full legal capacity and fulfil the conditions for conduction of business. A business plan and a version of licensing conditions shall be attached to the application by the applicant.

The fees payable for the receipt of an application for granting authorisation for operation of radio or television broadcasting are set in the Annex to Act No. 634/2004, on Administrative Fees. The fee amounts to 90,000 koruna regarding television broadcasting and 25,000 koruna regarding radio broadcasting.

The Council possesses a discretion when deciding to grant authorisation. Besides the requirements set out above, the Council also evaluates economic, organisational and technical preparedness, transparency of the ownership, contribution of programme schedule, representation of European production, and preparedness to provide subtitles to a particular percentage of broadcasted programmes for persons with hearing impairment. Regarding digital broadcasting, the Council also considers whether the applicant contributes to the development of national, ethnic and other minorities in the Czech Republic.

As regards timing, the Council will firstly request a statement from the CTO on technical matters connected with the licence, which shall be issued within 15 days after accepting the application. The Council shall then initiate the licensing procedure within 30 days of receiving of the statement from the CTO. In the announcement of the licensing procedure, the Council shall determine the period for filing of the application for granting the authorisation. Depending on the specific kind of licence requested, the licensing proceedings shall then take 60 or 90 days.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

A provider of on-demand audiovisual services is obliged to reserve at least 10 per cent out of the total number of catalogued programmes for European works. Alternatively, the provider may fulfil the obligation by dedicating at least 1 per cent of its earnings to the creation of European works or acquiring rights for using European works.

A provider of broadcasting possesses a right to broadcast programmes freely and independently. The broadcaster shall provide objective and balanced information for independent opinion-making. A broadcaster by law (Czech Television and Czech Radio) is obliged to set a programme to offer a balanced range of programmes for the population with regard to their age, gender, skin colour, beliefs and national, ethnic or social origin. Such rule does not apply for other broadcasters. The broadcaster is, if possible, obliged to reserve at least 10 per cent out of the total number of broadcasting time for European works created by independent authors. Alternatively, the broadcaster may fulfil the obligation by dedicating at least 10 per cent of its programme budget to the creation of European works created by independent authors or acquiring rights for using European works created by independent authors.

A provider of both radio and television broadcasting may integrate programmes with regionally different content. However, a provider of nationwide radio and television broadcasting with a licence is obliged to broadcast nationwide without regionally different content for at least 85 per cent of a week's broadcasting time.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Advertising is in general regulated by the Act on Regulation of Advertising. It regulates unfair commercial practices, comparative advertising, advertising of tobacco products, advertising of medical products for human use and veterinary medicinal products, advertising on infant formula and follow-on formula, and general requirements of advertising and transmission include sanctions for breach of the obligations as stated in the Act. The Act also contains a regulation of advertising on alcoholic beverages, on plant protection products, on firearms and ammunition and advertising on funeral services.

The Act specifically regulates advertising diffused by media, which in particular includes the following means of communication: periodicals and non-periodical publications, radio and television broadcasting, on-demand audiovisual media services, audiovisual production, computer sites, carriers of audiovisual works, brochures and posters.

Generally, advertising against legal regulations, advertising in the form of unfair commercial practices, anonymous advertising regarding elections into public bodies in specific time periods is prohibited. Moreover, comparative advertising is allowed only upon fulfilment of conditions set down in the Act. In all cases, advertising shall not be contrary to the principles of morality, shall not support behaviour detrimental to health or endangering the safety of persons, property or environment.

Advertising of tobacco products is not allowed through broadcast media unless the Act states otherwise. The same applies to firearms and ammunition. Advertising of alcoholic beverages is legally restricted with the prohibition of various elements in the advertisement, such as advertisement directed at minors under 18 years or promoting excessive drinking.

The advertiser is obliged to maintain a copy of every advertisement at least for a period of five years after its last transmission.

Broadcasters are obliged to ensure placement of advertisements between programmes. The exceptions to the rule are programmes with compact and separable parts, sport or social occasions' broadcasts with pauses.

The licence holder is obliged to ensure that an advertisement is incorporated into the film only if it lasts more than 45 minutes with the advertisement included, not more than once in every 45-minute time period; another interruption is allowed only if the film lasts, with the advertisement included, at least about 20 minutes more than two or more 45-minute time periods. As regards other audiovisual works, advertisements may be included only if the programme with the advertisement included lasts at least 30 minutes and not more than once in every 30-minute time period.

Interruption of news, religious programmes or programmes for children is not allowed in any case.

Online advertising is also regulated by the Act on Regulation of Advertising as the subject matter of the law is also advertising diffused by computer sites.

Additionally, Act No. 480/2004, on Information Society Services regulates unsolicited advertising.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Act No. 46/2000, the Press Act, establishes an obligation on a publisher of periodicals to publish public service announcements.

An entrepreneur providing a publicly accessible service of electronic communications is obliged to provide such service without any interruptions every day (with some exceptions stipulated by law).

Provided there is a public interest, the CTO holds a discretion to assign an obligation to broadcast certain radio or television programmes to an entrepreneur who provides a radio and television broadcasting service that is used by end users as the main means of broadcast reception. The service is provided upon a written contract that shall include a proposal of prices.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is regulated in the same way as traditional broadcast media (ie, by the Act on On-Demand Audiovisual Media Services) provided it qualifies as an audiovisual media service. There are no regulations, which would be applicable specifically to new media content. The Act establishes an independent list of obligations for providers of on-demand audiovisual media services and establishes a requirement of minimum content of European works.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The beginning of digital switchover dates back to 2008 when the first of the ATV transmitters was switched off. The switchover from analogue to digital broadcasting lasted over four years, when in February 2012 operation of the very last high-power ATV transmitter was discontinued.

The CTO issued a general measure that set down a technical plan for the digital switchover. The measure included a plan of reallocation of radio frequencies.

Generally, a plan of relocation of radio frequencies (national radio frequencies table) is set in the regulation published by the Ministry of Industry and Trade. The CTO then determines the parameters and conditions for the use of the radio spectrum under the radio spectrum utilisation plan.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

An entrepreneur securing a public communication network, through which digital television services are transmitted, is obliged to operate the network to allow the diffusion of services and programmes of widescreen (16:9) format. An entrepreneur who receives and broadcasts programmes or services of widescreen format is obliged to retain the format.

The CTO issues parts of the radio spectrum utilisation plan as measures of a general nature. That plan includes a general part of the radio spectrum utilisation plan and also parts of the radio utilisation plan focused on dedicated frequency bands determined by the lower and upper frequency limits.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The main regulatory authority guarding the media plurality in the Czech Republic is the Council. The main purposes of the Council are:

- supervising adherence to and development of plurality of the programme offers and information in the area of broadcasting and rebroadcasting;
- attending to independence of broadcasting and rebroadcasting with respect to its content;
- supervising observance of legal regulations in the area of broadcasting and conditions stipulated in the decision on granting a licence or in decisions on registration;
- granting, changing and withdrawing licences for broadcasting operation; or
- issuing, changing and cancelling decisions about registration for the operation of rebroadcasting.

In terms of the steps the authorities may require companies to take as a result of a media plurality assessment, the Council advises the broadcasting operators and operators of rebroadcasting on infringement of their duties stipulated by the Act on Radio and Television Broadcasting or conditions of granted licence, and grants them a term by which to remedy any potential breaches of the law.

As regards the media ownership and related issues, the current legislation regulating the ownership relations of radio and television broadcasters is laid down by the Act on Radio and Television Broadcasting and by the Act on the Protection of Competition. The Act on Radio and Television Broadcasting sets out the rules for ensuring the plurality of information in radio and television broadcasting. It sets out the limits for the cross-ownership of radio and television stations for both analogue and digital broadcasting and under this Act a single legal or natural person may not simultaneously be the owner of more than two licences for the operation of a nationwide digital broadcasting service entitled to broadcast full-format programmes. The Act on the Protection of Competition further deals with agreements between competitors, abuses of dominant market positions and mergers of competitors. Under this Act the merger of competitors is allowed, but in certain circumstances it requires the approval of the Office for the Protection of Competition.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

A switch of the technical standard of DTT broadcasting from DVB-T to DVB-T2/HEVC.265 is currently underway. The transition is regulated by a technical plan issued by the Czech Government as Decree 199/2018 of 29 August 2018. The technical plan provides for deadlines, conditions and the terms for switching off the DVB-T broadcasting. The shutting down of the DVB-T broadcast will commence in November 2019 and finish by June 2020.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

There are different and separate regulatory bodies for telecommunications, broadcasting and antitrust matters.

The CTO is the national telecommunications regulatory authority. Within its competences fall, inter alia, issuing licences to carry out electronic communications activities, performing analyses of relevant markets in the electronic communications area, determining undertakings with significant market power and imposing special obligations on them, cost regulation in the area of electronic communications including ex-ante regulation, and governance of radio spectrum.

The Council for Radio and Television Broadcasting is the national broadcasting authority. The Council is the central state administration body carrying out administration in the area of radio and television broadcasting, supervises adherence to and development of plurality

of programme offers and information in the area of broadcasting and in general supervises observance of legal regulations in the area of broadcasting.

The Office for the Protection of Competition is the national antitrust authority. The Office is the central authority of state administration responsible for creating conditions that favour and protect competition, supervision over public procurement and consultation and monitoring in relation to the provision of state aid.

The Office for Personal Data Protection has sole competence with respect to matters connected with personal data protection and misuse of personal data.

Competences of these regulatory bodies are set out by laws so that they do not overlap. Any competence disputes (whether positive or negative) will be finally decided by the Supreme Administrative Court of the Czech Republic.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

First instance decisions of the regulators may generally be challenged based on any grounds by filing an appeal to the president or chairman of the relevant regulator. Such an appeal generally suspends the legal effect of the original first instance decision.

Decisions of the regulators may then be challenged on points of law and procedure before the competent regional administrative court and subsequently also by a cassation complaint filed with the Supreme Administrative Court. Generally, motions against decisions of the regulators do not suspend the effect of such decisions, unless such effect is granted by the administrative court deciding on the matter.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

A new Act on damages in competition law came into force on 1 September 2017 transposing the EU Directive 2014/104/EU. This law should facilitate damage claims in the cases of infringements of competition laws such as cartels and abuse of dominant position on the market. Among others, the Act on damages in competition law provides for a specific court discovery regime, which should enable the damaged party to seek an injunction compelling the perpetrator to produce relevant documents.

On 14 November 2017, the Office for the Protection of Competition published a communique on its investigations in the sector of mobile voice and data services. The Office concluded that there is a significant difference between the corporate and retail market. In both markets, the situation is oligopolistic but none of the market participants can abuse its position. Moreover, there is no evidence alluding to the existence of a collusion among market participants. Thus, the Office for the Protection of Competition concluded that the law has not been infringed.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Background

In the European Union (EU), the progressive yet quick liberalisation of electronic communications services paved the way for the creation of a single electronic communications market. The liberalisation process, which began in the 1980s, finally led to a full opening of the electronic communications sector on 1 January 1998. Since that date, the never-ending evolution of the electronic communications market, reshaped notably by the convergence of the electronic communications, broadcasting and IT sectors, has required several reforms of the EU electronic communications framework. The new EU electronic communications frameworks generally come in 'packages' of directives. The first Telecom Package was adopted in 2002. It was then amended in 2009 and 2015.

Electronic communications regulatory framework

The current EU electronic communications framework includes the following texts:

- the Framework Directive (2002/21/EC), as amended by the Better Regulation Directive (2009/140), which, inter alia, provides for the general structure of the EU regulatory framework for electronic communications, sets out the powers of the national regulatory authorities (NRAs) and describes the procedures for the regulation of operators identified as having significant market power (repealed by Directive 2018/1972 with effect from 21 December 2020, see below);
- the Authorisation Directive (2002/20/EC), as amended by the Better Regulation Directive (2009/140), which, inter alia, puts in place a general authorisation regime (repealed by Directive 2018/1972 with effect from 21 December 2020, see below);
- the Access Directive (2002/19/EC), as amended by the Better Regulation Directive (2009/140), which, inter alia, deals with access and interconnection and sets out remedies that NRAs can impose on operators with significant market power on a relevant wholesale market (repealed by Directive 2018/1972 with effect from 21 December 2020, see below);
- the Universal Service Directive (2002/22/EC), as amended by the Citizens' Rights Directive (2009/136) and by Regulation (2015/2120) which, inter alia, imposes on member states a duty or obligation to ensure that end users are provided with a minimum set of services of a minimum level quality at an affordable price and sets out remedies that NRAs can impose on operators with significant market power on a relevant retail market (repealed by Directive 2018/1972 with effect from 21 December 2020, see below);
- the Directive on Privacy and Electronic Communications (2002/58/EC), as amended by the Citizens' Rights Directive (2009/136), which, inter alia, deals with the processing of personal data in the context of the provision of electronic communications services and contains provisions in relation to security of networks and services and notification of breaches of security;
- the Radio Spectrum Decision (676/2002/EC), which establishes the European policy for radio spectrum with the aim of ensuring coordination between member states and harmonisation conditions for the efficient use of radio spectrum;
- the Roaming Regulation (717/2006) on roaming on public mobile telephone networks, as amended by Roaming Regulation (544/2009), by Regulation (531/2012) and by Regulation (2015/2120), which deals with roaming charges in Europe;
- the Regulation (2015/2120), laying down measures concerning open internet access and amending Directive (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services and Regulation (531/2012) on roaming on public mobile communications networks within the EU, amended by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017; and
- the Directive (2014/61) of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks;
- Regulation (EU) 2017/1953 of the European Parliament and of the Council of 25 October 2017 amending Regulations (EU) 1316/2013 and (EU) 283/2014 as regards the promotion of internet connectivity in local communities (Wifi4EU);
- the Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) 1211/2009; and
- the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the EECC Directive).

The Directive (2018/1972) establishing the EECC includes several changes, inter alia new measures to: (i) increase competition and predictability for investments; (ii) reduce regulation for co-investment of rival operators in very high-capacity networks; (iii) improve coordination and use of spectrum across the EU; (iv) strengthen consumer protection; and (v) create a safer online environment. Members states shall transpose this Directive into national law by 21 December 2020, except for article 53 'on coordinated timing of assignments for access to radio spectrum', which applies as of 20 December 2018 (article 124 and 126 of the EECC Directive). The Directive repeals, with effect from 21 December 2020, the four main directives of the current Telecom Package:

- the Framework Directive (2002/21/EC), as amended by the Better Regulation Directive (2009/140);
- the Authorisation Directive (2002/20/EC), as amended by the Better Regulation Directive (2009/140);
- the Access Directive (2002/19/EC), as amended by the Better Regulation Directive (2009/140); and
- the Universal Service Directive (2002/22/EC), as amended by the Citizens' Rights Directive (2009/136).

Overhaul of the electronic communications regulatory framework

Considering the rapid digitalisation of the world market and the opportunities it entails, the European Commission (the Commission) under the supervision of Jean-Claude Juncker, its current president, has identified the completion of the Digital Single Market as one of the Commission's 10 political priorities.

The Digital Single Market is defined by the Commission as a market in which 'the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence'.

The goal of the Commission is to help generate €415 billion per year and create 3.8 million jobs by knocking down regulatory barriers in the digital space and transforming 28 separate digital markets across the EU into a single one.

The Digital Single Market Strategy, which was launched in May 2015, was built on three pillars:

- better access for consumers and businesses to digital goods and services across Europe;
- creating the right conditions and a level playing field for digital networks and innovative services to flourish; and
- maximising the growth potential of the digital economy.

The EECC Directive is part of the wider connectivity package proposed by the European Commission in September 2016. It aims at enabling full participation of EU citizens and businesses in the digital economy. This initiative plans to achieve the following milestones by 2025:

- gigabit connectivity for major economic drivers such as schools, medium-sized and large enterprises, and main providers of public services;
- upgradeable connectivity of at least 100Mb per second for all European households;
- 5G coverage for all urban areas and all major terrestrial transport paths.

In order to take into account the recent developments in the communications sector such as the increased use by end users of services based on Voice over Internet Protocol (VoIP), messaging services or web-based email services in place of traditional voice and SMS services, the EECC Directive sets out a new definition of the term 'electronic communications service'. Three types of service categories are introduced: (i) internet access services; (ii) interpersonal communications service (service that allows direct communications over an electronic communications network between finite numbers of people either based or not on a number); and (iii) services consisting wholly or mainly of the conveyance of signals (such as for machine-to-machine communications or for broadcasting). Most provisions apply indifferently to all electronic communications services except number-independent interpersonal communications services.

Institutions

The Commission is the main institution responsible for the enforcement of the electronic communications policy and regulation. Two Directorates General are mainly involved in the electronic communications policy: the Directorate General for Communications Network, Content and Technology (DG Connect) headed by Roberto Viola and the Directorate General for Competition (DG Comp) headed by Margrethe Vestager.

BEREC also plays a key role for the development and better functioning of the internal market for electronic communications. The Independent Regulators Group as well as each member state's NRA are also influential actors. Finally, decisions of national courts and tribunals and of the European Court of Justice also significantly contribute to the interpretation of the electronic communications framework.

The EECC Directive enhances the role of BEREC and reinforces the role of NRAs, both at national and European level, to increase consistency and predictability of application of the rules in the context of the Digital Single Market.

Foreign ownership

The EU electronic communications framework does not contain provisions imposing foreign ownership restrictions for the provision of electronic communications services.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Under EU law, the freedom to provide services is guaranteed under article 56 of the Treaty on the Functioning of the European Union (TFEU), according to which 'restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of member states who are established in a Member State other than that of the person for whom the services are intended'. This principle is reflected in the Authorisation Directive according to which member states shall 'ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in the Directive'. Article 12(1) of the EECC Directive, which will enter in force in the near future, reaffirms this principle.

For this purpose, the Authorisation Directive has replaced the individual licence regime by introducing a 'general authorisation' regime. This system is kept as such under the EECC Directive. Under this authorisation regime, the provision of electronic communications networks or services can only be subject to a 'general authorisation' (ie, the operator may be required to submit a prior notification of its activity to the NRA but cannot be required to obtain an explicit decision or any other administrative act). As an exception to the 'general authorisation' regime, member states can grant, upon request, individual licences for the use of scarce resources: frequencies, numbers and rights of way.

The list of information required as part of the notification procedure to the NRAs has been harmonised by the EECC Directive to avoid excessive administrative costs for operators.

A set of minimum operator's rights are attached to the 'general authorisation'. Thanks to the 'general authorisation', an operator has notably the rights to: (i) operate electronic communications networks and provide electronic communications services; (ii) apply for rights of way; (iii) negotiate interconnection with and where applicable obtain access to or interconnection from other operators; (iv) be given an opportunity to be designated to provide different elements of a universal service; and (v) have access to scarce resources (radio spectrum and numbering resources) (article 15 of the EECC Directive and articles 4 and 5 of the Authorisation Directive).

The EECC Directive and the Authorisation Directive also provide for an exhaustive list of conditions that a member state may attach to the general authorisation; such as, fees for the rights of use, administrative charges, interoperability and interconnection, accessibility by end users of numbers from the national numbering plan or 'must

carry' obligations (article 13 of the EECC Directive and article 6 of the Authorisation Directive).

EU law does not provide for a limit of the duration of the 'general authorisations'. However, when individual rights of use of scarce resources are granted for a limited period of time, the duration shall be appropriate for the service concerned.

The member states can allow the relevant NRA to impose fees for the rights of use for radio spectrum, numbers, as well as rights to install facilities. These fees have to be objectively justified, transparent, non-discriminatory and proportionate in relation to their intended purpose and take into account the objectives set out in the EECC Directive and the Framework Directive (article 42 of the Framework Directive and article 95 of the EECC Directive).

The EU Regulatory framework for electronic communications is technologically neutral (in particular, Recital 18 Framework Directive and Recital 14 of the EECC Directive) and as such applies to all electronic communications networks and services. There is no difference in the regime applicable to fixed, mobile or satellite networks and services.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Permitted use restriction

The Authorisation Directive indicates that member states shall facilitate the use of radio frequencies, under 'general authorisations' (article 5(1) Authorisation Directive). However, member states shall grant individual rights of use to avoid harmful interference, ensure technical quality of service, safeguard efficient use of spectrum or fulfil other objectives of general interest as defined by member states in accordance with EU law. This set of principles is confirmed by the EECC Directive not only for the use of radio frequencies but also for radio spectrum (article 46 of the EECC).

When it is necessary to grant such individual rights, member states must comply with a number of provisions in particular in relation to the efficient use of resources in accordance with the Framework Directive. These requirements also exist under the EECC Directive.

In addition, the Authorisation Directive specifies that only certain conditions may be attached to rights of use for radio frequencies. As a consequence, the permitted use may only be restricted under spectrum licences by the conditions attached to the rights of use and exhaustively listed in the Authorisation Directive. The following conditions may be imposed on operators ((B) of the Annex of the Authorisation Directive):

- the designation of service or type of network or technology for which the rights of use for the frequency have been granted including, where applicable, the exclusive use of a frequency for the transmission of specific content or specific audiovisual services;
- effective and efficient use of frequencies;
- technical and operational conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electronic fields, where such conditions are different from those included in the general authorisation;
- maximum duration subject to any changes in the national frequency plan;
- transfer of rights at the initiative of the rightholder and conditions for such transfer;
- usage fees;
- any commitments that the operator obtaining the usage right has made in the course of a competitive or comparative selection procedure; and
- obligations under relevant international agreements relating to the use of frequencies and obligations specific to an experimental use of radio frequencies.

Under the EECC Directive, the conditions remain identical ((D) of the Annex 1 of the EECC Directive), with additional obligations to pool or share radio spectrum or allow access to radio spectrum for other users in specific regions or at national level.

The Authorisation Directive also provides for principles that must be taken into account by member states where it intends to limit the number of rights of use to be granted for radio frequencies (article 7 of the Authorisation Directive). These principles are reaffirmed at article 45 of the EECC Directive.

In addition, the EECC Directive introduces further harmonisation measures for spectrum including promoting shared use of spectrum and coordinating spectrum assignments. The consistency of the spectrum assignment process will be safeguarded through a process involving BEREC scrutiny of NRAs' planned spectrum measures (articles 4.3 and 35 of the EECC Directive).

Tradability of spectrum licences

The Framework Directive recognises the transfer of frequencies rights to be an efficient means of increasing efficient use of spectrum. Under the Framework Directive, the Commission can adopt implementing measures to identify bands for which rights to use radio frequencies may be transferred or leased between operators. For these particular bands, member states are under an obligation to ensure that operators may transfer or lease their rights of use to other operators. For other bands, member states are free to make provisions for operators to transfer or lease individual rights to use radio frequencies in accordance with national procedures.

The EECC Directive adopts a different approach according to which member states shall ensure that undertakings may transfer or lease to other undertakings individual rights of use for radio spectrum.

Member states shall: (i) submit transfers and leases to the least onerous procedure possible; (ii) not refuse the lease of rights of use for radio spectrum where the lessor undertakes to remain liable for meeting the original conditions attached to the rights of use; or (iii) not refuse the transfer of rights of use for radio spectrum unless there is a clear risk that the new holder is unable to meet the original conditions for the right of use (article 51 of the EECC).

In both the Framework Directive and the EECC Directive, when an operator wishes to transfer rights to use frequencies, it shall notify the NRA responsible for granting individual rights of use. Such notification must also be made once the effective transfer has occurred. Notifications shall be made public.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

In February 2003, the Commission published a recommendation detailing a list of 18 markets susceptible to being subject to ex-ante regulation. Such recommendation was updated in December 2007, reducing the list to seven markets and then in 2014, it was reminded that 'the aim of the regulatory framework is, inter alia, to reduce ex-ante sector-specific regulation progressively as competition in markets develops and, ultimately, for electronic communications to be governed by competition law only'. Indeed, in the 2014 recommendation, only four markets were identified, none of which were retail markets:

- Market 1: wholesale call termination on individual public telephone networks provided at a fixed location;

- Market 2: wholesale voice call termination on individual mobile networks;
- Market 3: (i) wholesale local access provided at a fixed location, and (ii) wholesale central access provided at a fixed location for mass-market products; and
- Market 4: wholesale high-quality access provided at a fixed location.

Pursuant to the article 15 of Framework Directive, NRAs have to conduct a market analysis, based on national circumstances, to define relevant markets for which ex-ante obligations may be necessary to ensure effective competition. In doing so, they are required to take the 'utmost account' of the recommendations of the Commission. Where an NRA identifies that one of the relevant markets identified is not effectively competitive, it shall identify whether one or more operators has significant market power (SMP), identified as equivalent to the notion of dominance. When such operators are identified, NRAs shall impose or maintain appropriate specific regulatory obligations on them such as transparency, non-discrimination, accounting separation and access obligations and wholesale price controls.

The EECC Directive directly introduces the implementation of ex ante market regulations into the missions of the NRAs and provides that NRAs shall 'impose ex ante regulatory obligations only to the extent necessary to secure effective and sustainable competition in the interest of end-users and relax or lift such obligations as soon as that condition is fulfilled', these obligations include the imposition of access and interconnection obligations (article 67 of the EECC Directive).

In addition, the EECC Directive codified the 'three criteria test' contained in the Commission's Recommendation on Relevant Markets (2002) and used to determine whether a specific market should be regulated (eg, high barriers to entry, no dynamic tendency towards effective competition and insufficiency of competition law). The EECC Directive also extends the current maximum market review period from three to five years. However, NRAs may still conduct such analysis within shorter intervals if market developments require it. New provisions are introduced for revision of remedies imposed by NRAs, for instance when market conditions have changed because of new commercial agreements or the breach of existing ones or new co-investment agreements. A double-lock system is introduced whereby in cases where BEREC and the Commission agree that a draft remedy would create a barrier to the single market, the relevant NRA may be required to amend or withdraw the contemplated measure.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

The remedy of functional separation was introduced in the Access Directive in 2009 by the Better Regulation as an exceptional measure and was reproduced identically in the EECC Directive. It may only be imposed on vertically integrated operators when the relevant NRA concludes that the other ex-ante regulatory obligations have failed to achieve effective competition and that there are important and persistent competition problems or market failures identified in relation to the wholesale provision of certain access product markets. Such measure consists of imposing on the concerned operator a duty or obligation to place activities related to the wholesale provision of relevant access products in an independently operated business. On this basis, the operator shall supply access products and services to its other business entities and to other operators under the same terms and conditions, including price and service levels.

In addition, the EECC Directive introduces the possibility of imposing functional separation on a significant market power operator if the remedies imposed following a market review process have not succeeded in achieving competition.

The Access Directive also provides for a voluntary separation mechanism under which a vertically integrated operator that has been identified as having SMP in one or several markets informs the competent NRA in advance and in a timely manner of its intent to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership or to establish a separate business entity to provide to all retail providers, including its own retail divisions, fully equivalent access products. Upon such information, the NRA shall assess the effect of the intended transaction on existing regulatory obligations and, in accordance, shall impose, maintain, amend or withdraw obligations. This has been reaffirmed in article 78 of the EECC Directive.

BEREC has published guidelines that an NRA may rely upon when considering the appropriateness and the manner to implement functional separation (Guidance on Functional Separation under articles 13a and 13b of the revised Access Directive and national experiences).

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Scope of universal service

Pursuant to recital 210 of the EECC Directive, universal service is defined as a 'safety net to ensure that a set of at least the minimum services is available to all end-users and at an affordable price to consumers, where a risk of social exclusion arising from the lack of such access prevents citizens from full social and economic participation in society'. This concept is based on the Universal Service Directive but evolved to reflect advances in technology, market developments and changes in user demand. The national NRA is in charge of ensuring all citizens have access to a universal service.

The Universal Directive set out a certain number of mandatory services that operators shall provide, including: (i) provision of access at a fixed location and provision of telephone services; (ii) provision of directories and directories enquiry services; (iii) provision of public payphones; and (iv) measures for disabled users.

The EECC Directive sets new mandatory services to which consumers should have access at an affordable price. Member states may adopt different tariff options to ensure that the services are also affordable to consumers with low-income or special social needs such as older people, end-users with disabilities and consumers living in rural or geographically isolated areas. The new services include provision of available adequate broadband internet access service and provision of voice communications services at least at a fixed location, indicating that member states now have the possibility to extend universal service to mobile services. 'Adequate broadband' means the broadband 'necessary for social and economic participation in society' (ie, minimum needed to support services such as email, internet banking, standard quality video calls and social media (as set out in Annex V)).

Member states may consider that the need for the previous services set by the Universal Service Directive is established in light of national circumstances and shall be provided along with the new services from 21 December 2021.

Member states are able to designate one or more 'providers of services' according to the EECC Directive in charge of guaranteeing the provision of these services in order for the whole of the territory to be covered. Different providers of services may provide different elements of universal services. The universal service must be affordable; NRAs shall monitor the evolution and level of retail tariffs of these services.

Member states may require designated providers of services to provide customers with tariff options that depart from those provided under normal commercial conditions.

Funding of universal service

The methods for designating operators or providers of services in charge of the provision of universal service must ensure that such service is provided in a cost-effective manner. NRAs that consider that the provision of universal service may represent an unfair burden on the designated providers of services are given the possibility to calculate the net costs of its provision. If it is found that such operator is subject to an unfair burden, member states can, upon request, put in place a mechanism to compensate that provider of services or to share the net cost of universal service obligations between providers of electronic communications networks and services. According to the EECC Directive, the net costs of this universal service are to be paid for either through general taxpayer funds or else through a specific levy on electronic communications networks and service providers.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

Pursuant to the Framework Directive, a number allocation scheme is handled by member states through their NRAs, which control the granting of rights of use of all national numbering resources and manage the national numbering plans. NRAs are also under the obligation to establish objective, transparent and non-discriminatory assigning procedures for the grant of such resources. Article 94 of the EECC Directive sets out identical requirements. The Framework Directive further provides for an equal treatment principle between all providers of publicly available electronic communications services. The national numbering plan and its subsequent amendments must be published subject only to national security limitations. This principle is enshrined in the EECC Directive.

Member states have a role to support the harmonisation of specific numbers and number ranges within the Union where this promotes both the functioning of the internal market and the development of pan-European services. Implementing measures may be taken by the Commission on the subject.

Where the assignment of numbers with exceptional economic value is concerned, member states may use, inter alia, competitive or comparative selection procedures for the assignment of radio frequencies.

The right to use numbers may be subject only to the conditions listed in the Framework Directive or in the Annex I of the EECC. These conditions include, inter alia, designation of service for which the number shall be used, including any requirements linked to the provision of that service; effective and efficient use of numbers in conformity with the Framework Directive or EECC Directive; number portability requirements in conformity with the Universal Service Directive or EECC Directive; obligation to provide public directory subscriber information for the purposes or transfer of rights in conformity with Universal Service Directive or EECC Directive.

According to the EECC Directive, NRAs may also grant rights of use for numbering resources from the national numbering plans for the provision of specific services to undertakings other than providers of electronic communications networks or services, provided that adequate numbering resources are made available to satisfy current and foreseeable future demand.

In addition, the EECC Directive provides that each member state shall make available a range of non-geographic numbers which may be used for the provision of electronic communications services other than interpersonal communications services and shall promote over-the-air provisioning, where technically feasible, to facilitate switching of providers of electronic communications networks or services by end-users, in particular providers and end-users of machine-to-machine services.

Number portability is a requirement under the Universal Service Directive and the EECC Directive. It applies equally to fixed and mobile networks and to geographic and non-geographic numbers. However, the requirement does not apply to the porting between numbers from a fixed network to a mobile network and vice versa. All subscribers of publicly available telephone services are entitled to keep their number upon request, independently of their service provider.

Operators are required to port and activate a number within the shortest possible time and within a maximum delay of one working day. NRAs ensure that the prices charged between operators in relation to the provision of portability are cost-orientated.

Appropriate sanctions must be provided for by member states including an obligation to compensate subscribers in case of delay in the porting or abuse of porting by them.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

Pursuant to the Universal Service Directive, consumers must be offered contracts of 12 months and operators cannot offer contracts exceeding 24 months. The conditions and procedures for contract termination should not constitute a disincentive against changing service provider.

Consumers and other end users have a right to a contract with their operator. This contract must comprise a number of mandatory provisions that include, inter alia, the identity and the address of the operator, the services provided, the details of prices and tariffs, the means to obtain up-to-date information on all applicable tariffs and maintenance charges, payment methods, duration of the contract and the conditions for renewal and termination services and of the contract, any compensation and the refund arrangements applicable if service quality levels are not met.

The Universal Service Directive also gives member states the possibility to require that the contract include any information that may be provided by the relevant public authorities on the use of electronic communications networks and services to engage in unlawful activities or to disseminate harmful content, and on the means of protection against risks to personal security, privacy and personal data.

Subscribers also have a right to withdraw from their contract without penalty upon notice of modification to the contractual conditions proposed by their provider. Subscribers shall receive a notification not shorter than one month of such modification, along with information on the right to withdraw, without penalty in case of refusal of these new terms.

Finally, NRAs must ensure that operators publish transparent, comparable, adequate and up-to-date information on applicable prices and tariffs, on charges due upon termination and on standard terms and conditions in respect of access to, and use of, services provided by them to end users and consumers.

The EECC Directive includes the Universal Service Directive requirements, harmonises end-user rights and establishes more contract requirements. The EECC introduces a detailed list of information requirements to be included in end user contracts, which include, inter alia, information about the technical characteristics of the service, the price, the duration of the contracts and conditions for switching, procedures for dispute settlements or actions to be taken in security and integrity incidents. It should be noted that these requirements also apply to contracts with micro and small enterprises acting as end users. New provisions aimed at facilitating the switch from one service provider

to another have been introduced, for instance, provisions dealing with the issue of bundles as an obstacle to switching.

By 21 December 2019, the Commission shall, after consulting BEREC, adopt implementing acts specifying a contract summary template to be used by the providers to fulfil their obligations under article 102 of the EECC.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The principle of net neutrality was formally taken into account on the occasion of the 2009 reform of the Telecom Package. The Better Regulation Directive (2009/140/EC) included references to the principle of net neutrality. It introduced the notion of net neutrality in the Framework Directive, which now provides that NRAs shall promote the interests of the citizens of the European Union by, inter alia, promoting the ability of end users to access and distribute information or run applications and services of their choice. The Better Regulation Directive also amended the Universal Service Directive by introducing safeguard powers for NRAs, which are given the power to prevent the degradation of service and the hindering or slowing down of traffic over networks. Finally, operators and service providers are required to provide their subscribers with information on their traffic management policies used to measure and shape traffic so as to avoid network congestion or overload and their possible effects on service quality. The Annex of the Better Regulation Directive also contains a political declaration of the Commission that includes its commitment to preserve 'an open and neutral internet'.

After intense discussions and debate, the European Parliament and the Council adopted Regulation (2015/2120) concerning open internet access, which enshrines the principle of net neutrality into EU law. BEREC published guidelines on the implementation by NRAs on these European net neutrality rules in August 2016.

The Regulation (2015/2120) concerning open internet access guarantees the rights of end users to access and use the internet. Providers of internet access services are under the obligation to treat all traffic equally without discrimination, restriction or interference and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used. This prohibits, in particular, the practice of bandwidth throttling. However, this principle does not prevent providers of internet access services from implementing traffic management measures as long as they are transparent, non-discriminatory, proportionate and not based on commercial considerations. Three additional exceptions are provided for: compliance with other laws, preservation of integrity and security and congestion management measures.

Providers of electronic communications to the public are free to offer services other than internet access services that are optimised for specific content, applications or services or a combination thereof, which BEREC refers to as 'specialised services'. However, this is possible only where some conditions are met: the optimisation must be necessary to meet requirements of the content, applications or services for a specific level of quality, the network capacity must be sufficient to provide these services in addition to any internet access services provided, they must not be usable or offered as a replacement for internet access services and must not be to the detriment of the availability of general quality of the internet access services for end users. As NRAs are in charge of ensuring compliance with these provisions, they will contribute to the determination of the necessity and capacity tests. The recitals of the Open Access Regulation give as examples of specialised services 'services responding to a public interest or by some new M2M communications services'. BEREC also identifies services such as VoLTE and linear broadcasting IPTV services with specific quality of service requirements.

The practice of zero-rating, whereby traffic from certain sources does not count towards any data cap in place for the subscriber, is not prohibited under the rules governing net neutrality. However, BEREC considers that different forms of zero-rating may have different consequences and that the acceptability of each practice should be assessed on a case-by-case basis. For instance, a zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated applications would infringe net neutrality rules.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

At European level, no specific legislation or regulation exists in relation to online platforms. Yet, online platforms are a central subject of discussion between European institutions. As part of the Digital Single Market Strategy, a comprehensive assessment of the role of online platforms has been conducted. It is also one of the three emerging challenges identified in the Digital Single Market Strategy mid-term review.

In 2015, the Commission launched a public consultation seeking the views of stakeholders to better understand the social and economic role of platforms, market trends, the dynamics of platform-development, as well as the various business models underpinning platforms. The results of this consultation were published in May 2016 in a Commission Communication entitled 'Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe'. It presents the common features between online platforms, among which appear: the ability to create and shape new markets and challenge traditional ones, the benefit from 'network effects' whereby the value of the service increases with the number of users, reliance on information and communications technologies to reach the users and a key role played in digital value creation. The Communication identifies online platforms as including, inter alia, online advertising platforms, marketplaces and application distribution platforms but also search engines and social media. It insists on the importance of creating the right framework conditions and the right environment to retain, grow and foster the emergence of new online platforms in Europe. The Commission identifies market fragmentation as an obstacle to the development of online platforms. It also considers that effective enforcement of the existing rules concerning competition law, consumer protection or data protection is essential. It also recommends a problem-driven approach in any future regulatory measures. Finally, the Commission lists principles that should be taken into account in the responses to be adopted: a level playing field for comparable digital services, responsible behaviour of online platforms to protect core values, transparency and fairness for maintaining user trust and safeguarding innovation and open-minded and non-discriminatory markets in a data-driven economy.

In its Mid-Term Review on the implementation of the Digital Single Market Strategy, the Commission identified actions to be implemented in relation to online platforms. Thus, on 26 May 2018, the Commission adopted a proposal (COM(2018) 238 final) for a regulation on promoting fairness and transparency for business users of online intermediation services, such as e-commerce market places, social media, price comparison tools or search engines. The aim is to propose a pro-growth, pro-consumer, targeted legislative framework for business-to-business relations based on the principles of preventing abuse of market power and ensuring that platforms that serve as a gateway to a downstream market do not become gatekeepers.

In addition, the European Commission launched an action plan against disinformation and, on 26 September 2018, a self-regulatory Code of Practice was published to measurably reduce online disinformation on online platforms, leading social networks and in the advertising industry. On 5 December 2018, the Commission reported on the progress made and published an action plan that foresees an increase of resources allocated to counter-disinformation efforts.

The Commission also adopted on 1 March 2018 a Recommendation including a set of (non-binding) operational measures to be taken by companies and members states to tackle illegal content online. In addition, the Commission presented a Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services (COM/2018/238 final). This Proposal aims at establishing a legal framework that guarantees transparent terms and conditions for business users of online platforms, as well as effective possibilities for redress when these terms and conditions are not respected by online platforms (ie, online market places, online software application stores, online social media and online search engines).

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The European Regulatory Framework for electronic communications and the EECC Directive are technologically neutral so it applies to NGA networks in the same manner that it applies to other networks. However, the 2010 Commission Recommendation of 20 September 2010 on regulated access to NGA sets out a common approach for promoting the consistent implementation of remedies with regard to NGAs and provides for regulatory principles that NRAs should follow. NGAs are also dealt with in the 2013 Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.

The Directive on measures to reduce the cost of deploying high-speed electronic communications networks (2014/61/EU) also aims at facilitating and incentivising the rollout of high-speed electronic communications networks by reducing its cost. It includes measures such as the sharing and reuse of existing physical infrastructure, which are expected to create conditions for a more cost-efficient network deployment.

The EECC Directive introduced a new mission for NRAs, which is to promote access to, and take-up of very high capacity connectivity for both fixed and mobile networks. The new EECC Directive sets out provisions in relation to co-investment and NGAs, in particular 'very high-capacity networks'. The EECC Directive establishes an exception on access market and price regulation for operators with 'significant market power' undertaking to build or to co-invest in the infrastructure necessary for the creation of high connectivity networks.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

Data protection and privacy in the EU is currently governed by Regulation (EU) 2016/679 (the General Data Protection Regulation, hereinafter the GDPR) and Directive 2002/58/EC (the E-Privacy Directive, as amended by the Citizens' Rights Directive).

Since 25 May 2018, the GDPR directly applies in all EU member states, without having to be transposed into national law. The GDPR fully regulates the processing of personal data in the EU. By setting uniform high standards of data protection, it ensures the free flow of personal data in the EU. It has, in particular, a significantly broader territorial scope than the previous EU Data Protection Directive. It places, among others, greater emphasis on the documentation obligations of data controllers to demonstrate their accountability and significantly strengthens data subjects' rights to give them more control over their personal data. The GDPR also introduced significant fines for any data breaches in the amount of up to 4 per cent of a company's global revenue or €20 million, depending on whichever is higher. These pose a significant financial risk to data controller organisations, such as telecommunication service providers. Many telecommunication service providers use third-party service providers that process and store data on their behalf and thus, have to check compliance with the provisions set forth in GDPR to avoid any sanctions by the competent authority.

The E-Privacy Directive ensures the protection of fundamental rights and freedoms, in particular the respect for private life, confidentiality of communications and the protection of personal data in the electronic communications sector. It obliges EU member states to ensure privacy of communications and related traffic data. Under the E-Privacy Directive, any interception or surveillance of communications (including listening, storage or tapping) is prohibited, unless explicitly permitted under national law. To be permissible, such interception would have to be necessary, appropriate and proportionate for specific 'public order' purposes, namely to safeguard national security, defence or public security or for the purposes of law enforcement and would have to comply with the general principles of EU law and the European Convention on Human Rights.

As a part of the Digital Single Market Strategy, the E-Privacy Directive is currently under evaluation. In 2015, the European Commission considered it necessary to verify whether its rules have achieved their main objectives (ensuring an adequate protection of privacy and confidentiality of communications in the EU) and whether they are still fit for purpose in the regulatory and technological context.

It shall now be adapted to the new EU data protection framework as well as recent technological and economic developments in the EU market since the last revision of the E-Privacy Directive in 2009. Such new technologies include, among others, new internet-based services such as VoIP, instant messaging and web-based email services, which are not subject to the current E-Privacy Directive.

On 10 January 2017, the European Parliament and the European Council published the draft of a new Regulation on Privacy and Electronic Communications, which shall replace the current E-Privacy Directive and shall be directly applicable in the EU member states, without having to be transposed into national law. The key aspects of the proposal are the following:

- applicability of privacy rules to providers of electronic communications services (eg, WhatsApp, Facebook Messenger or Skype);
- enhancing security and confidentiality of communications (including content and metadata, such as sender, time, location of a communication), while reducing unjustified barriers to the free flow of data;
- new opportunities for telecommunication operators to provide additional services and develop their business, once consent is given for communications data content or metadata or both;
- more user-friendly and simpler rules on cookies; and
- protection against unsolicited electronic communications (spam).

The proposal includes fines for breaches in the amount of up to 4 per cent of a company's global revenue or €20 million, depending on whichever is higher. As of today, the EU Council published several amended drafts of the proposal since September 2017 and no final draft has yet been voted.

Negotiations with the parliament may start after the European Parliament elections in May 2019.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Commission has launched several initiatives in relation to cybersecurity.

In 2013, the Commission launched the EU Cybersecurity Strategy setting five priorities: the increase of cyber resilience, the reduction of cybercrime, the development of the EU cyber defence policy and capabilities related to the Common Security and Defence Policy, the development of the industrial and technological resources for cybersecurity and the establishment of a coherent international cyberspace policy for the EU and promoting core EU values.

In April 2015, the Commission adopted the European Agenda on Security (2015–2020), which replaced the previous Internal Security Strategy (2010–2014). This agenda contains a number of actions to fight cybercrime.

Furthermore, the Commission adopted the Communication Strengthening Europe's Cyber Resilience System and Fostering a Competitive and Innovative Cybersecurity Industry on 5 July 2016. It sets a series of measures aiming, inter alia, at stepping up cooperation across Europe, promoting the emerging single market for cybersecurity products and services. During this occasion, as part of the Digital Single Market Strategy presented in May 2015, a public-private partnership (PPP) on cybersecurity was signed. Its aim is to foster cooperation between public and private actors to allow people in Europe to access innovative and trustworthy European solutions including ICT products, services and software. The PPP also aims to stimulate cybersecurity industry by helping to align demand and supply sectors, especially in sectors where cybersecurity solutions are important, such as energy, health, transport and finance. The PPP includes a wide range of actors, from innovative small and medium-sized enterprises, producers of components and equipment, critical infrastructure operators and research institutes. An investment of €450 million from the EU is planned, under the research and innovation programme Horizon 2020.

In the digital single market mid-term review in May 2017, the Commission identified cyber-security as one of the key three areas for further work in the years to come and announced a number of actions, including a review of the EU Cybersecurity Strategy dated 2013 and of the mandate of the European Network and Information Security Agency (ENISA).

On 18 October 2018, the European Council called for measures to build strong cybersecurity in the European Union. EU leaders referred in particular to restrictive measures able to respond to and deter cyber-attacks. The proposal sets out new initiatives, inter alia, building a stronger EU cybersecurity agency, introducing an EU-wide cybersecurity certification scheme and swiftly implementing the NIS directive.

Institutions

ENISA is a centre of expertise for cybersecurity in Europe. It is located in Greece with its headquarters in Heraklion, Crete and an operational office in Athens. It was founded in 2004 by the Regulation (EC) 460/2004 of 10 March 2004. ENISA actively contributes to a high level of network and information security within the EU, thus contributing to the smooth functioning of the internal market.

ENISA works closely with member states and the private sector to provide advice and solutions. This includes pan-European cybersecurity exercises, the development of national cybersecurity strategies, Computer Emergency Response Team's (CSIRT) cooperation and capacity-building, as well as studies on data protection issues, secure cloud adoption, technology aimed at improving life, and trust services. ENISA also supports the development and implementation of EU Network and Information Security policy and legislation.

After a year-long pilot phase, the EU institutions decided to set up a permanent Computer Emergency Response Team called CERT-EU for the EU institutions, agencies and bodies in September 2012. It is composed of a team of information technology experts and cooperates closely with other CERTs in the member states as well as with companies specialising in IT security.

On 13 September 2017, the Commission issued a proposal for a regulation on ENISA, the 'EU Cybersecurity Agency', and on Information and Communication Technology cybersecurity certification ('Cybersecurity Act'). It was adopted by the EU Parliament during the 11 March 2019 plenary sessions. This Act provides an enhanced permanent mandate for ENISA and a certification for ICT products and services that comply with specified cybersecurity requirements. The resulting certificate will be recognised in all member states, making it easier for businesses to trade across borders and for purchasers to understand the security features of the product or service.

Legislation

In 2010, the Commission published a proposal for a directive on attacks against information systems, which was eventually adopted in 2013 (Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA). Pursuant to this Directive, member states are required to criminalise the 'intentional access, without right, to the whole or part of an information system', at least in relation to cases that are deemed not to be minor. It also requires that illegal system interference and illegal data interference be punished as criminal offences. Provisions also oblige member states to criminalise the instigation or aiding and abetting of any of these acts.

The Directive on security of network and information systems (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, the NIS Directive) is the first EU-wide piece of legislation on cybersecurity. It was adopted in July 2016 and member states were required to transpose it at the latest by 9 May 2018 and to identify operators of essential services by 9 November 2018. It provides for legal measures to boost the overall level of cybersecurity in the EU.

The NIS Directive requires member states to adopt a national strategy on the security of network and information systems defining the strategic objectives and appropriate regulatory measures to achieve and maintain a high level of security of network and information systems, covering at least the sectors exhaustively listed in the Directive: energy, transport, banking, financial market infrastructures, health sector, drinking water supply and distribution and digital infrastructure. Each member state must designate a national competent authority on the security of network and information services, which will be in charge of monitoring the application of the directive at national level. One or more CSIRTs must be designated by each member state, covering at least the sectors listed in the Directive. These CSIRTs must be allocated adequate resources to carry out their tasks, which include, inter alia, the monitoring of incidents at a national level, providing early warnings, alerts, announcements and dissemination of information to relevant stakeholders, participating in the CSIRTs network or establishing cooperation relationships with the private sector. The Directive established a cooperation group to support and facilitate strategic cooperation and the exchange of information among member states and to develop trust and confidence, and with a view to achieving a high common level of security of network and information systems in the European Union.

Under the NIS Directive, two categories of actors are subject to security requirements: operators of essential services and digital service providers. Operators of essential services are private businesses or public entities with an important role for society and the economy, and

will have to be identified by each member state following three criteria: the entity provides a service that is essential for the maintenance of critical societal or economic activities, the provision of that service depends on network and information systems and an incident would have significant disruptive effects on the provision of that service; they operate in the sectors exhaustively listed in the Directive. Digital service providers are defined as being any legal person that provides a service of online marketplace, online search engine and cloud computing service. Concerning digital service providers, member states will have to ensure that service providers identify and take appropriate and proportionate technical and organisational measures to manage the risks posed to the security of network and information systems that they use in the context of offering their services. The same requirement applies to operators of essential services in relation to the security of network and information systems they use in their operations. Additionally, member states shall ensure that these operators of essential services also take appropriate measures to prevent and minimise the impact of incidents affecting the security of the network and information systems used for the provision of such essential services, with the view to ensuring the continuity of these services. Both categories of operators are also subject to an obligation of notification to the competent authority or the CSIRT without undue delay of any incident having a substantial impact on the provision of their services.

The Commission adopted on 13 September 2017 a Communication (COM(2017) 476 final/2), the 'NIS Toolkit', which aims at supporting member states in their efforts to implement the Directive swiftly and coherently across the EU. It presents the best practices from the member states and provides explanation and interpretation of specific provisions of the Directive to clarify how it should work in practice.

On 13 September 2017, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy published a Joint Communication on Resilience, Deterrence and Defense: Building Strong Cybersecurity for the EU. This wide-ranging cyber security package builds on existing instruments and presents new initiatives to further improve EU cyber resilience and response in three key areas: (i) building EU resilience to cyber-attacks and stepping up the EU's cybersecurity capacity; (ii) creating an effective criminal law response; and (iii) strengthening global stability through international cooperation.

In addition, on 12 September 2018, the Commission presented the Proposal for a Regulation establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres (COM(2018) 630). This Regulation proposes to build from the contractual Public Private Partnership on cybersecurity created in 2016, to set up a cybersecurity competence network to support the development and deployment of cybersecurity technologies.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Big data play a major role in the EU and was subject to various actions taken by EU institutions. The EU recognises the potential of big data as a driver of the economy and innovation in its EU Digital Single Market Strategy and points out that big data is becoming essential to the development of data-driven technologies and services. The European Council marked big data as a high priority already in its political agenda in October 2013. In the context of an action plan dated 2 July 2014 on how to maximise the EU's data-driven economy, the European Commission recommended investing in big data solutions and infrastructure. In this context, it suggested setting up a €2.5 billion big data public-private partnership, creating a network to help individuals building sustainable businesses using big data and adopting new rules on data ownership and liability.

The European Data Protection Supervisor (EDPS) stressed the importance of a coherent enforcement of rights in the age of big data in several opinions and initiatives. The EDPS is an independent institution of the EU, which is responsible for ensuring the protection of individuals' rights in the context of processing personal data. It set up the Ethics Advisory Group in February 2016, which shall assess the ethical implications of how personal data are defined and used in the context of big data and artificial intelligence.

As requested in the EDPS opinion of 23 September 2016, a voluntary network of regulatory bodies (the Digital Clearing House) has been established. The goal of the Digital Clearing House is to share information about possible abuses in the digital ecosystem and the possibilities to handle them. The report also recommends that the EU institutions, together with external experts, investigate the possibility to create a common cyberspace where individuals are able to interact without being tracked.

The text of an EU Parliament resolution on the implications of big data on fundamental rights was tabled by rapporteur Ana Gomes in October 2016. The EU Parliament passed this non-legislative resolution on 14 March 2017. The EU Parliament stressed that the immense opportunities of big data could only be fully enjoyed by citizens and institutions within the EU, if public trust in new technologies was ensured by a strong enforcement of fundamental rights, compliance with current EU data protection law and legal certainty for all actors involved. According to the resolution, big data analytics pose specific challenges for fundamental rights and raise concerns over discrimination and security. The most pressing risks associated with data processing activities include security breaches, unauthorised access to data and unlawful surveillance. Also in that regard, the European Economic and Social Committee has published a study with regard to the ethics of Big Data and how to balance economic benefits and ethical questions of Big Data in the EU policy context.

According to the EU Parliament, the intrinsic purpose of big data analysis should be the achievement of comparable correlations with as few personal data as possible. Science, business and public communities should therefore focus on research and innovation in the field of data anonymisation. The resolution also points out that it is of particular importance to raise the awareness of EU citizens about digital rights, privacy and data protection. It concludes that the corresponding risks in the context of big data analysis will have to be addressed with specific guidelines, more transparency and accountability.

Together with various initiatives in the field of public sector data, research data and private sector data, the Commission announced its intention to fund a Support Centre for data sharing under the Connecting Europe Facility. This Support Centre will make it easier to share private sector data by providing best practices and know-how. In addition, the Commission announced a number of initiatives that will make different types of data available for re-use in the Communication of 25 April 2018 (COM(2018) 232 final) Towards a Common European Data Space and accompanying Staff Working Document (SWD(2018) 125 final) Guidance on Sharing Private Sector Data in the European Data Economy. This Staff Working Document aims to provide a toolbox on legal, business and technical aspects of data sharing and transfers for companies that are data holders or data users.

Furthermore, the EU considers that free flow of non-personal data is a pre-requisite for a competitive data economy within the Digital Single Market. The European Parliament and the Council adopted Regulation (EU) 2018/1807 dated 14 November 2018, On a Framework for the Free Flow of Non-personal Data in the European Union. It aims at removing obstacles to the free movement of non-personal data and will start to apply in May 2019.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

The GDPR contains provisions concerning international transfers of data, but it contains no data localisation obligations. On the contrary, the principle of free flow of data is enshrined in the GDPR. At the time of writing, no specific legislation or regulation is yet in place at EU level concerning data localisation.

Some member states have adopted data localisation laws. For instance, Germany has passed the Data Retention Act, which requires public electronic communication and internet providers to retain various call detail records for law enforcement purposes. The EU is concerned that this type of rule might hinder the free flow of data. Digital Single Market VP, Andrus Arsip has declared that 'Data should be able to flow freely between locations, across borders and within a single data space . . . in Europe, data flow and data access are often held up by localisation rules or technical and legal barriers.'

The Building European Data Economy initiative, part of the Digital Single Market strategy, aims at fostering the best possible use of the potential of digital data to benefit the economy and society. Following the adoption of a Communication on Building a European Data Economy, a Staff Working Document in January 2017 and a public consultation, the Council of the European Union adopted the Regulation (2018/1807) of 14 November 2018, On a Framework for the Free Flow of Non-personal Data in the European Union. The Regulation entered into force at the end of December 2018 with effect as of June 2018. This Regulation prohibits EU countries' governments from putting in place data localisation restrictions, except if they are required for national security and similar objectives, on the grounds that these represent a form of protectionism for which there is no place in a true single market. The goal is to create legal certainty for businesses, with reassurance that they can process their data anywhere in the EU. According to the Council of Europe, it will increase trust in cloud computing and counter vendor lock-in, resulting in a more competitive cloud computing market and a boost of operational efficiency for European businesses that operate across borders.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The main changes to expect stem from the overhaul project of the electronic communications framework initiated in September 2016.

Internet connectivity

Along with the EECC Directive and the Regulation Wifi4EU, the Commission proposed a set of measures and legislative reforms to ensure everyone in the European Union will be provided the best possible internet connection. To achieve this goal, the Commission set out broadband targets for 2025: (i) all schools, transport hubs and main providers of public services as well as digital enterprises should have access to internet connections with download speeds of 1Gb of data per second; (ii) all European end-users should have access to networks offering a download speed of at least 100Mbps; and (iii) all urban areas as well as major roads and railways should have uninterrupted 5G wireless broadband coverage.

The Commission also developed the 5G Action plan to boost European Union efforts for the deployment of 5G infrastructures and services across, the Digital Single Market by 2020. It sets out a framework and a clear roadmap for public and private necessary investment on 5G wireless technologies and infrastructure.

Wireless networks and spectrum

Regarding spectrum, a new decision was adopted in May 2017 (Decision (EU) 2017/899 of the European Parliament and of the Council of 17 May 2017 on the use of the 470–790MHz frequency band in the Union). It provides for exclusive access to the 700MHz band (694–790MHz) to mobile operators by 30 June 2020. It also provides for a delay of relocation of up to two years in duly justified limited cases (unsolved cross-border coordination issues resulting in harmful interferences, the need to ensure the technical migration of a large amount of the population to advanced broadcasting standards, the financial costs of transition exceeding the expected revenue generated by award procedures, force majeure). Finally, it affirms that broadcasting services will stay a priority in the sub-700MHz (470-694MHz) at least until 2030 based on national needs. As part of its 5G for Europe Action Plan (part of the Digital Single Market Strategy), the Commission proposed to make available provisional spectrum bands for 5G ahead of the 2019 World Radio Communication Conference (WRC-19) to be complemented by additional bands.

In order to promote the efficient use of spectrum, the EECC Directive introduced clearer powers for NRAs and other competent authorities to check the compliance of operators with the conditions attached to rights of usage of spectrum and numbers including the conditions related to coverage. The EECC Directive also proposes that where member states grant rights of use for harmonised radio spectrum for a limited period of time, those rights should be valid for at least 15 years. This aims at ensuring return on investment and providing more predictability for all market players. However, stricter requirements as to the actual use of spectrum would be put in place. The EECC Directive also promotes the coordination of assignment deadlines by implementing decisions taken by the Commission, which can include transitional measures regarding the duration of rights. Renewal of rights is also dealt with, with a focus on greater predictability to ensure better business continuity.

One of the objectives of the EECC Directive is to increase consistency of selection procedures and conditions attached to spectrum usage rights through a peer review system with BEREC acting as leader. For instance, it is provided that where an NRA adopts a spectrum management measure, it shall make the draft measure accessible to BEREC, to the Commission and NRAs of other member states at the same time and BEREC shall issue a reasoned opinion on the draft measure including whether the draft should be amended or withdrawn. If the NRA does not follow the opinion of BEREC it shall provide a reasoned justification. Provisions are also introduced to promote greater flexibility for the access to spectrum resources, in particular predictable conditions for spectrum trading and leasing.

MEDIA

Regulatory and institutional structure

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

Articles 167 and 173 of the TFEU can be considered the legal basis for audiovisual policy in the EU. The EU's main objective in this context is to create a single European market for audiovisual services. It encourages cooperation between the EU member states, in particular, in the audiovisual sector, and supports them where necessary. Within the EU, the Commission is responsible for any media policy (see question 28 for details).

Within the EU, audiovisual media services (including broadcasting and on-demand services) are to a broad extent regulated under Directive 2010/13/EC (the Audiovisual Media Services Directive, AVMS Directive). The AVMS Directive was adopted to codify and harmonise the existing legislation with respect to audiovisual media services.

Audiovisual media service is defined as a service which is 'under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, to inform, entertain or educate, to the general public by electronic communications network' (see article 1, paragraph 1a, AVMS Directive).

The AVMS Directive applies to broadcasts over terrestrial, cable, satellite and mobile networks as well as over the internet (platform and technology neutrality). It distinguishes between 'linear' services (which 'push' content to viewers, eg, by broadcasting via traditional television, internet or mobile phones) and 'non-linear' services (which 'pull' content from a network, eg, video-on-demand services). Under the AVMS Directive, linear services are generally regulated more tightly, as viewers are not able to control their content.

In February 2014, the European Regulators Group for Audiovisual Media Services was established, which is responsible for advising on the implementation of the AVMS Directive.

The AVMS Directive shall, in particular, harmonise national rules on:

- regulation of television broadcasts, including satellite broadcasts, under the 'country of origin' principle, including the right for EU member states to restrict the retransmission of unsuitable broadcast content from another EU member state;
- promotion, production and distribution of television programmes within the EU, including quotas for European-produced content and content made by independent producers;
- access by the public to major (sports) events;
- television advertising, product placement and programme sponsorship;
- protection of minors from unsuitable content; and
- right of reply (of any natural or legal person whose legitimate interest has been damaged by an assertion in a television programme).

On 25 May 2016, the Commission adopted a new legislative proposal on the AVMS Directive. The proposal contains, in particular, the following new elements:

- simplification of the 'country of origin'-principle;
- clarification of cooperation procedures between EU member states;
- extension of the provisions on European-produced content to on-demand service providers;
- alignment of the rules on protection of minors for TV broadcasting and on-demand services; and
- extension of the scope of applicability of the AVMS Directive on video-sharing platforms.

The proposal shall ensure that the AVMS is prepared for the convergence of audiovisual media services and that it is in line with current technological developments. The proposal is currently in the legislative procedure.

In February 2018, a new geo-blocking regulation was adopted (EU 2018/302), which entered into force on 22 March 2018. The regulation took effect on 3 December 2018. Geo-blocking refers to practices used by online sellers that result in the denial of access to websites from other member states. In particular, the regulation addresses issues of (potential) customers not being able to buy goods and services from traders located in a different member state for reasons related to their nationality, place of residence or place of establishment and focuses on discrimination of such customers. The regulation covers audiovisual copyright content; but non-audiovisual content, such as e-books, online music, software and videogames, is excluded.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

The ownership of broadcasters is, to a great extent, regulated by the EU member states under their national broadcasting laws. National law must, however, comply with EU law, including (among others) the provisions of the TFEU and the AVMS Directive.

EU law prohibits, in particular, any discrimination on grounds of nationality. As a consequence, foreign ownership restrictions are generally prohibited. EU law also prohibits any actions that are able to prevent or impede the activities of persons or companies established in other EU member states. The TFEU sets forth the following fundamental freedoms with which any national laws must comply:

- article 34: prohibition of national restrictions on the freedom of movement of goods within the EU (including, eg, material, sound recordings and other apparatus for broadcasting);
- article 49: right of EU citizens and companies to establish businesses in other EU member states (including, eg, broadcasting businesses);
- article 56: prohibition of national restrictions on the freedom to provide services by EU citizens (including, eg, television and radio broadcasting); and
- article 63: free movement of capital in the EU (including, eg, capital for purchasing shares in a company).

National laws restricting these fundamental freedoms may be compliant with EU laws under certain circumstances (eg, where necessary for public safety or public health reasons) or in case of an overriding public interest (eg, maintenance of the social order, protection of consumers' rights, guarantee of the freedom of speech and plurality of media). However, such restrictions have to be interpreted narrowly and must be objectively justified.

According to recitals 8 and 94 of the AVMS Directive, EU member states shall prevent any actions that create dominant positions or a concentration of media ownership, and shall contribute to the promotion of media pluralism. However, no binding measures obliging EU member states to take action against media concentration have so far been adopted.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The licensing requirements, fees and timescales for authorisations are generally regulated by the EU member states. The AVMS Directive, however, specifies which EU member state is competent to regulate a broadcaster (under the 'country of origin' principle) and sets out certain common minimum requirements and standards with which broadcasters have to comply and which are enforceable by national authorities. These minimum standards include, among others:

- transparency and information obligations;
- prohibition on discrimination based on race, religion or nationality;
- accessibility for users with a visual or hearing disability;
- prohibition of surreptitious or subliminal commercial communication;
- rules on commercial communications for alcoholic beverages;
- protection of cinematographic works;
- protection of minors; and
- promotion of European and independent works.

EU member states are not entitled to apply less stringent rules to broadcasts, but may impose stricter rules on audiovisual media service providers under their jurisdiction, provided that these do not violate fundamental EU rights.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

According to the AVMS Directive, EU member states shall ensure, where practicable, that broadcasters reserve a majority of their production, budget and transmission time (with the exception of time allocated to news, sport, games, advertising, teletext services and teleshopping) for European works. EU member states shall report on the implementation of this obligation. Such report shall, in particular, include a statistical statement on the achievement of the proportion for each television programme.

EU member states shall also ensure, where practicable, that broadcasters reserve at least 10 per cent of their transmission time for European works supplied by independent producers. Alternatively, EU member states may reserve at least 10 per cent of their programming budget to independent European works. EU member states shall define such 'independent works', taking into account the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.

The AVMS Directive does not distinguish services by means of transmission (eg, online or mobile content). It rather distinguishes between 'linear' and 'non-linear' services (see question 17). To the extent online or mobile content qualify as audiovisual media services, they are, thus, regulated in the same way as 'traditional' broadcast networks and fall under the scope of the AVMS Directive.

The AVMS Directive does not contain any specific content quotas for European or independent works for non-linear services. However, EU member states are required, where practicable and by appropriate means, to ensure that providers of non-linear services promote the production of and access to European works.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The delivery of television advertising, sponsorship and teleshopping are broadly regulated by the AVMS Directive. A prerequisite for the applicability of the AVMS Directive is that the online service is qualified an audiovisual media service.

The AVMS Directive aims at protecting consumers against excessive television advertising. It therefore sets forth strict rules to ensure consumer protection, stipulating, in particular, that television advertising and teleshopping shall be recognisable as such and shall be distinguishable from editorial content, either by optical, acoustic or spatial means. It allows for an interruption of the transmission of films (excluding series, serials and documentaries) once for each scheduled period of at least 30 minutes. In total, the proportion of television advertising and teleshopping spots within a given clock hour shall not exceed 20 per cent. The proposal for an amendment of the AVMS Directive envisages a change of the limit for advertising from 20 per cent per hour to 20 per cent per day (between 7am and 11pm).

The AVMS Directive prohibits certain types of advertising, namely advertising or teleshopping inserted during religious services and teleshopping for medicinal products subject to a marketing authorisation or for medical treatment. It also restricts advertising of alcoholic beverages to a large extent.

In addition to the restrictions under the AVMS Directive, the Tobacco Advertising Directive (Directive 2003/33/EC) contains an EU wide ban on cross-border tobacco advertising and sponsorship in the media other than television. The ban covers print media, radio, internet and sponsorship of events involving several EU member states (eg, the Olympic Games or Formula One races).

Any form of advertising is, of course, also subject to the fundamental principles of human dignity, non-discrimination on the grounds of race, nationality, religious or political belief as well as the protection of minors, health, safety and environment. Furthermore, the Directive concerning misleading and comparative advertising (2006/114/EC) stipulates general requirements for advertising, irrespective of the means of transmission. Additionally, article 13 of the Directive on privacy and electronic communications (2002/58/EC) establishes certain requirements for unsolicited communications such as electronic mail for the purposes of direct marketing. These rules need to be implemented in national law by the EU member states.

In 1992, advertising industry representatives in Europe launched the European Advertising Standards Alliance (EASA), an independent coordinating body that celebrated its 25th birthday in 2017, to promote responsible advertising. EASA provides detailed guidance on how to go about advertising self-regulation for the benefit of consumers and businesses. It has become the single authoritative voice on advertising self-regulation and promotes high ethical standards in commercial communications. In 2016, the Commission explicitly recognised the role and effectiveness of advertising self-regulation.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

According to article 31, paragraph 1 of Directive 2002/22/EC (the Universal Service Directive), EU member states may impose must-carry obligations for the transmission of specific broadcast channels or services on companies providing electronic communications networks for the distribution of radio or television broadcast (eg, cable companies or telecom operators). Prerequisite is that a significant number of end users use such networks as principal means for radio and television broadcasts.

Must-carry obligations shall only be imposed to the extent necessary to meet clearly defined objectives of general interest (eg, media plurality). According to the European Court of Justice, economic considerations would not be considered general interest obligations.

The rules for must-carry obligations have to be transparent, proportionate and subject to periodical review at least every three years. They must be clearly identified and based on objective non-discriminatory criteria known in advance. Broadcasters and network operators have to be able to know their specific rights and obligations.

Must-carry obligations may also entail a provision for proportionate remuneration. However, it must be ensured that there is no discrimination in the treatment of different companies providing electronic communications networks in similar circumstances.

Article 31, paragraph 1 of the Universal Service Directive does not cover the content of the services delivered (eg, which broadcasters benefit from must-carry obligations). Such content issues are, however, subject to the principles of non-discrimination and proportionality.

Regulation of new media content

23 | Is new media content and its delivery regulated differently from traditional broadcast media? How?

The delivery of new media content is regulated by the AVMS Directive, if and as far as it qualifies as an audiovisual media service (see question 17).

If a service does not qualify as an audiovisual media service, it is covered by Directive 2000/31/EC (the E-Commerce Directive). Prerequisite for the applicability of the E-Commerce Directive is that the service qualifies as an 'information society service'. According to article 1, paragraph 1 of Directive 98/34/EC (Information Society Services Directive), such information society service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of the service (eg, web-based content, video portals, e-commerce and web-hosting).

Similar to the AVMS Directive, the E-Commerce Directive is also based upon the 'country of origin' principle. A provider of information society services is therefore generally subject to regulation in the EU member state in which it has its establishment. In general, providers of information society services do not require prior authorisation under the AVMS Directive or the E-Commerce Directive.

On 6 May 2015, the Commission adopted the Digital Single Market Strategy, which announced a legislative initiative on harmonised rules for the supply of digital content and online and other distance sales of goods. The Commission published proposals for a Directive on contracts for the supply of digital content and a Directive for online and other distance sales of goods on 9 December 2015. Both proposals aim at ensuring better access for consumers and businesses to online goods and services across Europe by providing a higher level of consumer protection and a wider choice of products at more competitive prices.

The proposal for a Directive on contracts for the supply of digital content stipulates clear and specific rights for digital content and, in particular, rules on conformity of digital content with the contract, remedies in case of failure or non-conformity and modalities for the exercise of such remedies and modification or termination of such contracts. It envisages an application to contracts for the sale of digital content (eg, purchase of music or films) and rental of digital content (eg, watching a film online against payment) as well as contracts for digital services (eg, cloud computing and social media). It applies only to contracts concluded for consideration, which can also take the form of digital media (including personal data) provided by the consumer.

Digital switchover

24 | When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

According to the Commission, the EU is leading the world in switching from analogue to digital television. The Commission recommended that switch-off in all EU member states should be completed by 2012. By the end of 2015, all EU member states had finally completed the switchover.

The re-farming of freed-up spectrum is mainly regulated by the EU Radio Spectrum Policy Programme (RSPP), which was established in 2012. The RSPP covers all types of radio spectrum use and sets general regulatory principles and policy objectives to enhance the efficiency and flexibility of spectrum use in the EU. A key aspect of the programme is the establishment of an inventory of spectrum bands identifying the current use of spectrum together with an analysis of technology trends, future needs and spectrum-sharing opportunities. Through use of spectrum bands, the Commission aims to identify inefficient spectrum allocations and to free up capacity for new (more economic and efficient) uses of such spectrum.

Digital formats

25 | Does regulation restrict how broadcasters can use their spectrum?

No. This is regulated by the member states themselves.

Media plurality

26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Media pluralism is protected at EU level as a part of the fundamental right to information and freedom of expression, which is stipulated in article 11 of the EU Charter of Fundamental Rights. In addition, article 30 AVMS Directive assumes the independence of audiovisual media regulators. However, there are no clear and enforceable safeguards available to ensure independence of regulators.

In October 2011, the Commission appointed a high-level expert group on Media Pluralism and Freedom to provide recommendations on media plurality. The Commission also established the Centre for Media Pluralism and Media Freedom (CMPF). The CMPF's objective is to accompany the process of European integration as regards media pluralism and to develop policy reports on European Union competences in this area.

In 2013, the CMPF conducted a pilot test implementation of the Media Pluralism Monitor Tool (MPM Tool). The MPM Tool was to identify potential risks to media pluralism in the EU and provide support to policy and rulemaking processes. On 30 June 2014, the Commission adopted the Work Programme for 'Measures concerning the digital content and audiovisual and other media industries' and related pilot projects in the field of media pluralism and freedom to finance the implementation of the MPM Tool.

In 2016, an examination of the 28 member states as well as two candidate countries was carried out via the MPM Tool. The result showed that none of these countries were free from risks relating to media pluralism and media freedom. It also showed erosion to freedom of expression and protection to journalists in one-third of the countries. The key findings of the examination were the following:

- high concentration of media ownership with a significant barrier to diversity of information and viewpoints represented in media content as a result;
- lack of transparency of media ownership, which makes it difficult for the public to understand the biases in media content;
- media authorities in many countries were under strong political pressure, in particular with regard to appointment procedures and composition of authorities;
- underdeveloped media literacy policy;
- lack of adequate access to media; and
- underrepresentation of women in media.

In November 2016, the Commission organised a Colloquium on Fundamental Rights focusing on media pluralism and democracy, including topics such as: how to protect and promote media freedom and independence from state intervention or undue political or commercial pressures; how to empower journalists and protect them from threats of physical violence or hate speech; and the role of media and ethical journalism in promoting fundamental rights. In the course of the pending review of the AVMS Directive, the Commission intends to further strengthen media freedom and pluralism in the EU. However, no explicit legislative proposals have been issued at this stage.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

As a part of the Digital Single Market Strategy, revealed in May 2015, the AVMS Directive is currently being reviewed by the Commission.

In 2015, the Commissioned launched a public stakeholder consultation to assess the AVMS Directive under the new Regulatory Fitness evaluation process. This consultation was followed up on 25 May 2016 with a proposal to update the regulatory framework and to adapt the AVMS Directive to recent developments in the media sector. The proposal focuses on extending the scope of the Directive and to improve rules for on-demand services as well as access to public service content. The European Parliament and the European Council are currently reviewing the Commission's proposal. They intended to reach an agreement before the end of 2017, however, on 25 April 2017 the European Parliament's Committee on Culture and Education voted to amend the proposal. The revised AVMS directive was adopted by the European Council on 6 November 2018.

The implementation of a new Directive on contracts for the supply of digital content is still ongoing. On 8 June 2017, the European Council adopted its position on the Directive, which will provide a high level of protection and legal certainty to European consumers and suppliers when purchasing and selling goods or services cross-border. The main elements of the European Council's position included a wider scope of the Directive, a 'second right' of suppliers of digital content in case of lack of supply, and a time limit for supplier's liability of not less than two years. The European Parliament adopted a report on the proposal and, in March 2018, it has been decided to enter into interinstitutional negotiations.

On 14 September 2016, the Commission presented a combination of legislative and non-legislative measures to modernise the EU copyright rules, including a proposal for a Regulation of the European Parliament and of the European Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes. The objective of the draft regulation is to promote the cross-border provision of online services ancillary to broadcasts and to facilitate digital transmissions to other EU member states. The regulation would complement the existing Satellite and Cable Directive that already facilitates cross-border satellite broadcasting and transmission of TV and radio programmes by cable from and to other EU member states. The draft regulation proposes further rules, in particular, on the licensing of certain online transmissions of broadcasting organisations and expanding collective management of retransmissions of television and radio programmes to help broadcasters that also make their content available online in other EU member states. The legislative proposal has been sent to the European Parliament and to the European Council for review, amendment and adoption. It seems there are still disagreements on the side of the member states and the European Council presidency is seeking guidance on outstanding issues to unlock the negotiations. The Directives must then be implemented by each member state through local legislation, whereas the Regulations will become immediately binding on the member states following their effective dates.

The Commission conducted a public consultation on 'fake news' in the period of 13 November 2017 to 23 February 2018. The aim of the consultation was to help assess the effectiveness of current actions undertaken by market players and other stakeholders, the need for scaling them up and introducing new actions to address different types of fake news. The Commission published a report in April 2018 which stated that there is a common perception among respondents that fake news in general is highly likely to cause harm to society in the areas of political affairs, immigration, minorities and security. The results of the consultation show that respondents ask for action to reduce the spread of disinformation online and in particular the role of online social platforms was highlighted. Whether or not concrete regulatory actions will follow from this consultation, and what those are, remains to be seen.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The responsible administrative body for telecoms and media policy at EU level is the Commission. It is also responsible for the enforcement of EU competition law and EU competition policy.

Within the Commission, the following bodies are relevant for the communications and media sectors:

- Directorate-General for Communications Networks, Content and Technology (DG Connect): responsible for carrying out and developing the Commission's Digital Single Market Strategy (including policies on digital economy and media) and for supervising and monitoring the implementation of the EU telecoms and broadcasting regulations in the EU member states;
- Directorate-General for Competition (DG Comp): responsible for the application and enforcement of EU competition law in the area of telecoms and broadcasting at EU level;
- Directorate-General for Internal Market, Industry, Entrepreneurship and Small and Medium-sized Enterprises (DG Market): responsible for ensuring an open internal market for goods and services in the EU, in particular relating to electronic and online commerce; and
- Directorate-General for Justice and Consumers (DG Justice): responsible for EU policy on justice, fundamental rights and consumers, including the protection of EU citizens' personal data anywhere in the EU and other data protection policy at EU level.

The Commission's Directorate-Generals cooperate with each other. DG Comp will, in particular, consult the other Directorate Generals, if the telecommunications, media or data protection sector is involved, prior to adopting a decision in a competition law case. DG Comp and DG Connect cooperate, in particular, in developing specific policies that may have an impact on competition law in the telecommunications or media sector.

There are a number of other competent European bodies and committees within the field of communications and media at EU level, including in particular the following:

- BEREC: comprising the heads of the national regulatory authorities within the EU and responsible for the promotion of greater coordination and coherence between the national authorities as regards the establishment and regulation of the electronic communications market within the EU;
- Communications Committee: comprising representatives of the EU member states and responsible for the provision of opinions on draft measures of the Commission, in particular as regards the regulation of roaming and notification obligations for personal data breaches;
- Radio Spectrum Committee: comprising EU member state representatives and responsible for the harmonisation of the use of radio spectrum at EU level, in particular, advice on the specific technical measures required to implement the EU Radio Spectrum Policy;

- ENISA: assists the Commission and the EU member states in meeting the requirements of network and information security; and
- Radio Spectrum Policy Group: comprising governmental officials and experts in the field of radio spectrum regulation and assisting the Commission in the development of radio spectrum policy at EU level.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Any member state, the European Parliament, or the European Council can appeal decisions of the Commission to the General Court of the European Union on points of law or fact, article 263, paragraphs 1 and 2 of the TFEU. A further appeal on points of law can be made to the Court of Justice of the European Union (CJEU). Natural or legal persons are only entitled to challenge a decision of the Commission, if such decision is either addressed to that person or of direct and individual concern to that person, article 263, paragraph 4 of the TFEU. Natural or legal persons are also entitled to challenge an EU regulatory act, in case such act is of direct concern to them and does not require its transposition into national law by the EU member states.

With respect to decisions of the national regulatory authorities, EU law obliges the EU member states to provide for effective appeal mechanisms to challenge such decisions under their jurisdictions. On the basis of article 267 of the TFEU, national courts are able to refer specific questions of EU law arising in the context of their court decisions to the CJEU for a preliminary ruling.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

E-commerce sector inquiry and new regulations

In May 2015, the Commission launched, as part of its Digital Single Market Strategy, a sector inquiry into the electronic commerce of consumer goods and digital content. On 10 May 2017 the Commission published the final report on the sector inquiry, which sets out in detail potentially problematic restrictions in agreements between e-commerce operators. One main point of the sector inquiry is e-commerce of digital content or the online provision of audiovisual and music products. The Commission concluded that the access to digital content rights is a key determinant for competition and identified several concerns relating to licensing arrangements for digital content: (i) scope of licensed rights; (ii) territorial restrictions and geo-blocking; (iii) territorial restrictions and geo-blocking; and (iv) payment structures and metrics. In this regard, the Commission identifies certain licensing practices that may make it more difficult for new online business models or services to emerge. For example, the use of bundling to restrict output in situations where online rights have been acquired but are not, or only partly, exploited by the licensee, and the use of certain mechanisms to renew agreements (such as automatic renewal clauses, first negotiation clauses and or a matching offer right) could be problematic depending on the context and markets concerned.

In particular, geo-blocking practices are a priority of the Commission. Geo-blocking is understood as commercial practice whereby online providers prevent users from accessing and purchasing consumer goods or digital content services offered on their website based on the location of the user in a member state different from that of the provider. In February 2018, a new geo-blocking regulation was adopted (EU 2018/302), which entered into force on 22 March 2018. The regulation took effect on 3 December 2018. The regulation covers audiovisual copyright content but non-audiovisual content such as e-books, online music, software and videogames is excluded. A further Regulation (EU 2017/1128) has also been adopted to enable subscribers to use their audiovisual content services subscriptions outside their home member state when travelling in the EU.

Following the final report on the sector enquiry, the Commission has additionally published a policy brief on e-marketplace bans which also relies on the findings of the long-awaited Coty judgment of the CJEU (C-230/16).

Antitrust decisions

On 27 June 2017, the Commission concluded a first part of the cases against Google in relation to Google's comparison shopping results. The Commission imposed a record fine of €2.42 billion for abusing its dominant position in general internet search, thereby stifling competition in comparison shopping markets. The Commission has objected to Google leveraging its market dominance in general internet search into a separate market, comparison shopping. Google abused its market dominance as a search engine to promote its own comparison shopping service in search results and giving it an illegal advantage, while demoting those of rivals. This was found not to be competition on the merits and is illegal under EU antitrust rules. Google has implemented certain changes to comply with the Commission's decision but the Commission and Google continue to argue over the effectiveness of the remedies implemented. Still, the Google saga will continue also with other cases in relation to the Android operating system, where the Commission is concerned that Google has stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy to protect and expand its dominant position in general internet search, and AdSense, where the Commission is concerned that Google has reduced choice by preventing third-party websites from sourcing search ads from Google's competitors. The Commission has already come to the preliminary conclusion that Google has abused a dominant position in these cases, but these are still being investigated.

On 21 March 2018, the European Commission fined manufacturers of capacitators (Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, Rubycon) €253,935,000. Together with the immunity applicant, Sanyo, they operated a cartel for the supply of aluminium and tantalum electrolytic capacitors in the period between 1998 and 2012. The Commission's investigation found that from 1998 to 2012, the nine Japanese companies participated in multilateral meetings and engaged in bilateral or trilateral contacts to exchange commercially sensitive information.

In January 2018, the Commission opened formal antitrust proceedings against NBC Universal for alleged breach of article 101 of the TFEU. This newly opened case is related to an investigation by the Commission dating back to January 2014, on restrictions affecting cross-border provision of pay TV services involving NBC Universal, Paramount Pictures C, SKY (UK), Sony Pictures Entertainment, The Walt Disney Company, Twentieth Century Fox Int Ltd and Warner Bros Entertainment UK Ltd. The Commission had opened formal proceedings against Twentieth Century Fox, Warner Bros., Sony Pictures, NBC Universal, and Paramount Pictures that same month (Paramount had offered commitments in July 2016 and the Commission since closed its proceedings in January 2018). In July 2015, the Commission opened proceedings against Walt Disney, which are still on-going.

Merger decisions

On 18 May 2017, the Commission followed up on one of its earlier big merger decisions – the *Facebook/WhatsApp* case. The Commission imposed a fine of €110 million for providing incorrect or misleading information during the Commission's 2014 investigation of Facebook's acquisition of WhatsApp. During the merger control proceedings,

Facebook informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. In August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. The Commission has found that, contrary to Facebook's statements, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook staff were aware of such a possibility. This decision shows the importance of providing accurate information to the Commission.

Similarly, the Commission fined Altice, the Dutch cable and telecommunications company, for implementing its acquisition of the Portuguese telecommunications operator PT Portugal before a notification or approval by the Commission. This case highlights the Commission's increased scrutiny of gun-jumping cases.

The proposed acquisition of NXP by Qualcomm has been cleared by the Commission after an in-depth Phase II investigation. The Commission's concerns included that the merged entity: (i) would hold a strong market positions within both baseband chipsets and NFC/SEs chips which lead to concerns of bundling and tying; (ii) would have the ability and incentive to modify NXP's current intellectual property licensing practices in relation to NFC technology by bundling the acquired NFC intellectual property to Qualcomm's patent portfolio; and (iii) would remove competition between companies active in the markets for semiconductors used in the automotive sector and, in particular, in the emerging Vehicle-to-Everything (V2X) technology, which will play an important role in the future development of 'connected cars'. The case highlights the Commission's review of future innovation when assessing mergers, in line with cases in other industries such as *Bayer/Monsanto* and *Dow/DuPont* where innovation issues have been raised.

The Commission also reviewed further of mergers in the telecommunication sector as the consolidation in the industry continues. Notably, the Commission cleared three mergers in the cases *Vivendi/Telcom Italia*, *Broadcom/Brocade* and *Discovery/Scripps* all subject to conditions and cleared two mergers without conditions in cases *Ennoconn/S&T* and *Bite/Tele2/Telia Lietuva*.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The telecommunications and media sectors have developed quite separately in Greece. Telecommunications developed following the decision of the government in 1992 to proceed with the establishment of a competitive market for mobile telecommunications. That year, two licences for mobile networks were granted to two subsidiaries of foreign operators, Vodafone and Telecom Italia, which launched their services in 1993. The incumbent Greek operator, OTE, was then totally excluded from the tender. A licence for mobile networks was granted to OTE in 1995, which launched its services in 1998. At the same time, the government started the privatisation of the incumbent, a procedure that ended in 2008, 14 years later.

The key law for liberalisation of communications was enacted in 2000. The EU Framework on electronic communications networks and services was initially transposed into national legislation with a significant delay in 2006. The revised Electronic Communications Framework was transposed into national legislation through Law 4070/2012.

In the media sector, the liberalisation of the market in Greece and the transition from the state-controlled radio and television to the regime of radio and television operated by privately owned companies has been the result of a de facto development in the market that occurred before the appropriate legal framework. An immediate effect of this is that the market developed in a totally unregulated way. Few of the free-to-air television stations still operate with a temporary licence, and the majority of the free-to-air radio and television stations operate legally under certain temporary provisions, in a very muddy legal environment. In October 2015, Law No. 4339/2015 entered into force, introducing the provisions on the authorisation of digital terrestrial television broadcasting content providers.

The decision-making procedure in Greece is divided and fragmented. The basic framework is set out in the acts that are enacted by Parliament. There is, however, an enormous quantity of secondary legislation that involves decisions that must be taken jointly by different ministers and three independent authorities. These are the regulator for telecommunications, the National Commission for Telecommunications and Post (EETT), the National Council of Radio and Television (ESR) and the Competition Committee (CC). The situation gets more complicated, as whereas the ESR is an independent authority that is established by the Greek Constitution, this is not the case for either the EETT or the CC. In addition to the above, issues related to data protection and privacy of communications are regulated by the Data Protection Authority (DPA) and the Hellenic Authority for Communication Security and Privacy (ADAE) respectively, both established by the Greek Constitution.

Therefore, the jurisdiction of the ESR is described in the Constitution and cannot change unless the Constitution is amended, something that is, in itself, very difficult. This does not allow necessary changes in the legal regime that would lead to a more workable distribution of the issues that fall within the jurisdiction of the ESR and the EETT. The existing regime is drawn along the lines that content is regulated by the ESR and infrastructure and frequencies by the EETT. However, some types of licensing, and in all cases the licences for transmitting content, are still to a great extent granted by the ESR. On the other hand, whereas the EETT is responsible for applying the ex-ante rules for the liberalisation of the market, in all the electronic communications markets, including, therefore, that of broadcasting, and also the ex-post competition law, the CC is responsible for applying the ex-post competition law in the sector of television and radio irrespective of what technology is used.

Finally, except for online gambling, e-commerce and the data protection legislation, there is no other internet-specific legislation. General provisions of law are applicable, along with certain guidelines or ad hoc decisions of the Greek DPA that are used as guidelines for the interpretation of such general provisions on specific electronic communications services.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Any natural or legal person can apply to acquire a general authorisation to provide electronic communications services or networks, which is processed at once. To obtain a general authorisation, the requesting entity needs to submit a Registration Declaration to the EETT, using the standard form provided by the EETT, along with the relevant supporting documents. This Registration Declaration must be submitted solely through the Online Application System for Electronic Communications Services Providers. When submitting the application, the person concerned must electronically send to the EETT all required supporting documents attached to the Statement. To access the Online Application System for Electronic Communication Providers, the applicant must submit an 'Administrator's Statement', according to the provisions of the EETT decision 586/006/2010 as in force. The person providing this Statement may perform the specific electronic communications activity described in the Registration Declaration, immediately upon filing a complete Registration Declaration. For the Declaration to be deemed complete, relevant administrative fees must be paid. The requesting operator is included in the Registry of Authorised Operators and may obtain a relevant certificate by the EETT upon request within seven days of receipt of such request.

Any natural or legal person can apply for rights of use, which will be processed within three weeks from the application for a right of use of numbers or six weeks for numbers with significant economic importance; applications for rights of use of frequencies will be processed

within six weeks if there is no limitation of the number thereof or up to six months from the application if such a limitation is imposed.

With the exception of free spectrum bands, for all wireless services an individual right to use frequencies is required and is granted by the competent authorities upon a relevant request. Only if the spectrum available is not enough to cater for existing demand from existing or new competitors will a limitation on the number of individual licences be effected. This will be the result of a public consultation that the EETT must prepare following a ministerial decision to that effect. If, as a result of that consultation, the number of individual rights has to be limited, the EETT must decide how this limited number of individual rights will be granted. Any kind of tender can be held in accordance with the principles of transparency, etc, that are set by Greek law in accordance with EU directives. In practice, in cases of limited number of rights of use of frequencies, the EETT usually awards them through auctions.

As far as licences for antennas and base stations are concerned, the relevant framework has been reviewed to deal with the bureaucracy and the incomplete framework that led to severe delays in the issuance of licences. The main target of the new process is to accelerate the process by establishing a one-stop shop for applications.

The duration of general authorisations is indefinite. The duration of rights of use of frequencies is defined in the relevant EETT Decisions, awarding the rights of use.

Fees imposed on operators with a general authorisation are paid on an annual basis and correspond to the costs of management, monitoring and compliance with the General Authorisation Regime and to the rights to use radio frequencies or numbers it derives from a formula included in the EETT Decision on General Authorisations. The main factors taken into account for the calculation of the fees are the total turnover from electronic communications networks or services minus the wholesale interconnection and roaming costs paid to other operators. The fees are equal to a percentage that varies depending on the net revenues, calculated as described above.

Fees for use of numbers are defined for each series of numbers in a decision of the EETT on allocation of numbering resources.

Fees for rights of use of spectrum are imposed by decision of the EETT and are usually paid on an annual basis, except for rights of use of frequencies that are granted through competitive procedures, such as auctions, in which case the EETT only defines the minimum bid, and the final fees result from the auction procedure.

All the telecoms operators are obliged to have registered themselves under the general authorisation regime and be granted individual rights to use frequencies or numbers and the appropriate licences for every antenna they use. Apart from that there is no other substantial difference in relation to the regulation of fixed, mobile and satellite services.

There is no exclusivity granted to any operator in any sector. However, there are a limited number of licences with regard to 2G, 3G and 4G mobile and fixed wireless access and digital television networks. According to the relevant legislation, the EETT proceeds to a public consultation that leads to a proposal by the EETT to the Minister of Transport concerning the way in which licences will be granted, the cost, the duration of the entitlement, etc.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Spectrum licences and applicable secondary legislation specify the permitted use and the technical characteristics of equipment that may be used, to the extent that specifications are required, taking into account the principle of proportionality and technological neutrality. The law allows for spectrum trading under specific conditions. To transfer, lease or make any change in the control of the rights holder, an application must be filed to the EETT that considers the relevant application and decides based on specific criteria defined by law.

In Q3 of 2018, the EETT launched a public consultation on the amendment of the Regulatory Framework for the Use of the Radio Frequency Spectrum for Internet-Related Things (IoT), the results of which were published in February 2019.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Following the deregulation of the retail fixed calls markets in 2013, the EETT decided to also deregulate the market of fixed retail access to publicly available telephony networks in December 2016. Currently, the only retail market that is still subject to ex-ante regulation is the market for retail leased lines with capacity up to 2Mbps. The incumbent (OTE) has been found to have significant market power (SMP) in this market.

The incumbent OTE has also been designated an SMP operator in the following wholesale markets: fixed origination, termination to individual fixed networks, local loop unbundling (LLU), wholesale broadband access and terminating segments of leased lines.

All fixed network operators have been designated as having SMP in the markets for termination to individual fixed networks and all (three) mobile network operators have been designated as having SMP in the markets for termination to individual mobile networks.

The ex-ante regulatory obligations for transparency, price controls, cost accounting separation, access to and use of specific network facilities and non-discrimination have been imposed on SMP operators in the above markets (with a few exceptions in specific markets).

The EETT's most recent decisions on (deregulation of) the retail and (regulation of) wholesale access markets were issued on December 2016.

Additional issues regarding telecoms regulation (fixed infrastructure)

In practice there are no cable networks in Greece.

Access to the local loop or LLU is regulated. OTE is designated as an SMP operator and specific obligations are imposed upon OTE, namely access to the local loops and associated facilities (eg, collocation), transparency, non-discrimination, price control, cost accounting obligation and accounting separation.

The market analysis of the local access market, which designated OTE as an SMP operator, imposed an obligation to provide access for the deployment of NGA Networks based on VDSL Vectoring infrastructure and services by other operators (or based on other NGA technology) through a process managed by the EETT for the assignment of local sites to operators.

The interconnection market is regulated. Concerning the fixed market, OTE is designated as having an SMP position and specific obligations are imposed upon OTE. In cases of interconnection disputes, the EETT can intervene through the standard dispute resolution procedure, provided for by the Law on Electronic Communications. Prices of wholesale interconnection services that are regulated are defined on the basis of cost-orientation.

In Q2 2018, the EETT performed a public consultation on the third round of regulation of leased lines in the Greek Territory (market 4 of Commission Recommendation 2014/710/EU 'Wholesale high-quality access provided at a fixed location'). A decision is to be notified to EC shortly. According to the draft measure that was published for the public consultation, the currently regulated retail leased lines market with capacity up to 2Mbps is proposed to be deregulated.

Additional issues regarding telecoms regulation (mobile)

With the exception of free spectrum bands, an individual right to use frequencies is required for all wireless services and is granted by the competent authorities upon a relevant request. Only if the spectrum available is not enough to cater for existing demand from existing or new competitors will a limitation on the number of individual licences be effected. This will be the result of a public consultation that the EETT must prepare following a ministerial decision to that effect. If, as a result of that consultation, the number of individual rights has to be limited, the EETT must decide how this limited number of individual rights will be granted. Any kind of tender can be held in accordance with the principles of transparency, etc, that are set by Greek law in accordance with EU directives.

The aforementioned rules are also applicable in the assignment of unused radio spectrum. No change of permitted use is allowed.

The law allows for spectrum trading under specific conditions. To transfer, lease or make any change in the control of the rights holder, an application must be filed to the EETT, which considers the relevant application and decides based on specific criteria defined by law.

A general obligation to provide access to MVNO operators is imposed on mobile network operators (MNOs) through a relevant provision included in the rights of use of frequencies. However, this obligation does not specify the pricing or non-pricing terms of access provision. In Q4 of 2018, the EETT issued a decision, following a dispute resolution petition by fixed operator Forthnet requesting MVNO access by mobile operators Vodafone and Cosmote, ruling on both the obligation but also the pricing terms thereof.

Call termination on a mobile network is regulated, as all MNOs have been found to hold an SMP position in the market for termination of calls to their mobile network. Mobile termination rates are regulated on the basis of the cost-orientation principle and a series of additional obligations (access, transparency, non-discrimination, accounting separation) have been imposed on MNOs with an SMP position.

The provisions of the EU Roaming Regulation have been fully implemented as of 15 June 2017.

With regard to next-generation mobile services, all individual licences issued in 2003 with regard to 3G mobile networks provided for specific coverage obligations for the operators. Such obligations continued to exist after the individual licences under the previous regime were adjusted to the current regime of individual rights of use of spectrum. These were relaxed in practice because of the slow development of technology and demand, but such conditions have now been fully covered. Generally, the law allows the EETT to impose such obligations and until now the EETT has done so, but as a rule these obligations are rather limited and the EETT is not strict in their implementation, bearing in mind the development of the market. The most important development in this field has been the award of rights of use of frequencies in the 800MHz to 2,600MHz band to MNOs for the provision of electronic communications services through an auction in October 2014. The 800MHz frequencies were previously used for analogue broadcasting.

Additional issues regarding internet services (including voice over the internet)

With the exception of radio and TV legislation, online gambling legislation, the provisions of the Greek presidential decree implementing e-commerce and the data protection legislation, which includes specific provisions on internet services, there is no specific national regulation. The general provisions of law and relevant EU framework, recommendations, opinions and self-regulation instruments also affect the provision of internet services.

There are no specific limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers. The EU legislation is fully implemented.

Addititonal issues regarding access and/or securing or enforcing rights to public and private land to install telecommunications infrastructure

Law 4463/2017 implemented EU cost reduction Directive 2014/61/EU. Until the operation of the Information System, which will support the one-stop procedure for the granting of the rights of way, the procedure of article 11 of Annex X of Law 4070/2012, as amended by Law 4463/2017, applies.

In July 2018 the EETT conducted a public consultation on the modification of EETT regulation (528/075/2009) for the determination of fees for rights of way, rights of use of rights of ways and the amount of guarantees of good performance of rights of ways operations for Greece with the aim of simplifying the relevant procedures. Additionally, the EETT issued in August 2018 its new Regulation on Collocation and common use of facilities.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is an obligation for structural separation for entities that provide services in the public telecommunications sector using exclusive or special rights granted to them by the Greek state. Functional separation was introduced by Law No. 4070/2012 as a remedy that may be imposed by the regulator to SMP operators, under the conditions stipulated in law, which are in accordance with the relevant EU directive. However, in practice the issue has not been raised by the EETT and no relevant consultation has been undertaken. Apart from that, accounting separation could be imposed on operators with SMP in specific markets and has indeed been imposed on the incumbent in the markets where it has been found to hold an SMP position, as well as MNOs in the mobile termination markets.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The universal service obligations apply to the following services:

- access at fixed locations and telephony services;
- directory services;
- public payphones and other points of access to public telephony; and
- special provision for disabled users.

According to the decision on cost allocation, the cost is undertaken by all operators authorised under the general authorisation regime (including the incumbent), by a proportion depending on their total revenues deriving from the provision of electronic communications networks or services, provided that their turnover exceeds €15 million.

The designated Universal Service Provider, OTE SA, has already applied for compensation concerning the net cost of the Universal Service Obligation for the years 2010 to 2015. On 14 December 2017, EETT issued its final decision (published February 2018) for the net cost of universal service for the year 2010, which stipulates that the net cost amounts to €24,831,663 and it notes that it is an unfair burden for OTE SA. On the same day, the EETT also issued its final decision for the net cost of Universal Service for the year 2011, which stipulates that the net cost amounts to €21,982,162 and it also notes that it is an unfair burden for the designated Universal Service Provider, OTE SA.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

Number allocation includes primary and secondary allocation. Numbers are primarily allocated by the EETT by awarding 'rights of use of numbers' following application of the providers that have obtained a general authorisation covering services that justify the use of the requested number range. Providers may proceed to secondary allocation to users. No third-level allocation is permitted (allocation from one user to another). The decision on the allocation of numbers is issued within three weeks from the date of submission of a complete application. The fees for allocation and use of numbering resources (for the first year) must be paid within two weeks from submission of the application. In case of rejection of the application, the allocation and usage fees are reimbursed to the applicant. The allocation is valid until the due date of payment of the annual usage fees of the coming year and is renewed upon payment of the annual fees every year.

Number portability applies to fixed and mobile numbers and to the following special categories of numbers: corporate and VPN access numbers (50), personal numbers (70), freephone numbers (800), shared cost (801), numbers for services with maximum charge (806, 812, 825, 850, 875), numbers used for calling cards services (807), numbers for access to data services (896, 899) and premium charge numbers (90).

Portability requests are addressed to the recipient provider, which communicates the request through the national portability database to the donor-operator.

Portability for both fixed and mobile numbers must be completed within one working day from the date of acceptance of the portability request from the donor-operator. However, for fixed numbers, when the portability request is submitted jointly with an LLU transfer request, the numbers are ported on the date of transfer and activation of the local loop, which technically extends the deadline for fixed numbers.

The EETT's new rules on both fixed and mobile numbers' portability entered into force in June 2018, with the aim to resolve inadequacies of the former framework. Under the new arrangements, a subscriber has the right to withdraw without charge and in case of a contract either remotely (via telephone, the internet or fax) or out of the shop (for example, through a representative of the company at the subscriber's site) without explanation. Therefore, it has the possibility to cancel the number portability application that it has submitted. The aforementioned options apply for a period of 14 calendar days from the conclusion of the contract. More specifically, under the new framework:

- the request for portability is forwarded to the actual operator after 14 days, when the implementation process starts;
- if the subscriber wishes the request to be processed earlier than 14 days, he or she must make a declaration to the new company. The company has the right either not to accept the request or to ask the subscriber a written statement that he or she then accepts to lose the right of withdrawal. In this case, the subscriber has the option to apply for cancellation of portability until the service reaches a new company and if the 14-day deadline has not passed; and
- to cancel portability, the subscriber must send a request only to the company to which he or she has submitted the portability request and by one of the means of communication available to him or her for this purpose.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Customer terms and conditions for the provision of electronic communications networks and services are subject both to general consumer protection legislation and to sector-specific regulation and particularly to the General Authorisation Regulation of EETT, which defines the minimum content of such terms and conditions.

As of January 2019, the EETT's General Authorisation Regulation introduces obligations for:

- automatic service interruption to avoid overcharging;
- maximum termination rate for early termination of a fixed-term contract; and
- seamless access of customers to conventional terms and pricelists.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

There are no relevant specific limits. The EU legislation is fully implemented. In Q4 2017, the EETT performed a public consultation on specific issues of Regulation (EU) 2015/2120 of the European Parliament and of the Council 'laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services'.

Within that framework, in October 2017, the EETT launched a public consultation on a draft decision for the implementation of measures of Regulation (EU) 2015/2120 concerning access to the open internet and published responses to comments received by the market on December 2017.The draft decision addressed issues like: speed definitions, methodological framework for speed assessment, user information, definition of continuous or repeated deviation, definition of significant deviation, control of subscriber's complaints. Additionally, in the field control of commercial practices (regarding zero rating and subsidised access), services or information for the purposes of subscriber support, as well as applications for speed measurement in cell phones is acceptable, whereas the following is not permitted:

- provider pages that include the promotion of products and services;
- services (such as music, videos, e-books) favouring the content of the provider itself against third-party content providers; and
- discrimination after exceeding the data cap.

EETT Decision 876/7b/ 2018 introducing an open internet regulation that establishes measures for the purchase of internet access services, in accordance with the relevant European Regulation (2015/2120) was issued in December 2018.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no legislation or regulation specifically addressing digital platforms.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

In the fourth round of market analysis referring to the market for wholesale fixed local access, the EETT found once more that the fixed incumbent OTE holds an SMP position in these markets and imposed additional obligations related to the deployment of NGA networks through VDSL Vectoring. These obligations include the provision of information on the incumbent's local access network for the purpose of

assignment of specific local sites to other operators with the obligation to deploy VDSL Vectoring infrastructure following an allocation process managed by the EETT. The operators that are assigned specific areas (local sites) also undertake obligations related to the terms of provision of services at wholesale level.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

In addition to the general provisions on data protection, special provisions have been imposed by law concerning data protection in communications. The DPA is responsible for monitoring the implementation of relevant legislation.

Furthermore, the Constitution provides for an independent ADAE, which is responsible solely for the communications sector and has issued relevant secondary legislation (the Regulations). The ADAE sets the rules that must be followed by all telecommunications operators and service providers in safeguarding secrecy in telecommunications, being a constitutionally protected right.

Specific issues

Interception and data protection

Specific regulation requires operators to assist the government to lawfully intercept telecommunications messages after the intervention of the public prosecutor when a major crime is being investigated and under the supervision of the ADAE.

Data retention and disclosure obligations

The relevant EU directive has been fully implemented in Greece (Law No. 3917/2011). Operators and service providers must destroy customer data 12 months after the time of every communication unless otherwise specifically requested by the public prosecutor. Operators and service providers are not compensated for their efforts. Following the annulment of the Data Retention Directive (Directive No. 2006/24/EC) by the European Court of Justice, the national legal framework on data retention is under review, but remains in force. The aforementioned framework is subject to obligations arising from GDPR in force, as applicable since 25 May 2018.

Unsolicited communications

The relevant EU directives have been fully implemented (Law No. 3471/2006).

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Data controllers and processors are required by law to ensure the implementation of appropriate organisational and technical measures to ensure protection of personal data. Security obligations of electronic communications networks and services providers are mainly governed by article 37 of Law No. 4070/2012 and relevant ADAE Regulations (ADAE Decisions Nos 165/2011, 205/2013).

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no legislation or regulation addressing specifically the legal challenges raised by big data.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Law No. 3917/2011 imposes on operators an obligation to store in Greece all data retained in compliance with the data retention obligation for 12 months. The initial wording of the law in 2011 required retained data to be 'generated and stored' in Greece. This was amended in 2013 and the current framework only refers to the obligation to 'store' such data in Greece and retain it for a period of 12 months.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Deployment of NGA networks (vectoring) is in full progress by the EETT. The EETT issued in 2018 a regulation on enforcement of a new regulation for deployment of NGA networks via VDSL Vectoring technology in the access network.

MEDIA

Regulatory and institutional structure

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

See question 1. In the media sector, there is a significant difference between the development and regulation of distribution platforms and pay-tv on one hand and free-to-air TV content providers on the other hand. In February 2014 the EETT completed the procedure for the award of the first licence for digital television network, which was awarded to Digea. In April 2014, the EETT issued a decision on the techno-economic model to be used to define the price caps to be charged by Digea to operators.

According to the applicable legislation, it is relatively simple to obtain a licence for pay-TV via cable or satellite, as it requires an application by a company having the form of a *société anonyme*; there is no limit on the number of licences granted and there is an obligatory period within which the licence must be granted jointly by the ESR and the Minister, or refused. Breach of this period without a response from the ESR is considered to be a silent approval. The decision is a joint decision of the ESR and the Minister, meaning in practice that the Minister is bound to issue a ministerial decision in line with the proposal of the ESR. The Minister cannot refuse. An application can be made from any company in the EU having the form of a *société anonyme*. Licensing for terrestrial pay-TV and free-to-air TV is more complicated, based on a tender. Law No. 4339/2015 has defined the process and key conditions for the award of licences to digital terrestrial TV content providers. Issues that will be evaluated are the extent of the investment, financial reliability, experience and existing position in the market to avoid concentration, as well as the kind of programmes that will be transmitted. See question 19 for further details on the licensing framework.

Ownership restrictions

18 | Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

According to the applicable legislation (Law No. 3592/2007), controlling more than one licence holder in the television or radio sector is prohibited. Everyone is allowed to participate in more than one licence

holder in television or radio to the extent that he or she does not control more than one (a person has control over a licence holder if it can substantially influence the decision-making process or it has the power to appoint at least one member of the board of directors or an administrator in another operator). Foreign investors have the opportunity to participate in broadcasting activities in Greece, subject to the generally applicable restrictions.

The concentration of media is prohibited. Concentration in media is considered to exist if an undertaking acquires a dominant position that is defined in Law No. 3592/2007, which provides also for complementary application of Competition Law No. 3959/2011. The Competition Commission is the competent authority to consider issues of concentration in the sector or any other competition law issues.

Market share is calculated on the basis of income from advertising and exploitation of programmes or provision of other similar services during the previous year.

Law No. 4339/2015 (as amended by Law No. 4487/2017) sets the following restrictions on shareholders holding more than 1 per cent, board members and legal representatives of entities that participate in tenders for digital terrestrial TV content providers: non-convictions by irrevocable court decision for specific crimes; and non-participation in any manner in companies conducting research in the radio or TV market and in advertising companies, as well as in companies conducting telemarketing. The law also refers to the general prohibition from participating in companies that execute public contracts and require licence applicants to submit evidence proving how the applicant acquired the financial means used or intended to be used for the operation of the content provider.

There is no suggestion of any change to the regulation of cross-ownership.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

According to the applicable legislation (Law No. 3592/2007, Law No. 4070/2012 and Directives for Television without Frontiers), analogue licences to transmit free-to-air radio programmes and digital terrestrial pay-TV and radio are granted through a tender. The digital television network licences were granted through an auction in February 2014. Regarding licensing of content providers for free-to-air digital terrestrial television, the licensing requirements are defined in Law No. 4339/2015, as mentioned above. The law provides for the award of licences through an auction conducted by the ESR, following the relevant ministerial decision. Special conditions shall be defined by the ESR, but the law sets requirements with respect to the legal form, the minimum capital, the requirement to identify shareholders, technical infrastructure, programme content, number of employed personnel, etc.

Law No. 4367/2016 amended Law No. 4339/2015 by adding a new article 2, which gave the power to the Ministry to perform the first auction for the provision of free-to-air TV licences. The number of licences to be awarded through this process was set to four. In 2016 the Minister initiated the process for the assignment of four free-to-air licences. The auction was performed and completed in September of 2016, but the Council of State (Supreme Administrative Court), following appeal of the participants and existing TV operators, found that the process for the award of the licences by the Minister violated the Constitution and annulled it. Article 2A, which awarded the relevant powers to the Minister, was abolished and the process for the award of free-to-air TV licences shall be conducted by the ESR. On 6 July 2017, the ESR issued a decision defining that the number of TV licences to be awarded through the tender will be seven. On 27 November 2017, the ESR initiated the process for the assignment of seven free-to-air licences. Representatives of six media companies submitted applications to the ESR for a forthcoming tender for private television licences. The six applications were from the companies representing Skai, Star, Alpha, ANT1 and Epsilon and from a firm called Tileoptiki Elliniki. Each of the five of them pertaining to SKAI, StarChannel, Alpha, Antenna TV AE (Ant1) and 'E' TV acquired one licence, whereas the sixth applicant, Tileoptiki Elliniki SA, was found to be eligible on conditions relating to the proof of financial capacity of the company. These conditions were not met by the company, resulting in the rejection of its application, in June 2018. Mega channel did not submit tender, prompting employees to air a televised protest.

A new TV licence competition was held in 2018 for the seventh licence. Finally, five channels have submitted requests for annulment of the tender No. 1/2017 before the Council of State. The hearing took place on 4 May 2018 and their request was rejected. Subsequently, five licences have been awarded and the ESR announced in January 2019 an auction for the granting of the two remaining licences.

The general provisions on radio and television content apply, meaning that the programme must adhere to the general principles of the Constitution and there are further obligations concerning minors, rating of the programmes, advertising, pluralism and non-discrimination, etc. In fact, the Directives for Television without Frontiers are implemented in Greek law by Presidential Decree No. 109/2010, and apply to providers that are under the jurisdiction of Greece as defined therein. With a few exceptions, this also applies to programmes and programme providers that originate outside the EU. In the case of pay-TV, the agreements between programme administrators and the holders of a licence (the platform operator) must be approved by the ESR. Only notification and not approval is needed in the case of an agreement with providers concerning a programme that has already been transmitted in public from a licensed free-to-air station in Greece or in another country.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The EU legal framework has been transposed into national legislation. No regulation applies to online and mobile content.

The broadcasting of foreign-produced programmes is regulated by the same regulations that are applicable to Greek programmes. There are minimum quotas for European content and an obligation that the foreign-produced programmes in a language other than Greek must be subtitled, which is applicable only to free-to-air TV and pay-TV, but not to online or mobile content.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast media advertising is regulated in accordance with Presidential Decree No. 109/2010 and the Open Frontiers Directives, fully implemented, which are not applicable to online advertising. The latter is regulated by general provisions in the legislation concerning e-commerce and the protection of the consumer. Furthermore, the recently established Electronic Media Business Register aims towards the registration of all online media. The relevant Register and its members were published on 18 April 2017 on the website of the Ministry of Digital Policy. Only online media providers that are registered are eligible to receive state advertising.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There are no regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks, the only exception being the obligation on these operators to provide some spots with 'social' content.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

According to the applicable legislation (Law No. 3592/2007) new media content and its delivery are regulated in the same way as traditional broadcast media.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The relevant legislation (Law No. 3592/2007) is in place and sets the framework. The schedule and technical specifications for the digital switchover have been defined by Joint Ministerial Decisions. According to these decisions, the switch-off of analogue broadcasting and completion of digital broadcasting was scheduled to be completed within 325 days from 7 February 2014 (date of award of the Rights of Use of Frequencies for terrestrial digital broadcasting) (ie, by 29 December 2014). However, according to Digea's public announcements, the last switchoff was scheduled for 6 February 2015.

Regarding the reallocation of freed-up frequencies (digital dividend), the EETT performed an auction in October 2014 for the award of freed-up frequencies at the band of 800MHz and 2,600MHz, which was concluded with the award of these frequencies to the three existing MNOs for mobile broadband (4G/LTE).

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The existing regulation does not restrict how broadcasters can use their spectrum.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The provision of broadcasting services over broadband networks requires a network operator and a content provider, who may be the same or different entities.

The provision of television and radio services via terrestrial digital technology (using radio frequencies allocated for broadcast television and radio digital signal) requires a network provider of electronic communications and a content provider. The network provider and the content provider are required to be separate entities.

The main activity of Digea Digital Provider Inc (Digea) is to provide networking and multiplexing, as well as network broadcasting for any legitimate TV station wishing to use its services. In essence, Digea creates the network and transfers the content of the channels, as delivered to its systems.

Following EETT's plenary decision in February 2014, Digea was granted all spectrum rights of use of national and regional coverage to develop digital terrestrial television network. After the successful completion of the tender process by EETT, Digea has developed infrastructure for the digital terrestrial television networks and the last analogue broadcasting to be switched off was on 6 February 2015. According to the licence granted by the national regulatory authority (EETT), the digital network provider (Digea) has the obligation to serve all licensed programmes under the same conditions (non-discriminatory treatment).

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

In February 2014 the EETT completed the procedure for the award of the first licence for a digital television network. In October 2015, Law No. 4339/2015 defined the process and conditions for the award of licences to digital terrestrial TV content providers. The law provides for a limited number of licences, the exact number of which shall be defined by ministerial decision. The government has stated its intention to award a very limited number of licences with national coverage (statements at the beginning of 2016 referred to five national coverage licences). The law also provides for other categories of licences defined on the basis of coverage range (national or regional) and on the basis of content (informative, etc). However, certain provisions of the law were annulled by the Council of State and the procedure for awarding of licences shall take place in the near future. A new TV licence competition was held in 2018 for the seventh licence. Finally, five channels have submitted requests for annulment of the tender No. 1/2017 before the Council of State. The hearing took place on 4 May 2018 and their request was rejected. The ESR announced in January 2019 an auction for the granting of two licences for the provision of terrestrial content digital TV broadcasting of free-of-charge national general information program.

Moreover, a new act has been prepared for the procedure for award of licences for digital radio stations in Greek territories. In January 2018, following the issuing of Ministerial Decisions 169-171/2018, the EETT launched an auction for the awarding of rights to use radio frequencies of terrestrial digital radio-free broadcasting (DAB) of national and regional coverage, with the procedure of sealed tenders in which each tenderer pays the price offered. Through this process, a National Coverage Radio Frequency Use Right would be granted for the DAB + multiplex channels described in the relevant tender document and several Regional Radio Frequency Use Rights for the award areas specified in the same tender document. The auction received two applications for awarding, which were both found non eligible by the EETT in May 2018. Analogue radio FM stations in Greece still operate under temporary licencing regime.

In Q2 2018, the EETT performed a public consultation on the third round of regulation of leased lines in the Greek Territory (market 4 of Commission Recommendation 2014/710/EU 'Wholesale high-quality access provided at a fixed location'). A decision is to be notified to the European Commission shortly. According to the draft measure that was published for the public consultation, the currently regulated retail leased lines market with capacity up to 2Mbps is proposed to be deregulated.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

All the regulatory agencies are independent administrative authorities. They are fully independent from network operators and service providers. The agencies that regulate the communications and media sectors are the following:

- the EETT: the national regulatory authority that supervises and regulates the electronic communications and postal services market. Additionally, it is responsible for frequency allocation and spectrum management. It is also responsible for the application of competition law in the electronic communications sector and in the postal services sector;
- the ESR: an independent administrative authority that supervises and regulates the radio and television market;
- the CC, which is responsible for application of competition law in all sectors, except the electronic communication and postal services sector;
- the ADAE: an independent authority responsible for the protection of security and privacy of communications; and
- the DPA: an independent authority responsible for protection of personal data in all sectors.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Decisions of the regulators can be challenged at the Administrative Appeal Court and the decisions of the court can be challenged at the Council of State. Major regulatory issues are challenged directly at the Council of State. In case of the EETT (the NRA for electronic communication, competition authority and spectrum agency), all regulatory decisions (regulatory administrative acts) are appealed against before the Council of State with a Petition for Annulment, whereas decisions with the content of an individual administrative act are appealed against before the Administrative Court of Appeal. All regulatory decisions brought before the Council of State and decisions with the content of an individual administrative act, not imposing penalties, are challenged only with regard to the appropriate application of law and procedural rules, and not on the merits (the facts) of the case. Decisions that impose fines, etc, can be challenged both in their substance and with regard to the appropriate application of law and procedural rules at the Administrative Appeal Court. Decision of the Administrative Court of Appeal can be appealed against on a second grade before the Council of State only with regard to the appropriate application of law and procedural rules.

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Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

In Q3 2017, the EETT imposed a €6.3 million fine on OTE (€3.5 million for violating free competition laws and €2.8 million for breach of regulatory obligations, claiming the amount was determined based on the severity of the violations and to ensure fair market practices are adhered to) following an investigation launched after complaints were filed by competing telecoms provider Forthnet, as well as mobile companies Wind Hellas and CYTA.

Also, the Greek government has launched an international tender to sell a 5 per cent stake in former monopoly telco OTE (Cosmote), a move in line with Greece's international economic bailout terms. Privatisation agency Hellenic Republic Asset Development Fund (HRADF, or locally TAIPED) announced on its website the start of the process for the acquisition of 24.51 million common registered shares in OTE SA, 'to be conducted in one phase', requesting that interested investors submit their binding offers, in accordance with the Request for Proposal posted on the HRADF website, no later than 15 March 2018 (with a 7 March deadline to request clarifications).

Germany's Deutsche Telekom (DT) who own a 40 per cent stake in OTE and have pre-emptive rights on the 5 per cent stake to be tendered, exercised its right to purchase the additional 5 per cent stake in OTE for €284.05 million. The Greek state shares joint management control with DT, while retaining a 10 per cent stake, half of which was transferred to the HRADF in November 2016 for subsequent sale.

In Q2 of 2018, the EETT cleared on phase 2 the merger of Vodafone Company with the fixed, and only, MVNO operator in Greece, Cyta Hellas (EETT Decision 857/7/28-6-2018). The merger to be concluded with absorption of Cyta Hellas by Vodafone within Q2 of 2019.

India

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The regulatory and policy framework encompassing the communications sector in India comprises a number of statutes, rules, regulations, guidelines, etc, laid down by the government of India. The primary statutes regulating the sector include:

- the Indian Telegraph Act 1885 (the Telegraph Act);
- the Indian Wireless Telegraphy Act 1933 (the Wireless Act);
- the Telecom Regulatory Authority of India (TRAI) Act 1997 (the TRAI Act);
- the telecoms policy amended from time to time, the latest being the National Digital Communications Policy 2018 (the NDCP 2018), which was approved in September 2018;
- the Broadband Policy 2004; and
- the Information Technology Act 2000 (the IT Act).

The Telegraph Act is the primary legislation underlying the telecommunications regulatory framework for India and prescribing various powers of the government to operate and regulate telecoms services in the country. Under the current regime, the task of granting licences and approvals to telecoms players for providing telecoms services in India has been assigned to the Department of Telecommunications, the Ministry of Communications and Information Technology (DoT). The DoT formulates and implements the telecoms licensing regime, under which licences and approvals are granted to corporations to carry out telecoms services.

The Wireless Act was formulated and implemented to regulate wireless communication and the possession of the concerned wireless telegraphy apparatus. It has been explicitly stipulated that the possession of any apparatus, appliance, instrument or material used or capable of use in wireless communication requires a licence from the DoT to that effect. A penalty has been prescribed for possession without the requisite licence.

In 1997, the government passed the TRAI Act and set up TRAI as the regulatory authority for the telecoms and broadcasting sector with the power to make policy recommendations on related issues. The TRAI Act also provides for the adjudication of disputes between the telecoms licensees and the DoT through the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).

The DoT is responsible for formulating Policy Frameworks aimed at accelerating the growth of the telecommunication services. Recognising that provision of world class telecommunications infrastructure is the key to rapid socio-economic growth of the country, the government has been announcing its telecom policy statements at regular intervals since the onset of market liberalisation in the country in the early 1990s. In effect, post-liberalisation the Indian telecom sector has been shaped by five policy statements:

- National Telecom Policy 1994;
- New Telecom Policy 1999;
- Broadband Policy 2004;
- National Telecom Policy 2012 (NTP 2012); and
- National Digital Communications Policy 2018.

The NDCP 2018 seeks to unlock the transformative power of digital communications networks – to achieve the goal of digital empowerment and well-being of the people of India; and towards this end, attempts to outline a set of goals, initiatives, strategies and intended policy outcomes. The NDCP 2018 aims to accomplish the following Strategic Objectives by 2022:

- provisioning of Broadband for All;
- creating four million additional jobs in the digital communications sector;
- enhancing the contribution of the digital communications sector to 8 per cent of India's GDP from approximately 6 per cent in 2017;
- propelling India to the Top 50 Nations in the ICT Development Index of ITU, from 134 in 2017;
- enhancing India's contribution to Global Value Chains; and
- ensuring digital sovereignty

The vision of the government as stated in the NDCP 2018 is to fulfil the information and communication needs of citizens and enterprises by establishment of a ubiquitous, resilient, secure and affordable digital communications infrastructure and services; and in the process, support India's transition to a digitally empowered economy and society. In pursuit of accomplishing the above-mentioned objectives by 2022, the NDCP 2018 envisages three missions:

- Connect India: creating robust digital communications infrastructure to promote 'Broadband for All' as a tool for socio-economic development, while ensuring service quality and environmental sustainability;
- Propel India: enabling next generation technologies and services through investments, innovation and intellectual property rights (IPR) generation to harness the power of emerging digital technologies, including 5G, AI, IoT, cloud and big data to enable provision of future ready products and services; and to catalyse the fourth industrial revolution (Industry 4.0) by promoting investments, innovation and IPR; and
- Secure India: ensuring sovereignty, safety and security of digital communications to secure the interests of citizens and safeguard the digital sovereignty of India with a focus on ensuring individual autonomy and choice, data ownership, privacy and security, while recognising data as a crucial economic resource.

Apart from the above-mentioned legislation, the Foreign Direct Investment (FDI) Policy, as amended from time to time, lays down the foreign investment and ownership restrictions for the sector. The government prescribes the threshold limits of investment, entry routes and other conditions for such investment under the FDI Policy, as amended from time to time. The FDI Policy segregates various services on the basis of foreign investment allowed, regulated and prohibited. Presently, with regard to the foreign investment in entities engaged in the telecoms services, although FDI up to 100 per cent is permitted for most of the telecoms services, certain service-specific conditions and entry restrictions for the investment coming from outside India may apply. Any amount of investment beyond 49 per cent in the telecoms entity would require the prior approval of the government. In November 2017 the DoT issued internal standard operating procedures for scrutiny of FDI cases in the DoT as well as a checklist.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The licensing regime for the provision of the telecoms sector witnessed a sea change in 2013 with the introduction and implementation of the 'unified licence regime'. The unified licence regime has been implemented primarily with the objective of 'one nation, one licence', as envisaged under the NTP 2012. It replaces the earlier regime where the players were required to obtain separate licences for different telecoms services in India, such as internet services, national long-distance (NLD) services, international long-distance (ILD) services and so on.

The unified licence regime for the first time allows telecoms operators to offer all telecoms services under one licence, subject to separate service authorisation for the provision of different telecoms services, covered by the unified licence. The unified licence covers within its ambit all the fixed, mobile and satellite services and communication both on wireline and wireless media with full mobility, limited mobility and fixed wireless access. The service authorisations covered by the unified licence are:

- access service;
- internet service;
- NLD service;
- ILD service;
- global mobile personal communication by satellite service;
- public mobile radio trunking service;
- very small aperture terminal closed user group service;
- Indian national satellite system mobile satellite system reporting service; and
- resale of international private leased circuit service.

The service areas for each of the service authorisations have also been defined. The unified licence is granted for a period of 20 years from the effective date of the licence. The general, operating, monitoring, financial and security conditions for each of the service authorisations have been divided into the general unified licence conditions (applicable irrespective of the service authorisation) and the specific service authorisation-related conditions (applicable only if the said authorisation has been granted). Apart from freeing up the spectrum from the licence, the unified licence also bars cross-holding in different telecommunications companies.

With regard to the official fees, the charging heads have been defined separately under the unified licence with different limits for entry fees, net worth, paid-up capital, bank guarantees and processing fees. However, where a licensee is applying for more than one service authorisation, the unified licence sets out the upper limits for such financial implications. The prescribed upper limits are also the amounts applicable in cases of the licensee applying for all the services covered by the unified licence. These have been fixed at 250 million rupees each for the minimum equity and net worth of the licensee company, 150 million rupees for the entry fees and 100,000 rupees for the application processing charges. For the provision of the services, an amount of 2.2 billion rupees has been fixed as the performance bank guarantee and 440 million rupees as the financial bank guarantee. In addition, 8 per cent of the adjusted gross revenue (AGR) shall be annually charged from the service providers as the licence fee, which includes the levy for universal service obligations, currently 5 per cent of AGR. However, it should be noted that the mechanism for computation of AGR has been specified for different service authorisations.

In addition to the unified licence, the DoT has also prescribed a registration process for infrastructure provider entities wishing to do business in India. This registration process covers the providers of telecoms infrastructure such as dark fibre, right of way, duct space and tower. The financial requirement for the registration includes a small processing fee and does away with the entry fees and bank guarantee. The infrastructure providers engaging in India would have an easier entry as they would merely have to register themselves rather than obtaining a licence.

To provide telecoms services in India, the players would require the unified licence and spectrum would have to be secured separately through the auction process. The auction of the 2G spectrum and the licences awarded in 2008 were quashed by the Supreme Court of India on the grounds of unconstitutionality; however, many of these quashed licences have been re-auctioned. Separately, the auction of 3G and BWA spectrum was held in 2010 and licences were issued. The last auction was conducted in September–October 2016; it was India's biggest sale of airwave spectrum. The total of 2,354.55MHz of spectrum offered for sale divided in seven bands, of a value amounting to 5.63 trillion rupees. It was the first time that the DoT had auctioned spectrum in the 700MHz band. However, only 965MHz of spectrum worth 65,789.12 million rupees could be successfully sold. No bids were made for the 700MHz and 900MHz band. It can be deduced that the Indian telcos prefer short-range penetration over the long range.

Recognising the potential of Internet of Things (IoT) and Machine to Machine (M2M), emphasis was laid down in the NTP 2012 as: 'To facilitate the role of new technologies in furthering public welfare and enhanced customer choices through affordable access and efficient service delivery. The emergence of new service formats such as Machine-to-Machine (M2M) communications (eg, remotely operated irrigation pumps, smart grid, etc) represent tremendous opportunities, especially as their roll-out becomes more widespread.'

It was also believed that launch of various government programmes such as Digital India, Make in India and Startup India will help immensely in driving the growth of the M2M/IoT industry in the country. In addition, many mega projects have been undertaken by the government of India, which will help in the effective and sustainable utilisation of resources by the application of M2M/IoT technology.

In May 2015, the DoT published the National Telecom M2M Roadmap after seeking inputs from certain stakeholders from the industry. The Roadmap focuses on communication aspects of M2M with the aim to have interoperable standards, policies and regulations suited for Indian conditions across sectors in the country. In addition, the Telecom Engineering Centre (TEC) of DoT has also come out with nine technical reports on M2M detailing sector-specific requirements and use cases to carry out gap analysis and future action plans with possible models of service delivery.

After going through a complete process of consultation with the concerned industry representatives and analysing various issues involved and also considering the comments received from stakeholders in their written responses, TRAI issued a set of recommendations on 5 September 2017 on various aspects of M2M services

including its regulation under a possible registration process or appropriate licensing and security concerns. TRAI recommended that device manufacturers should be mandated to implement Security by Design principles in M2M device manufacturing so that end-to-end encryption can be achieved, and the government should provide comprehensive guidelines for manufacturing and importing of M2M devices in India.

However, the above recommendations of TRAI have not been fully completely incorporated in to respective policies and guidelines. In this regard, DoT issued a set of instructions dated 16 May 2018, for implementing restrictive features for SIMs used only for M2M communication services and related Know Your Customer (KYC), security and other instructions relating to provisioning of M2M services in India by the licensed telecom service providers.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The legal regime relating to the spectrum policy is contained under the Telegraph Act and the Wireless Act and the rules and regulations thereunder. The Wireless Planning and Coordination Wing of the DoT (WPC) has been constituted as the regulatory authority responsible for frequency management, including licences. The WPC is divided into a number of departments, one of the most important functions being the formulation and implementation of the National Frequency and Allocation Plans.

Previously, spectrum allocation was linked to the granting of a licence by the DoT; however, as contemplated by the NTP 2012, the unified licence has delinked spectrum from the licence. The Supreme Court of India decided that all natural resources, including spectrum, should be granted by way of auction (ie, market-related processes only). However, spectrum can be used only for the purposes for which it was granted.

The government permitted spectrum sharing and trading and has issued specific guidelines for sharing and trading of access spectrum. However, spectrum leasing has not been permitted. In terms of the Spectrum Sharing Guidelines, all access spectrum has been permitted to be shared, provided that the telecom operators intending to share have spectrum in the same band. Further, the Spectrum Trading Guidelines permit trading of spectrum only between two access service providers holding the prescribed licences along with the proper authorisation of access service in a service area.

NDCP 2018 recognises spectrum as a critical natural resource and enabler to achieve India's socio-economic goals of inclusive growth and development. Accordingly, the government issued the National Frequency Allocation Plan 2018 (NFAP-18) which aims to provide a roadmap for the availability and allocation of wireless spectrum to facilitate the development and deployment of next-generation wireless services in the country. The NFAP-18 is notable for several firsts that are expected to drive the sustainable growth of wireless services in India in the years to come. A few of the most notable contributions are:

- a massive expansion in the quantum of Licence Exempt Spectrum from 50MHz to 605MHz in the wireless access services to promote high speed broadband through Wi-Fi;
- a formal recognition to Short-Range Devices (SRDs) and Ultra-Wideband Devices (UWDs) through the allocation of licence-exempted spectrum in several bands for such devices; and
- enhancing the transparency in terms of providing consolidated and comprehensive information on all International Mobile Telecommunication (IMT) bands.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The basic regime governing the players and their conduct in the market is contained in the telecoms licence, which does not impose substantial ex-ante regulations.

The unified licence requires the licensee company to have the minimum prescribed amount of equity and net worth, which is the same for all players across the sector. Although the unified licence allows interconnection on the basis of the mutual agreements between the service providers, they will at all times conform with the orders, regulations and guidelines issued by TRAI in relation to the interconnection usage charges. The telecoms licensee must also not discriminate in any manner in the provision of its services. To ensure the same TRAI issued ex-ante steps for regulating differential tariff for data services based on content by issuing the 'Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016'. This would disallow service providers to offer or charge discriminatory tariffs for data services on the basis of content being accessed by a consumer.

Last year a debate arose on turf wars between the competition regulators (ie, Competition Commission of India (CCI) and sector-specific regulators in India such as TRAI) the possible scope of ex-ante regulations were brought into the limelight. Hitherto, the understanding was that ex-ante competition matters fell in the domain of TRAI, and ex-post matters such as predatory pricing were the turf of the CCI. Last year, Reliance Jio Infocomm Ltd started giving free voice and data services in promotional offers to its subscribers to increase its customer base. The incumbents in the telecom sector, Vodafone India Ltd, Bharti Airtel Ltd and Idea Cellular Ltd, alleged in their several complaints before the CCI that Reliance Jio was engaging in predatory pricing. Arguably, it was not fair competition as the 'promotional offer' went on for several months.

However, the complaints before CCI bore no results, as Reliance Jio was not in a dominant position. Thus, the way CCI understands and acts against predatory pricing in the present scheme of legislative mandate is bound to leave an enforcement gap through which cases like Reliance Jio can leak. These are the gaps that TRAI can fix ex-ante to ensure fair competition.

In a recent development, in the case of *CCI vs Bharti Airtel Limited and others*, the Supreme Court, from the jurisdiction perspective had analysed whose jurisdiction, at the first instance, shall prevail (ie, TRAI (Sectoral Regulator) or the CCI) when certain jurisdictional facts pending before the Sectoral Regulator also form part of the inquiry before the CCI. The Supreme Court clarified that where a Sectoral Regulator exists, it is the competent authority to decide the jurisdictional facts and technical issues at the first instance. Thereafter, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion.

Thus, a balancing approach was adopted by the Supreme Court as the CCI's jurisdiction to look into the telecom matters is not ousted. It is only the CCI that is empowered to deal with the anticompetitive act from the lens of the Competition Act.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

One of the strategies for seamless delivery of converged services was to move towards a unified licence (UL) regime and facilitate delinking of licensing of networks from the delivery of services so that the telecom service provider (TSP) can utilise their networks and spectrum efficiently

by sharing active and passive infrastructure and also to facilitate resale at service level by introduction of Virtual Network Operators (VNOs). In a convergence era, the same network can provide various services that are independent of the network layer, meaning that delivery of services can be provided by one operator and network may be owned by a distinct operator. Accordingly, the government issued guidelines for granting ULVNOs in March 2016.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The universal service obligations (USOs) were introduced in India by the DoT further to the objectives laid down under the National Telecom Policy of 1999. The purpose of implementation of the USOs is to provide access to the telegraph services (such as internet, voice-over-internet protocol (VoIP) and other new technology services) to the populations residing in the rural and other remote areas of India at an affordable price. The new technology services such as VoIP and next-generation networks, for which the DoT has not prescribed any specific licence or approval, have now been included within the purview of the unified licence.

To accomplish the USOs, the DoT has set up the Universal Service Obligation Fund (USOF), which was given statutory status by the Indian Telegraph (Amendment) Act 2003. At the time of its establishment, the primary aim of the USOF was to provide access to only basic telegraph services; however, its ambit was increased to include all types of telegraphic service by the Indian Telegraph (Amendment) Act 2006. The Telegraph Rules 1951 were also subsequently amended for administration of the USOF and to enable support for mobile services and broadband connectivity in rural and remote areas of the country and to provide subsidy support to eligible operators for operational sustainability of rural wireline household direct exchange lines. The levy for the USOF is included in the annual licence fees of 8 per cent of the AGR levied on all the telecoms licensees and amounts to 5 per cent of the AGR.

The USOs apply to ICT services provided to rural and remote areas. The services include Public Access Service, by operation and maintenance of village public telephones and rural community phones, creation of infrastructure for provision of mobile services in such areas, creation of general infrastructure in such areas for development of telecommunications facilities and induction of new technological developments.

For providing broadband connectivity to such areas, USOF has signed an agreement with a state-owned TSP. The Rural Wire-line Broadband Scheme anticipates offering wire-line broadband connectivity to rural and remote areas, making use of the existing rural exchanges infrastructure and copper wire-line network. This scheme is being implemented at national level in India. To extend the broadband connectivity including last mile connectivity up to all villages under the Bharat Net project, the operating and capital expenses incurred shall be funded by the USOF.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The mobile number portability (MNP) regime allowing users to move from one service provider to another, retaining their number, was introduced in India in November 2010 on a pilot basis, before being launched nationwide in January 2011.

The regime allows the subscribers within a telecoms circle to carry over their mobile number to another service provider with the same circle. As a condition to the unified licence, the licensee would have to ensure that its network is compliant with the MNP rules, regulations and regime laid down and amended from time to time. Certain conditions, such as the payment of dues, submission of proof of identification and address have been laid down under the regime. The subscribers complying with such conditions may carry over their mobile number on the payment of the requisite fees.

In the course of implementation of the 'one nation, full mobile number portability' objective laid down by the NTP 2012, in September 2013 TRAI recommended to the DoT a pan-India basis MNP, wherein a mobile subscriber would be able to port the number licensed in one circle to another circle. Consequently, full nationwide MNP was finally implemented from July 2015. It was observed by TRAI that as a result, on the MNP facility a huge number of porting requests were being received by the customers and the majority of them were also being rejected in accordance with the regulations. Such rejection of porting requests created dissatisfaction and frustration among subscribers. To check this, TRAI issued Telecommunication Mobile Number Portability (Seventh Amendment) Regulations 2018 to MNP regulations 2009, wherein major shift in the mechanism for generating Unique Porting Code (UPC) has been provisioned. Responsibility of UPC generation has been shifted from donor operator to MNP service provider after real time query with database of donor operator. Porting process of individual mobile numbers has been modified, which will become faster and convenient as MNPSPs shall schedule the porting of a mobile number upon successful validation of a real-time query with the donor operator and does not require a port response from the donor as in the existing process.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

The Indian telecoms regulatory regime does not separately provide specific rules for the customer terms and conditions; however, broad rules on certain issues have been laid down.

The unified licence, besides describing the relationship between the telecoms players and the DoT, also stipulates a few outline conditions within which the licensee is to provide its services to the subscribers. The telecoms players have to ensure that the customer terms and conditions are within the purview of the licence granted and also do not violate any specific rules laid down by the DoT and TRAI.

The DoT and TRAI have at times in the past regulated certain aspects of telecoms services, such as limiting the number of daily messages that can be sent using the short-messaging service (SMS), regulation of unsolicited commercial communication (UCC) and the 'do-not-disturb' service, both in the interests of end customers. UCC and SMS are serious problems. TRAI has taken several initiatives since 2007 to try and protect consumers from these telemarketing calls and messages and has intervened from time to time, to control or mitigate this problem. TRAI issued a consultation paper on UCC dated September 2017, which provides an overview of various problem areas with the present system, like UCC-related complaints being on the rise, the long time taken to register or to take action against UCC complaints, victimisation cases, issues of similar headers, traceability of content providers, consent taking process, etc. It also highlights new trends like robocalls and silent calls, which may be of concern to customers.

TRAI also made recommendations on encouraging data usage in rural areas through provisioning of free data. In the past year it had stated that a scheme under which a reasonable amount of data, say 100MB per month, may be made available to rural subscribers for free and the cost of implementing this scheme must be borne by USOF. TRAI has also issued recommendations dated 9 March 2018 on in-building access by telecom service providers. To ensure that there is a ubiquitous voice and data network inside commercial and residential complexes and large public places like airports, hotels and multiplexes, the first

and foremost requirement is that TSPs and infrastructure providers gain category-I access to in-building facilities and infrastructure.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

There are currently no regulations or guidelines in place in India with regard to net neutrality. Hence it can be safely said that currently there are no limits on internet service providers' freedom to control and prioritise the type or source of data. Net neutrality has been contemplated by the NTP 2012. However, granting a general recognition and acceptance of the principle, the telecoms regulator has in certain instances proposed investigations into the data plans and packages offered by certain telecoms providers to their subscribers, to determine whether they are in violation of net neutrality principles. There have been consultations initiated on the subject by TRAI, which issued a consultation paper on 'Over-the-top Services and Net Neutrality' in March 2015. The DoT also constituted a committee, which submitted a report dated May 2015 on net neutrality. Further, in December 2015, TRAI issued another consultation paper on 'Differential Pricing for Data Services', which raised concerns over zero-rating platforms being offered by telecom service providers. Having completed its detailed, two-stage, consultation process, TRAI has considered the various points of view and formulated its recommendations on the subject. This document lays down the recommendations starting with a discussion on the principle of non-discriminatory treatment, which forms the underlying basis of the net neutrality debate, which is followed by a discussion on the applicability of this principle to different categories of services, drawing a distinction between 'internet access services' and other 'specialised services' that currently exist or may evolve in the future. It also outlines reasonable traffic management practices identifying permitted exceptions and lays down the supplementary requirements of a robust framework for transparency and disclosures. Further, it provides a monitoring and enforcement framework to implement the recommendations on non-discrimination, reasonable traffic management and transparency.

Zero-rating is a practice where mobile operators do not charge end consumers for access to specific websites or apps, but instead charge the latter for the data consumed by consumers in accessing the website or app. As there is no specific regulatory legislation on net neutrality in India, zero-rating practices are discretely prevalent, being, however, subject to certain limitations. The ISPs and the telecom companies are prohibited from blocking, obstructing or delaying in any way, services and other internet and telecom traffic, unless necessary for reasons of congestion management, security, continuity of the network, etc. This blocking shall only be lawful, when necessary, to protect the integrity and security of the network or users' terminals.

Bandwidth throttling is often adopted in India to avoid traffic congestion, there being no regulatory mechanism to keep a check on the traffic management methods adopted by the TSPs. Also, internet users can request an ISP to filter their internet traffic by blocking certain services and applications based on ideological grounds.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Since 2015, Over the Top (OTT) services have witnessed a significant increase in adoption and usage. Technologies and networks for delivery of such services have also evolved during this period. Over a period of time TRAI has issued the various recommendations and regulations pertaining to multiple issues relating to OTT services such as the Regulatory Framework for Internet Telephony, prohibition on discriminatory tariffs on data services, net neutrality and privacy, security and data ownership in the digital services. To further consider the remaining issues related to regulatory imbalance between TSPs and OTT players providing services that can be regarded as the same or similar to services offered by TSPs and issues related to economic aspects of such OTT services, TRAI issued a Consultation Paper on Regulatory Framework for Over-The-Top (OTT) Communication Services in November 2018.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The NGA networks are presently not regulated by specific rules or obligations. Nonetheless, TRAI is working towards defining specific rules and regulations for the development and implementation of NGA networks. Further to providing for a specific set-up for the NGA networks, TRAI has formed a core committee to advise in this regard and initiated a consultation process.

With a view to increased penetration into India, including the provision of telecoms services in rural and remote areas, the DoT mandated the establishment of the USO Fund in 2002. The Broadband Policy was introduced in India in 2004. Initially, it was mandated that the USO Fund would only be used for providing basic telecoms services to such areas; however, with the expanding telecoms industry and with an eye for modernisation, all sorts of telegraph and telecoms services were brought within the purview of the USOs and the Fund constituted for the same. In 2008, subsidy support was introduced for certain eligible operators to provide for operational sustainability of rural wireline household direct exchange lines. There have also been initiatives by the telecoms operators to promote broadband use in rural areas.

A regulatory framework specifically for NGA networks is expected to be established in the near future. In this regard, TRAI has on certain occasions initiated consultations with regard to a number of issues and frameworks on the implementation of NGA networks in India.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

There is no specific data protection legislation currently in place in India. However, with specific regard to the newly implemented regime, the unified licence explicitly sets out certain conditions for telecoms licensees to abide by to ensure that the data of end customers and subscribers remains secure.

As a blanket condition under the licence, the licensee is to ensure that all monitoring activities are to be carried out in accordance with any rules framed under the Telegraph Act for ensuring the privacy of voice and data. The Telegraph Act, in case of a public emergency or public safety, empowers the government, state government or an authorised government officer to order the non-transmission, interception, detention or disclosure of messages about a particular subject.

Additionally, to provide for an effective system of data protection, the Personal Data Protection Bill 2006 was introduced in 2006, but has not yet been formulated into a law. Subsequently, however, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (Sensitive Personal Data Rules) were brought into effect in 2011 under the provisions of the Information Technology Act 2000, under section 43A of the IT Act. The rules provide for the implementation of reasonable security

practices and procedures to be followed by entities handling sensitive personal data of individuals. These rules apply to all entities that acquire or deal with sensitive personal data or information of natural persons, irrespective of the nature of business activities. Thus, any part of big data falling within the ambit of sensitive personal data or information, which means personal information relating to a password, financial information, personal health condition and its records, sexual orientation, biometric information or any other details that are given to the body corporate for providing a service.

In the absence of any specific regime protecting the privacy of data in India, the Supreme Court of India has held that the right of privacy is a fundamental right of an individual. In a step towards this, the government of India constituted an expert committee under the chairmanship of Justice BN Srikrishna comprising of members from government, academia and industry to study and identify the key data protection issues and recommend methods for addressing them. The committee put out a White Paper in December 2017 to solicit public comments on what shape a data protection law must take. After almost a year of deliberations and consultations, the Committee has submitted its Report and the draft Data Protection Bill 2018 to the Ministry of Electronics and Information Technology on 27 July 2018, which is yet to be tabled in the parliament. The much-awaited Data Protection Bill 2018 makes 'individual consent' the keystone of data sharing. For consent to be valid, it should be free, informed, specific, clear and capable of being withdrawn. For sensitive personal data or information, consent will have to be explicit. The Bill is largely based on the principles of the General Data Protection Regulation in the EU.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

India had no cybersecurity policy before 2013. It was on 2 July 2013 that the government unveiled the National Cyber Security Policy 2013. It aims at protecting public and private infrastructure from cyberattacks. It also intends to safeguard critical information such as personal information, financial and banking information, and sovereign data. The Cyber Security Policy 2013, along with providing a strong vision to secure the critical infrastructure and build a resilient cyberspace for citizens, business and government, also intends to circumvent any resultant economic instability arising from cyberattacks.

In the absence of any specific laws in this regard, the Information Technology (IT) Act 2000 and Rules provide for certain protections. The IT Act contains three major aspects (ie, legal recognition of electronic documents, electronic filing of documents with government agencies and to amend certain acts such as Indian Penal Code, Indian Evidence Act). The Act also covers cybercrimes under section 66 such as internet fraud, pornography, data theft and phishing.

The IT (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules encapsulate provisions for data protection and privacy. However, as cybersecurity becomes an exponentially growing concern, the need for a consolidated legal framework has become a necessity that must be satisfied immediately. In addition to the above-mentioned provisions in place, the proposed Data Protection Bill, 2018 would also take care of the important aspects of cybersecurity.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

At present in India there is no specific legislation or regulation for big data. However, the data protection framework prescribed under the Sensitive Personal Data Rules under the IT Act would include big data practices in India. These rules provide that any body corporate handling sensitive personal data or information, as discussed above, shall conform to the same for handling and dealing with such information. It is also possible that personal or even non-personal data, when processed using big data analytics could be transformed into sensitive personal data. Therefore, there may be a need to create safeguards that will prevent misuse of personal information in these contexts of use mentioned in the White Paper issued by the Ministry of Electronics and Information Technology (MEITY).

Certain initiatives in relation to big data management have been taken by the government. The Department of Biotechnology plans to harness the power of big data to promote the biotechnology industry in India. Also, the Department of Science and Technology proposes to promote big data science, technology and applications in the country and to develop core generic technologies, tools and algorithms for wider applications for various government initiatives and functionalities.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

The National Data Sharing and Accessibility Policy is applicable to all sharable non-sensitive data generated using public funds. For use and transfer of such data, the user of the data must acknowledge the source, provider and licence of data by explicitly publishing the attribution statement. The Other Service Provider Guidelines, however, particularly bar any transfer or storage of data that originates on the Public Switched Telephone Network of Indian jurisdiction to any foreign jurisdiction, without prior consent.

According to the Information Technology (Electronic Service Delivery) Rules 2011 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011, transfer of sensitive personal data and information by a body corporate or any person to another in India, or located in any other country ensuring the same level of data protection, may be allowed, only if it is necessary for the performance of the lawful contract between the body corporate or any person on its behalf and provider of information or where such person has consented to data transfer. In addition to it the body corporate must provide a privacy policy for dealing with such personal information and sensitive data.

Therefore, it can be decisively said that India does permit cross-border data transfers, provided that the data subject gives prior consent. In the telecom sector, India currently has a data localisation mandate with respect to customer account information. From industry experience, this does cause some inconveniences with regard to international clearing house activities, particularly with regard to global telecom companies that are looking to provide enterprise-level telecom consolidation. The proposed Data Protection Bill, 2018 provides for all the data localisation concerns; however, it is yet to become a law.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

A number of policy initiatives by the government and DoT have led to a complete transformation with phenomenal growth in the sector over the past decade and it is poised to grow further. The regulatory framework concerning communications and telecoms in India witnessed an evolution in recent years with the implementation of certain key initiatives, including MNP, USO and the introduction of the unified licence, among other things. The country is projected to witness a

high penetration of internet, broadband and mobile subscribers in the near future. These steps were taken in line with the objectives set by the NTP 2012.

The unified licence regime has simplified the telecoms licence regime and allows all telecoms services to be offered under one licence. The unified licence allows the sharing of spectrum among the various licences, which was not permitted earlier. The UL regime has resulted in major consolidation of the telecom industry, resulting in only a few players in the market.

A major development was observed in the area of inflight connectivity services on various aircrafts. TRAI had issued recommendations on 'Introducing In-flight Connectivity Services in India'. After considering the recommendations of TRAI, the DoT issued Flight and Maritime Connectivity Rules, 2018 laying down the guidelines for provision of inflight connectivity services.

The upcoming trends in the sector would further lead to an upscale in the market. The government is targeting broadband connectivity from 15 million currently to over 600 million in 2020, with voice connectivity being carried forward to data and emerging technologies including cloud computing. The digital transformation is emerging as a key driver of sweeping change in the world around us. The telecommunication industry is at the forefront of this transformation. After connecting the individuals and enterprises, innovators are turning their attention to the M2M communications, which promise to connect billions of sensors and devices. Upgrading to 5G networks will connect wearable computers, a vast array of sensors, and other devices, leading to better health, economic gains and other advantages. The OTT segment is going to be a game changer in the digital space. A format set of legislation and regulation is expected form the government.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The regulatory regime governing the media sector is contained under the Prasar Bharti Act 1990 and the Cable Networks Act 1995 and the rules framed thereunder. The institutional structures and government bodies regulating the sector include the Ministry of Information and Broadcasting (MIB) and the Prasar Bharti. These government bodies have been entrusted with the activities of governance through the issue of guidelines, policies and rules and the granting of licences for the broadcasting and electronic media sector. In 2004, broadcasting services and cable services were included within the ambit of telecoms services by a notification of the government. TRAI, in addition to the telecoms sector, has also been set up as the regulator for the media and broadcasting industry and the TDSAT has the power to adjudicate on disputes.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

In India, the latest FDI Policy issued in 2016 lays down the caps, entry routes and other conditions applicable to the foreign investment in-flow into the Indian entities for various sectors, including the media services. The FDI Policy divides media services into the following categories and subcategories:

Broadcasting services

Broadcasting carriage services

An FDI cap of 100 per cent is permitted for teleports (ie, setting-up of uplinking HUBs or teleports; direct to home); cable networks (multi-system operators (MSOs) undertaking upgradation of networks towards digitalisation and addressability, operating at the national, state or district level); mobile TV; headend-in-the-sky (HITS) broadcasting services; and also cable networks, including MSOs, not undertaking upgradation of networks towards digitalisation and addressability and the local cable operators. The entry route for such services is by the automatic route up to 49 per cent and the government approval route between 49 per cent and 100 per cent.

Broadcasting content services

Up to 49 per cent FDI through the government approval route is permitted for the terrestrial broadcasting FM (FM radio) services.

Similarly, FDI up to 49 per cent through the government approval route is also permitted for the services of uplinking of news and current affairs TV channels.

FDI up to 100 per cent through the automatic route is allowed for the services of uplinking of non-news and current affairs TV channels and downlinking of TV channels.

Print media

FDI and investment by the non-resident Indians, persons of Indian origin and foreign institutional investors up to a total of 26 per cent through the government approval route is permitted for the services of publishing of newspapers and periodicals dealing with news and current affairs and for the publication of Indian editions of foreign magazines dealing with news and current affairs.

Up to 100 per cent FDI through the government approval route is allowed for the services of publishing and printing of scientific and technical magazines, speciality journals and periodicals. Publication of a facsimile edition of foreign newspapers is allowed up to 100 per cent through the government route.

Likewise, for the services of the publication of facsimile edition of foreign newspapers, FDI up to 100 per cent through the government approval route is permitted.

In addition to the above-mentioned entry routes and sectoral caps, the FDI Policy also imposes a condition that the entity or company receiving the foreign investment shall have to obtain the requisite licence and act in compliance with the conditions of such licence and those specified or notified by the MIB or any other government body from time to time in relation to the provision of such services. Besides these criteria, certain conditions have also been imposed with regard to the key personnel to be deployed by the entity receiving the foreign investment, such as the majority of directors on the board of the company, the chief executive officer, chief security officer and the chief officer in charge of the technical network operations must be Indian citizens or Indian citizens resident in India and, in compliance with like conditions, may require security vetting or clearance on a regular basis by the government.

At present there are no umbrella restrictions on cross-ownership of media companies, despite some guidelines for certain licences that forbid entities from controlling more than one broadcasting service in the same market. One such restrictive condition is contained in the guidelines for Direct to Home (DTH) licences, which state that:

> *Broadcasting companies and/or cable network companies shall not be eligible to collectively own more than 20 per cent of the total equity of the DTH applicant company, at any time during the licence period. Similarly, the DTH applicant company shall not*

have more than 20 per cent equity share in any broadcasting and/or cable network company.

However, in this regard it is pertinent to note that a proposed bill, the Broadcasting Services Regulation Bill, aims to impose certain cross-ownership regulations on media companies in addition to imposing restrictions on the accumulation of interests to provide for competition and plurality of views.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The MIB has responsibility for the granting of licences for broadcasting and the regulation broadcasting services thereafter.

Applications for the licence or permission to provide broadcasting services in India have to be made to the MIB in the prescribed manner. Once the MIB grants permission, the industry players would have to comply with the conditions prescribed by the Ministry. The tenure of the licence or permits for uplinking non-news and current affairs channels is 10 years, for downlinking five years, for DTH 10 years, for cable TV network operators one year and for HITS broadcasting services 10 years.

Licensees are required to obtain security clearance from the Ministry of Home Affairs for security-related reasons. Additionally, for providing uplinking services, the applicant or licensee is required to obtain an additional clearance for usage of satellites from the Department of Space and from the WPC for obtaining a licence for operating wireless. The multi-channel downlinking and distribution of television programmes in the C-band or Ku-band (ie, the HITS broadcasting services, which were introduced into India in 2009) can be provided upon obtaining the HITS licence from the MIB.

With regard to the financial implications of these licences, permits and approvals, the entities obtaining a licence for uplinking, downlinking or DTH must pay the application processing fees, and annual licence fees and royalty payments on spectrum usage that have been prescribed by the WPC from time to time. DTH and HITS licensees are required to pay an additional non-refundable entry fee of 100 million rupees.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The guidelines laid down by the MIB for the purpose of downlinking of television channels regulate the broadcasting of foreign channels in India. The guidelines do not specify requirements of local content on television channels, but they do stipulate the must-carry obligations for the broadcaster. Additionally, the service provider downlinking the registered channels shall be obligated to comply with the Programme and Advertising Code prescribed under the Cable Television Networks (Regulation) Act 1995 in addition to any other codes, standards, guidelines rules or restrictions that have been prescribed by the MIB for regulation of content on television channels from time to time. Content restrictions are also imposed through licensing terms and conditions. Any content that is considered offensive to morality or decency, that promotes superstition, is defamatory, denigrates India's sovereignty and integrity, affects national security or is in contempt of court, is restricted from being broadcast through any service or medium in India.

Further, no news or current affairs channel shall be permitted to be downlinked if it does not carry any advertisements aimed at Indian viewers, is not designed specifically for Indian audiences, is a standard international channel, and has been permitted to be telecast in the country of its uplinking by the regulatory authority of that country. These restrictions are applicable to all programmes and to delivery of content via all media including online and over mobile devices, irrespective of whether it is produced by an Indian or a foreign producer.

The MIB has stated that the present uplinking guidelines, and downlinking guidelines that came into effect from 5 December 2011 are now more than five years old and that keeping in view the change in technology, market scenarios, and the lesson learnt in the last few years of their operations, there is a need to review and amend some of the provisions of these guidelines to ensure healthy growth of the broadcasting sector. To lessen the gap, the MIB has sought recommendations from TRAI on issues primarily relating to permission for uplinking and downlinking of satellite TV channels, and setting up of teleports. As a result, TRAI issued a consultation paper on the same in December 2017.

Presently there is regulatory framework to guide placement of TV channels in distributers' networks but there is no regulation stipulating criteria to place a channel on a landing page. Therefore, landing page Logical Channel Numbers (LCN) may be used for placing a television channel to show enhanced reach compared to other channels placed in other LCNs; therefore, the competing broadcaster may see it as a discriminatory practice. The television ratings in India are published under the 'Policy Guidelines for Television Rating Agencies in India' issued by the MIB on 16 January 2014, and the said guidelines were formulated based on recommendations of TRAI. The Broadcast Audience Research Council is a registered agency under these guidelines that provides Television Ratings in the country. TRAI recently issued a consultation paper dated April 2018 on issues related to the placing of a television channel on a landing page.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Cable and radio advertisements are regulated by the provisions of the Cable Advertisement Code and the Code for Commercial Advertising over All India Radio respectively. Online advertisements shall be subject to the IT Act, the terms of the ISP guidelines, the licence and other content regulation laws as mentioned earlier.

The Cable Advertisement Code has been framed and implemented under the Cable Network Rules. The Cable Advertisement Code stipulates that advertising must not offend morality, decency and religious sentiments. Additionally, the Cable Advertisement Code provides for a detailed list of restrictions on advertisements to be featured on cable networks. The Code for Commercial Advertising over All India Radio also lays down a similar prohibition on advertising and states that no advertisement shall be permitted that derides any race, caste, colour, creed or nationality; is against the law of the land; tends to incite people to crime, cause disorder, violence or breach of law; glorifies violence or obscenity; adversely affects friendly relations with foreign states; or relates to or promotes cigarettes and tobacco products, liquor, wines and other intoxicants.

The MIB had issued advice to the TV channels in India advising them not to telecast advertisements that violate the self-regulation code for advertising, which has been prescribed as a violation of the Cable Television Networks (Regulation) Act 1995 and the rules thereunder. This strengthens the self-regulatory mechanism of the advertising sector, which has been propelled by the Advertising Standards Council of India, a self-regulatory voluntary organisation of the industry.

Apart from the above broadcasting media-specific advertisement codes, there are certain other pieces of general legislation that lay down the requirements for advertising of specific products, such as the Drugs and Cosmetics Act 1940; the Pharmacy Act 1948; the Emblems

and Names (Prevention of Improper Use) Act 1950; the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954; the Prize Competitions Act 1955; and the Copyrights Act 1957.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

The must-carry obligations under the regulatory regime are contained in the Cable TV Networks Act, which stipulates the compulsory retransmission of channels operated by or on behalf of the parliament, in such manner as the government may provide from time to time. Additionally, the Cable TV Networks Act also requires the transmission and retransmission of at least two Doordarshan terrestrial channels and one regional language channel of the concerned state in the prime band, in satellite mode on frequencies other than those carrying the terrestrial frequencies. The DTH licence stipulates that the DTH licensee is to provide access to various content providers and channels on a non-discriminatory basis. The MIB has also been empowered to specify the names and numbers of channels of Prasar Bharti or any other channel that is required to be carried mandatorily as part of the internet protocol television (IPTV) services in India. As a clarification, the MIB clarified that all multi-system operators are obligated to carry the prescribed Doordarshan channels and also to ensure good quality reception, using the stipulated signals for the purpose.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content and its delivery are regulated by the same guidelines as applicable for delivery of content under traditional broadcast media.

The delivery of online content through IPTV is regulated by the MIB through the specific Guidelines for Provisioning of Internet Protocol Television (IPTV) Services. The cable operators providing the IPTV services are governed by the Cable Television Networks (Regulation) Act 1995 and any other laws as may be applicable. The Programme and Advertisements Code is also applicable in cases of IPTV service, thus the content is required to be in conformity with the same. The provisions of the IT Act may also come into play owing to the convergence of services with regard to the content being published over the internet. The IT Act provides for penal provisions in case of violations of the provisions of the Act on account of publishing of content prohibited by the Act.

The telecoms licensees providing TV channels through IPTV are required to transmit only such broadcast satellite television channels in exactly the same form and manner as are registered with or permitted by the MIB. However, in such cases, the responsibility to ensure that content is in accordance with the extant laws, rules and regulations shall be that of the broadcaster, and the telecoms licensee will not be held responsible for such violations. Carrying any broadcast satellite television channels that are prohibited either permanently or temporarily or not registered with the MIB is not permitted.

Additionally, media content through OTT platforms is still out of any regulatory scheme but it is under consultation and we may have guiding regulations soon.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

India's advancement in broadcasting technology is marked by the introduction and implementation of digital cable television. This proposes to deliver a new freedom to choose in terms of television channels and content. In 2011, the government mandated the digitalisation of TV signals, marking a shift from analogue to digital broadcasting and laid down the roadmap for implementation of digitisation in cable television section in four phases starting from June 2012. TRAI notified the Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 in April 2012. Digitisation in the cable sector was implemented in four phases and it was completed all over the country by 31 March 2017. This enjoined TRAI to work on a common interconnection framework. After due consultative process, TRAI's Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 were released in March 2017. As per notification, the Interconnection Regulations, 2004 and Interconnection Regulations, 2012 were to be repealed. However, as these new regulations are subjudice in various courts, presently the Interconnect Regulations, 2004 and Interconnection Regulation, 2012 remain in force.

TRAI also issued a consultation paper on Empanelment of Auditors for Digital Addressable Systems, which is a preparatory work before calling proposals for empanelment of auditors, and has no bearing on the above said regulations or ongoing litigations.

TRAI recently recommended that there is a definite need to facilitate digital radio broadcasting in India to effectively utilise spectrum in VHF-II band for radio broadcasting, to provide diverse content and other value-added services to radio listeners. TRAI further suggested that no date for digital switchover of radio broadcasting services should be declared at this stage. Existing analogue FM radio channels should be allowed to remain operational for the remaining period of their Phase-III permissions.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The spectrum use regime prescribes that broadcasters are permitted to use the allotted spectrum for the specific activity for which the spectrum has been granted. Using spectrum for any other purpose is restricted.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Media pluralism in India is in its nascent development stages. To ensure media pluralism and counter the ills of monopolies, reasonable restrictions need be put in place on ownership in the media sector to strike a balance between ensuring a degree of plurality of media sources and content on the one hand and providing freedom to companies to expand, innovate and invest on the other.

TRAI has in August 2014 issued recommendations on issues relating to media ownership. In its recommendations on content aggregators, TRAI disallowed bundling of channels from more than one broadcaster, recommending curbs on cross-media and corporate ownership of TV channels and newspapers. TRAI made vertical integration a possibility by allowing broadcasters to own distribution platforms. The regulator

defined control of ownership at 20 per cent shareholding, or over 50 per cent voting rights or half the members of the board of directors of the media company, or controlling management or affairs through decision making and appointment of key managerial personnel. Also, TRAI broadly prescribed the guidelines for identification of the genres or segments for cross-media ownership.

The need to regulate in this regard arises on three accounts:

- dissolution of political control and influence through surrogates over newspapers, TV channels and TV distributions, often employed to propagate political agendas;
- entities backed by political parties are either taking over the operations of other cable TV operators or driving them out of business using other means, thereby virtually extending their monopoly in the entire region; and
- similar influence can also be practised by corporate sector entities.

The inherent conflict of interests, which arises from uncontrolled ownership in the media sector, gives rise to sponsored news reports, biased analysis and forecasts in the political and corporate arena, and irresponsible, sensationalist reporting, among other things. These are even more lethal when control rests with entities having business and political interests.

Thus, the need to ensure pluralism is great and the concerned agencies and bodies are in the process of taking appropriate measures to achieve this and the evolution of a strong regulatory regime is not too far away.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The media and broadcasting sector in India witnesses regular growth on account of technological advancement and the implementation of modern-day techniques for media content delivery.

Recently, TRAI gave recommendations on issues related to radio audience measurements and ratings in India. The recommendations include guidelines for industry-led bodies, a framework for regulating the radio rating system and guidelines for the radio rating agency. It has further recommended, in the past year on issues related to digital radio broadcasting in India to develop an ecosystem that can facilitate deployment of digital radio broadcasting. This deals with the policy framework of India, frequency bands, digital radio broadcasting, an approach for the implementation of digital broadcasting.

Further, recommendations on issues related to digital terrestrial broadcasting in India were made to the DoT by TRAI. This includes introduction of digital terrestrial television (DTT) services throughout the country in a time-bound manner, the eligibility conditions of private DTT operators, licensing conditions and other modalities for entry of private players, to create a supportive ecosystem, the Ministry of Information and Broadcasting along with the MEITY may devise a policy framework to make DTT complaint devices, etc, available.

TRAI has also made recommendations on Sharing of Infrastructure in the Television Broadcasting Distribution Sector, which recognise the need for facilitating sharing of infrastructure in TV broadcasting distribution network services in the cable TV segment, HITS platform, DTH services, sharing of CAS and SMS by distributors of TV channels and amendments in Network Operation and Control Centre and WPC guidelines for enabling infrastructure sharing. Major efforts are being made by the government to regulate the internet-based media services such as the draft amendment to the intermediary guidelines, 2018, OTT consultation etc.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The Indian communications and media sectors are regulated by TRAI, which has the functions of governance and regulation of the players engaged in the sector and makes the necessary recommendations to the DoT and government regarding the said sectors. However, the TRAI has not been granted adjudicatory power with regard to the disputes that may arise between the telecoms and media players inter se or with the concerned regulators. The TDSAT, constituted under the TRAI Act, has been entrusted with the adjudicatory responsibilities in the telecoms and media industry.

The TDSAT has been empowered to hear and decide upon disputes between the players or licensees and licensor or regulatory body; and between the different players inter se for both the communications and the media sectors. Whereas the DoT is the licensing and regulatory authority for the telecoms sector, the MIB is the authority for the media and broadcasting sector. However, the antitrust authority in India has been constituted in the CCI. The CCI, apart from being the regulatory body, has also been entrusted with the function of adjudication of antitrust disputes in India.

Under the Indian regulatory framework, no question of conflict of jurisdiction arises between the TDSAT and the CCI. The CCI has been established under the provisions of the Competition Act 2002, which also states that any entity that adopts anticompetitive, restrictive trade or other similar activities contemplated by the Competition Act 2002 would be dealt with under the provisions of the Act and by the CCI, irrespective of the business activities of such entities, be it telecoms, media, broadcasting or any other. However, the TDSAT has been established to deal with instances relating to and in connection with telecoms licences and media regulations and approvals. Additionally, the Competition Act 2002 explicitly states that the provisions of the Act will override any other law in force in India.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

The appellate procedure provides for an appeal against the decisions of TRAI to the TDSAT. The TRAI Act provides that an appeal may be made before the TDSAT against any direction, decision or order made by TRAI. Either of the central government, state government or local authority or any person aggrieved by the direction, decision or order of TRAI may prefer such appeal to the TDSAT. As per the prescription of the TRAI Act, such appeal is required to be made within a period of 30 days of the communication of the concerned direction, decision or order.

Further, an appeal against any order of the TDSAT lies before the Supreme Court of India. However, the decisions or orders of the TDSAT made thereof with the consent of the parties are not appealable. It is pertinent to mention that an appeal can be made to the Supreme Court of India against a decision or order of the TDSAT only if the case involves a substantial question of law or if the appellate decree has been passed ex parte. An appeal is to be filed before the Supreme Court of India within 90 days of the date of such order or decision.

Competition law developments

30 | Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The telecommunications and media sector continues to be subjected to a high degree of regulation, much of which is intended to make the sector more competitive and lead to lower prices, higher quality and greater choice for consumers. The CCI ensures that there is no abuse of dominant position and that the players are not engaged in any anti-competitive practices.

Recently, the issue of predatory pricing arose with the entry of Reliance Jio in the 4G segment of the telecommunications market. As the name suggests, predatory pricing is the practice of pricing goods or services at such a low level that other players cannot compete and are forced to leave the market. The Competition Act, 2002 strictly prohibits predatory pricing, treating it as an abuse of dominant position. One of the incumbent operators accused Reliance Jio of predatory pricing through the free data and calling services offered for the first few months from its launch. However, hearing one such complaint, the CCI has held that the relevant market for Jio is the market for provision of wireless telecommunication services to end users in each of the 22 circles in India and not 4G LTE as stated in the complaint, and that Jio is justified in offering promotional tariffs to attract its customers as it is a new entrant.

According to the guidelines on mergers and acquisitions issued by DoT, a telco going into M&A with a rival will have to ensure the combined market share is below 50 per cent both in the subscriber base and adjusted gross revenue (AGR). If the share exceeds in any of the 22 circles, it will have a year to reduce it. Also, the total number of operators in a circle should not fall below four. The recently ongoing merger of Vodafone and Idea as the number two and three telcos in India will make it the largest telco in India, succeeding Bharti Airtel. It would be interesting to see how the entity will comply with the provisions and not hinder the competitive equilibrium as the percentage of market share in subscriber base and AGR are expected to cross the permissible limits.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The key laws regulating Indonesia's communications sector are, among others:

- Law No. 36 of 1999 on Telecommunications (the Telco Law);
- Law No. 11 of 2008 on Electronic Information and Transaction as amended by Law No. 19 of 2016 (the EIT Law); and
- Law No. 32 of 2002 on Broadcasting (the Broadcasting Law).

The Telco Law is further administered through a number of implementing regulations, which include:

- Government Regulation No. 52 of 2000 on Provisioning of Telecommunications;
- Government Regulation No. 53 of 2000 on Utilisation of Radio Frequency Spectrum and Satellite Orbit; and
- Government Regulation No. 82 of 2012 on Electronic Transaction and System Operation (GR 82/2012).

The Telco Law emphasises that the telecommunications sector operates under state control. In implementing the Telco Law, the Indonesian government must endeavour to improve the provision of telecommunications networks and services through effective policies and regulations, supervision and control.

The minister is responsible for administering the telecommunication laws and regulations. Currently, the relevant minister is the Minister of Communication and Information Technology (MCIT). The MCIT heads a three-tiered ministry. Below the MCIT, the Directorate General of Provisioning Post and Informatics, the Directorate General of Post and Informatics Equipment Resources, the Directorate General of Application on Information Technology and the Directorate General of Information and Public Communication are the second-tier administrative divisions. A number of subdivisions operate as the third tier, including the Directorate of Telecommunications and the Directorate of Broadcasting.

The MCIT has also established the Indonesian Telecommunications Regulatory Body (BRTI) to assist in the administration of the telecommunications sector. The MCIT specifically delegates its authority to regulate, supervise and control the provision of telecommunications networks and services to the BRTI, while maintaining the authority to formulate policies, regulate, supervise and control other fields of the telecommunications sector.

Foreign investment regulations also apply within the telecommunications sector. Under Law No. 25 of 2007 on Investment, foreign investment may only be undertaken via an Indonesian limited liability company established for the purpose of foreign investment. Such companies are commonly referred to as a *Perusahaan Penanaman Modal Asing* (PMA company). Depending on the line of business of the PMA company, its shares may be wholly owned by foreign nationals, either individual investors or foreign entities. PMA companies may also arise from a joint venture scheme under the co-ownership of foreign individuals (or entities) and one or more Indonesian partners.

Presidential Regulation No. 44 of 2016 on Lines of Business that are Closed and Lines of Business that are Conditionally Open for Investments (Negative List of Investments) imposes the foreign shareholding restrictions with maximum 67 per cent foreign ownership for a PMA company in the telecommunications sector in general, which shall include those engaging in the following business activities:

- the operator of the telecommunication networks, covering the provision of fixed network and mobile network operations (cellular, satellite or terrestrial);
- the operator of the telecommunication services, covering the:
  - basic telephony services providers (telephony, facsimile, short message services, or multimedia messaging services);
  - content services providers (ringtone, premium short message services, etc);
  - internet services providers;
  - data communication system providers;
  - telephony internet services providers for the public;
  - internet interconnection services (network access point) providers; and
  - other multimedia services providers; and
- the operator of the telecommunications network that is integrated with the telecommunication services.

Nevertheless, with regard to the provision of telecommunication network and infrastructure, the Negative List of Investment imposes further restrictions on the provision of telecommunication tower business, in which the telecommunication tower may only be provided and managed by a local (non-PMA) company. The Investment Coordinating Board should be consulted regarding shareholding restrictions applicable to other lines of businesses in the communications and informatics sectors on a case-by-case basis.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The telecommunications licensing regime in Indonesia is divided into three categories for the provision of telecommunication networks, telecommunication services and special telecommunications. Currently, to fully integrate the business licensing process into the Online Single Submission (OSS) system, as required under Government Regulation No. 24 of 2018 on the Electronically Integrated Business Licensing Service (GR No. 24/2018), the MCIT issued MCIT Regulation No. 7 of

2018 on Electronically Integrated Business Licensing Services on Informatics and Communication (MCIT Regulation No. 7/2018). MCIT Regulation No. 7/2018 partially revoked telecommunication network and services provisioning regulations (as described below), specifically on the licensing provisions. Thus, currently all licensing processes are subject to the applicable procedures at the OSS system.

The previous licensing regime that was applicable for the provision of telecommunication networks and services (other than for special telecommunication) which requires a 'principle licence', followed by an operational licence, is no longer applicable and is only applicable for broadcasting business. The OSS system has introduced commitment-based licensing concept, in which every business entity is required to obtain a Business Identification Number, a Business Licence and a Commercial/Operational Licence before carrying out its business activity commercially. These requirements are also applicable for the telecommunication network and services business.

An application or a dismissal for licences in the communications and information technology sector will be issued via the OSS system within the same business day. Each licence issued under MCIT Regulation 7/2018 is considered as a 'Business Licence' (with conditional effectiveness). Subject to each type of telecommunication network and services, the commitments to fulfil the relevant obligations in writing will need to be submitted. The Business Licence will be considered as an effective commercial or operational licence, upon the satisfaction of commitments for each type of licence, as specifically regulated under MCIT Regulation 7/2018. The commitments must be completed within one year (for telecommunications network provision) or six months (for telecommunications services provision) as of the issuance of the Business Licence (with conditional effectiveness).

With regard to the commitment, the issued Business Licence will not be effective until the applicable commitment has been fulfilled. These commitments also include the obligation to:

- provide minimum construction commitment or network provisions for the first year of operations and for every five years;
- provide minimum services commitment or telecommunication services provisions for the first year of operations and for every five years;
- conduct operational feasibility test;
- obtain landing rights, if applicable; and
- obtain radio frequency spectrum utilisation licence, if applicable.

After all relevant commitments are satisfied, the Business Licence will be effective as a Commercial/Operational Licence and will be valid for an indefinite period, subject to annual evaluation by the MCIT and a comprehensive evaluation once every five years.

The provision of telecommunication networks and services are regulated separately by, respectively:

- MCIT Regulation No. 01/PER/M.KOMINFO/01/2010 as amended by MCIT Regulation No. 38 of 2014 and MCIT Regulation No. 7 of 2015 on the Provision of the Telecommunications Network (the Telecommunications Network Decree); and
- Minister of Transportation Decree No. KM. 21 2001 as amended by Minister of Transportation Decree No. KM. 30 2004, MCIT Regulation No. 07/PER/M.KOMINFO/04/2008, MCIT Regulation No. 31/PER/M.KOMINFO/09/2008 and MCIT Regulation No. 8 of 2015 on the Provisioning of Telecommunication Services (the Telecommunication Services Decree).

Generally, the operator of a telecommunication network is not limited, and permits may be obtained through evaluation by observing, among others, healthy business competition, investment protection, balance of ratio between supply and demand, and national efficiency. One exception is for the operation of networks requiring a certain allocation of radio frequency spectrum, regional code or a network access code. Such networks are limited and the procedure for obtaining a licence is conducted through selection (either comparative evaluation or tender) by the MCIT (except for existing telecommunications network operators that have obtained a licence to use a regional code or network access code, which will be subject to an evaluation).

Further, the telecommunication devices and equipment using 2.4GHz and 5.8 GHz frequency bands are subject to class licence.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

In Indonesia, licences to use radio frequency spectrum (spectrum licences) cover radio station licences (apparatus licences), radio frequency spectrum bandwidth licences (bandwidth licences) and class licences (attached to the telecommunication devices and equipment certification). Apparatus licences are granted by the MCIT through a technical analysis. Bandwidth licences are granted by the MCIT through a selection process, evaluation or conversion from apparatus licences. The selection process must be done together with the selection of the telecommunications network or service operation and after the issuance of the telecommunication network or service operation licences. The selection process can be conducted in two different forms: comparative evaluation or a tender. Separately, evaluation process is only applicable for the use of radio frequency for national security and defence. Spectrum licences for most of the cellular bands are granted as bandwidth licences. The spectrum licence will specify the radio frequency that is permitted to be used. The spectrum licences are in principle non-transferable, unless the transfer is approved by the MCIT (for bandwidth licences) or the Director General of Post and Informatics Equipment Resources (for apparatus licences). In the event that the ownership of a licence holder is transferred through an acquisition or there has been a merger between two licence holders, the transfer of the apparatus licence may be done after obtaining prior approval from the MCIT or Director General of Posts and Informatics Equipment Resources, as applicable. To date, the notable case on the transfer of licence is that being referred to in the MCIT's approval on the merger between PT XL Axiata (XL) and PT Axis Telekom Indonesia (Axis), in which XL is the surviving entity. The MCIT approved XL's acquisition of Axis' spectrum licences provided that XL, as a surviving entity, returns the bandwidth licences for 2 × 10MHz in the 2.1GHz frequency band to the government so that it can be issued to another telecommunications operator under the selection process. If the spectrum licence is not used anymore, the spectrum licence must be returned to the MCIT.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The telecommunications network market is subject to ex-ante regulation through MCIT Regulation No. 03/PER/M.KOMINFO/1/2007 on Network Leases (Regulation No. 03/2007). Regulation No. 03/2007 requires the telecommunications network operator to provide a customer access network in end-to-end network lease services.

Further, the operator must not discriminate in providing the types of services or the network lease tariff rates. For the purpose of Regulation No. 03/2007, discrimination may occur through:

- queues, procedures and timing for the provision of network lease services;
- tariff rates and discount patterns on the network lease services;
- quality of the network lease services;

- contract for the provision of network lease services;
- types of network lease service users; and
- provision of additional services.

The operator is required to determine the type of network lease service based on distance, capacity and the type of users. The types of network lease services include, but are not limited to, local network lease services, long-distance network lease services or international network lease services.

The Telecommunications Network Decree further requires all operators to guarantee the availability of the interconnection, recognising the right of all operators to obtain interconnection from other operators.

Ministry of Transportation Decree No. KM. 33 of 2004 on the Supervision of the Fair Competition in the Provisioning of Fixed Network and Basic Telephony Services requires all fixed-network operators and basic telephony service operators to give equal treatment to other operators in providing interconnection and other services. Operators must not act in any way that discriminates against other operators. Furthermore, through MCIT Regulation No. 08/PER/M.KOMINFO/02/2006 on Interconnection, it is stipulated that interconnection must be provided by the network operators based on requests, to ensure that customers can get access to the telecommunication services.

Further to the above, operators of the packet-switched based local fixed network using the radio frequency band of 2.3GHz (the 2.3GHz network) for the purpose of wireless broadband services are subject to ex-ante regulation obliging such operators to lease 20 per cent of their total network capacity.

The selection document attached to MCIT Regulation No. 22/PER/M.KOMINFO/04/2009 on the Selection Document of the Packet-Switched based Fixed Local Network Operation Using 2.3GHz Radio Frequency Band for the purpose of Wireless Broadband Services (Perkominfo 22/2009) provides that the successful tender winner must open its network capacity to other operators. Perkominfo 22/2009 allows other telecommunications operators open access to the successful tender winner's network to channel signals through a fair tariff division. Open access is granted by leasing the capacity based on a fair and mutually beneficial agreement. In this instance, the successful tender winner is obliged to lease a minimum of 20 per cent of the granted capacity of the 2.3GHz network to the telecommunications operators.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

From a regulatory perspective, the Telco Law separates telecommunications network provisions from those regulating telecommunications services. Nevertheless, the Telecommunications Network Decree provides that, in general, the telecommunications network provider may operate as a telecommunications service provider using its own telecommunications network. This effectively removes any real structural or functional separation between an operator's network and service activities.

Alternatively, telecommunication service operators may lease the telecommunication network from another licensed network operator through a written cooperation.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The Telco Law obliges telecommunications operators to make a contribution to promote universal services in the telecommunications sector. The universal services obligation (USO) requires telecommunication network and telecommunication service operators to contribute to telecommunications facilities and infrastructure, or to contribute through other compensation. Additional contributions include the interconnection cost for costs of system development. The clarification of the Telco Law affirms that the obligation to develop telecommunication facilities under the USO is only imposed on a fixed-network operator. Other telecommunications operators, including internet service providers, are simply obliged to pay a contribution.

Under Government Regulation No. 80 of 2015 on the Types and Tariffs of the Non-Tax State Income Applied in the Department of Communication and Information Technology, in conjunction with MCIT Regulation No. 10 of 2018 on the Implementation of the Telecommunication USO (the TUSO Decree), every telecommunications network and service provider is charged with contributing to the fund for universal service obligations in the telecommunications sector. The USO contribution is paid as a percentage of the annual gross income of the provider.

Government Regulation No. 80 of 2015 set the USO contribution tariff at the rate of 1.25 per cent of the operator's gross revenue per financial year. According to the TUSO Decree, the mandatory USO contribution finances telecommunications access services in remote regions, uneconomically feasible regions and other regions that are still in need of telecommunications and information technology facilities and infrastructure. The contributions being made by telecommunication operators will be managed by the Telecommunication and Information Accessibility Agency (*Badan Aksesibilitas Telekomunikasi dan Informasi* or BAKTI), in which BAKTI will utilise the fund for establishing telecommunication network or services in underdeveloped regions.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

Number portability allows customers to keep their original phone number when switching to another telecommunications operator. Indonesia's telecommunication rules and regulations do not require operators to establish mobile phone number portability.

The Telecommunications Network Decree stipulates that the operation of a telecommunications network requiring a certain radio frequency spectrum allocation, or requiring a network access code, must be limited and the licensing procedure thereof is subject to a selection process (either comparative evaluation or tender). The Directorate General determines the numbering, including the network access code, based on a technical basic plan to be decided on by the MCIT.

Consequently, each telecommunications operator is granted its own unique network access code that cannot be shared between telecommunications operators. This feature effectively eliminates the possibility for mobile phone number portability.

In this case, based on an annex of MCIT Regulation No. 14 of 2018 on the Fundamental Technical Plan of National Telecommunications, number allocation is referring to ITU-T recommendation of E.164 on fixed and mobile network, as well as national services. The numbering allocation itself is based on the following categorisation:

- voice-based services:
  - free call for national intelligent network services;
  - split charging call for national intelligent network services;

- vote call for national intelligent network services;
- uni call for national intelligent network services;
- calling card for national intelligent network services;
- premium call for national intelligent network services;
- community service centre for government institutions, state-owned companies, and fix-local network and mobile network operators;
- emergency number;
- calling card;
- national destination code;
- Asynchronised Data Packet Network Access;
- Synchronised Data Packet Network Access; and

- short messaging service and content provision services:
  - short messaging services for public services, government institutions and state-owned companies;
  - short messaging services for customers of fix-local network and mobile network;
  - premium services and content provision services; and
  - reserved slot, for future purposes.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

There are no specific regulations concerning customer terms and conditions in the communications sector. Nevertheless, it is viewed that the communications sector is covered by the general provisions of Law No. 8 of 1999 on Consumer Protection (CPL).

The CPL stipulates that the business or entrepreneur providing goods or services has a general obligation to:

- act in good faith in conducting business activities;
- provide correct, clear and honest information about the condition and guarantee of goods and services, and directions for use, repair and maintenance;
- treat and serve consumers correctly, honestly and indiscriminately;
- guarantee the quality of the goods or services based on prevailing standard provisions on the quality of goods and services;
- provide an opportunity to consumers to test and try certain goods or services and to provide a warranty or guarantee for the goods made and traded;
- provide compensation or refund for the losses caused by the use, application and utilisation of goods supplied or services rendered; and
- provide compensation and or refund if the goods or services received or utilised are not in accordance with the agreement.

Further, the CPL prohibits certain standard clauses in goods and services contracts. Some relevant prohibitions include, but are not limited to:

- provisions that transfer liability away from the goods or services provider;
- provisions stating the goods or services provider may reject returns; and
- provisions stating that the good or services provider may refuse to return money that has been paid by the consumer for the goods or service purchased by the consumer.

The CPL also prohibits standard clauses that are hidden from, unclear or unintelligible to the consumer. A 'standard clause' is defined by the CPL as any rule, term or condition that is unilaterally written into a contract by the goods or service provider and is binding on the consumer.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The principles and objectives of the Telco Law affirm principles of just and equitable benefit, legal certainty, security, cooperation, ethics and self-confidence. Abiding by the Telco Law's principles and objectives, telecommunications operators must give equal opportunity and treatment to all relevant parties. However, to date, no specific regulations exist to limit the freedom of internet service providers to prioritise the type or source of data that it delivers or to regulate the net neutrality issue. Although draft regulations and guidelines on this matter have been in circulation, it is not clear when such regulations and guidelines will become effective. In relation to the zero-rating of data transmission by certain services or applications' practice and bandwidth 'throttling' practice, the MCIT has not regulated these practices. At the moment, it is understood that the MCIT has not objected to the zero-rating practice, to the extent that the zero-rating will be offered to all users without discrimination. From the practice, it seemed that the MCIT has not objected to the bandwidth 'throttling' practice being imposed by certain operators to their customers for accessing the internet exceeding the agreed bandwidth or data cap.

In addition to the above, the EIT Law clearly prohibits the distribution of electronic contents containing pornography, gambling, offensive or defamatory content, extortion or threats. Contravention of the EIT Law may incur criminal sanctions.

Recently, the Business Competition Supervisory Commission (KPPU) is investigating potential unfair business practice involving PT Telekomunikasi Selular (Telkomsel). As a background, Telkomsel, a telecommunication network and services operator owned by PT Telkom Indonesia (65 per cent), a state-owned telecommunication operator, and Singapore Telecommunication Limited (35 per cent), blocked the access to video on demand streaming services from Netflix. However, Telkomsel allowed access to similar services provided by Telkomsel's subsidiary. Currently, the allegation is still under investigation and there is no decision or conclusion from KPPU yet.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Currently, there is no specified regulation pertaining to digital platforms in Indonesia. Nevertheless, the MCIT has an unwritten policy, which states that the operator of a digital platform must be considered as an electronic systems operator. In brief, as an electronic systems operator, a business actor is required by GR 82/2012 to maintain confidentiality, integrity, authenticity, accessibility, availability and traceability of electronic information and electronic documents that are stored in the electronic system. Further, article 17 of GR 82/2012 also stipulates that an electronic systems operator for public services is obliged to place the data centre and disaster recovery centre in the Indonesian territory for the purpose of law enforcement, protection and upholding the state's sovereignty against its citizens' data.

Further to the above, MCIT Regulation No. 36 of 2014 on Registration Procedure for Electronic Systems Operators (Regulation No. 36/2014) provides that an electronic system operator for public services shall cover:

(i) state or government institutions and their working units;
(ii) state or regional-owned enterprises and their working units;
(iii) independent institutions that have been established based on the law; or

(iv) other legal entities that provide public services in the framework of implementing the mission of the state.

The scope of Regulation No. 36/2014 is limited to points (ii) and (iv). The electronic systems operator for public services conducts registration by way of the director general of information technology application, while the electronic system operator for non-public services may conduct voluntary registration.

However, the term 'public services' and 'mission of the state' under GR 82/2012 on Regulation No. 36/2015 is often interpreted broadly by the authority, in which the MCIT attempts to enforce such requirements to all electronic systems operators, to register their electronic systems, as well as placing the data centre and disaster recovery centre in the Indonesian territory.

Currently, the operation of digital platform is subject to Circular Letter of the MCIT No. 3 of 2016 on Provision of Over-The-Top (OTT) Applications or Content Services via the Internet (Circular Letter 3/2016). Circular Letter 3/2016, defines OTT Services as:

- OTT Application Services, the use of telecommunications services via an internet protocol-based telecommunications network that enables the creation of communication services in the form of short text messages, voice calls, video calls, online chatting, financial and commercial transactions, data storage and collection, games, social networking and media and their derivatives; and
- OTT Content Services, the provision of all forms of digital information consisting of text, sound, images, animation, music, video, films, games or combination of part or all of the above, including those that are streamed or downloaded, by using telecommunications services via an internet protocol-based telecommunications network.

Circular Letter 3/2016 stipulates that an OTT service provider may be in the form of an Indonesian individual or business entity, or a foreign individual or business entity. If the OTT service provider is a foreign individual or business entity, Circular Letter 3/2016 requires the provider to register as a permanent establishment (PE), which would then be subject to the laws and regulations on taxation.

Currently, the MCIT is preparing a draft regulation on digital platforms. Based on the current draft MCIT regulation on digital platform services (where the term 'digital platform services' is used to replace 'OTT services'), a foreign digital platform service provider that: (i) provides commercial services; (ii) manages personal data of Indonesian citizens; and (iii) provides services to at least 1 million accounts is required to appoint a representative (which is a local digital platform service provider) that will act for and on behalf of the foreign digital platform service provider, by entering into a cooperation agreement. However, this draft MCIT regulation concerning digital platform services is not in effect yet.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The government is aware of NGA technology; however, there is no specific regulation regarding NGA, nor are there specific regulatory obligations applicable to NGA networks.

Further, MCIT Regulation No. 10 of 2018 on the Implementation of the Telecommunication USO has provided a legal basis for a government financing scheme to promote basic broadband.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

Yes, there are specific rules regarding data protection that are applicable to the communications sector. For example:

- under the Telco Law, a telecommunications service operator must protect the confidentiality of all information transmitted and received by a services subscriber through the operator's networks and services, except for the purpose of criminal proceedings; and
- the EIT Law stipulates that unless provided otherwise by relevant laws and regulations, the use of any information through electronic media that involves personal data must be made with the consent of the person concerned. The EIT Law also provides that any person whose rights are infringed may lodge a claim for damages incurred under the law. The EIT Law further states that the protection of personal data is part of one's privacy rights. One's right to privacy includes:
  - the right to enjoy a personal life, free from any disturbance;
  - the right to communicate with others without being monitored; and
  - the right to supervise information access concerning one's personal life or data.

In furtherance to the EIT Law, there is MCIT Regulation No. 20 of 2016 concerning Protection of Personal Data in the Electronic System (Regulation No. 20/2016), which is now generally considered as the umbrella provision on the protection of personal data. Regulation No. 20/2016 stipulates certain requirements for the implementation of various activities related to the management of personal data, including those listed below.

Collection of personal data

- The collection must be based on the consent (either physically or electronically) of the personal data owner;
- the collection must be limited to the information that is relevant to and within the purpose of the collection thereof, and conducted in an accurate manner;
- the users must be informed that the data being collected may be transmitted to or hosted by another party;
- the electronic system operator must provide the option to the personal data owner: to determine whether the collected personal data remains confidential; and to change, supplement, or update the personal data; and
- the personal data that are directly obtained and collected must be verified with the personal data owner, or, in the event that the personal data are obtained and collected indirectly, it must be verified with various legitimate data sources through which the data is processed.

Processing and analysis of personal data

- Personal data, which have been verified for accuracy, may only be processed and analysed for the purposes of the electronic system operator that was explicitly stated during the original collection. This rule does not apply to the personal data that has been shown or published openly by the electronic system for public services.
- The processing and analysis must be conducted based on consent.

Personal data storage

- The accuracy of the personal data to be stored must have been verified.
- The personal data must be stored in encrypted form.

- The personal data must be stored for at least a period required by relevant regulations for each sector, or at least five years if there is no applicable specific regulation.

Personal data presentation, publication, transmission, dissemination or the provision of access

- The presentation, publication, transmission, dissemination and provision of access to personal data: must be based on the consent of the personal data owner, unless stipulated otherwise by laws and regulation; and may only be conducted after its accuracy and conformity with the purpose of data collection have been verified.
- The electronic system operator must give an option to the personal data owner, to determine whether or not the relevant personal data to be managed can be used by or disclosed to a third party, on the basis of consent of the personal data owner, to the extent that it still relates to the purpose of the personal data collection.

Destruction or deletion of personal data

The personal data may be destroyed or deleted: after the lapse of data storage period as required by the relevant regulation or Regulation No. 20/2016; or upon the request of the personal data owner, unless stipulated otherwise by laws and regulation.

From the above, it can be concluded that the overarching principle of Regulation No. 20/2016 is the emphasis on the obtaining of the personal data owner's consent for the personal data handling or management and verification of personal data being handled. In addition to that, Regulation No. 20/2016 also requires the electronic system being used for the data collection to be certified. However, currently, according to the MCIT, the provisions concerning the certificates related to electronic system operator are still not yet effectively enforced owing to the absence of implementing regulations.

Currently the government is preparing the bill on personal data protection. However, there is no indication on when the bill will be enacted as a law.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

In general, through the MCIT the government of Indonesia has issued MCIT Regulation No. 26/PER/M.KOMINFO/5/2007 concerning Security on the Utilisation of Internet Protocol-based Telecommunication Network, as amended several times, lastly by MCIT Regulation No. 5 of 2017 (MCIT Regulation No. 26/2007), in which are provided the basic provisions on cybersecurity. Under MCIT Regulation No. 26/2007, monitoring of cybersecurity is under the authority of ID-SIRTII (Indonesia-Security Incident Responses Team on Internet Infrastructure). In this case, the responsibility of ID-SIRTII in relation with cybersecurity shall include:

- socialisation to all relevant parties to implement security efforts over the use of the internet protocol-based telecommunication network and infrastructure;
- coordination on prevention, monitoring, detection, and early warning towards threat and disruption and incident handling at national internet protocol-based telecommunication network, especially for strategic infrastructure;
- establishment or provision, operation, maintenance and development of database system, analysis, monitoring and securing of the use of internet protocol-based telecommunication network, which functions are, inter alia: to support the coordination mentioned above, to store the log file and to support the law enforcement process;
- implementation of information service function towards the security threats and disruption in the utilisation of internet protocol-based telecommunication network and provision of consultation service and technical assistance;
- laboratory training activity, simulation, research, and development in the internet protocol-based telecommunication network security sector;
- data and information analysis and processing activities, resulting from the security implementation and incident handling, laboratory, simulation, research and development;
- presentation, exchange and reporting of analysis and data and information processing activities; and
- acting as the national coordination centre for incident handling related to the security threats and disruption on the use of internet protocol-based telecommunication network in Indonesia.

Further, the EIT Law and article 39 of GR 82/2012 stipulate the requirement of the electronic agent to have and implement a policy and procedure to take any necessary action in the event there is an indication of data hacking or theft. GR 82/2012 defines 'electronic agent' as a device of an electronic system that is made to perform an action automatically on certain electronic information that is organised by a person or legal entity.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Currently, there is no specific legislation or regulation concerning big data. Based on MCIT press release No. 84/PIH/KOMINFO/10/2015 dated 26 October 2015, the big data technology is free to be used provided that the application of the big data technology complies with the provision on data protection in Indonesia, which includes the Telco Law; the EIT Law; Law No. 14 of 2008 on Disclosure of Public Information, as partially revoked by Decision of the Constitutional Court No. 77/PUUXIV/2016; and Law No. 7 of 1992, as amended by Law No. 10 of 1998 on Banking and CPL to protect the rights of Indonesian citizens.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

GR 82/2012 requires electronic system operators, especially for public services, to place the data centre and disaster recovery centre in the Indonesian territory for the purpose of law enforcement, protection and upholding the state's sovereignty on its citizens' data. However, according to the MCIT, the provisions related to the placement of data centres and disaster recovery centres in Indonesia are currently not yet effectively enforced owing to the absence of implementing regulations. Therefore, the MCIT has so far not imposed any sanctions on business entities that do not or cannot fulfil these requirements.

Further, pursuant to article 22 of MCIT Regulation No. 20 of 2016 concerning Protection of Personal Data in the Electronic System, the transfer of the personal data to the territory outside the territory of the Republic of Indonesia, that is managed by an electronic system operator at government agencies and the regional government agencies as well as all sectors of society or private parties domiciled within the territory of the Republic of Indonesia, must:

- coordinate with the Minister or the authorised official or agency. The coordination is implemented in the following form: reporting the personal data transfer plan specifying at least the full name of the country of destination, the full name of the recipient, the date of transfer, and the reasons or purposes for which the

personal data are transferred; seeking advocacy, if necessary; and reporting the results of such activity; and
- apply the provisions of the laws and regulations concerning cross-border personal data exchange. However, to date, no laws and regulations pertaining to such provision have been enacted.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Of particular interest in the Indonesian communications sector is the expected change of the use of certain radio frequency bands following the implementation of long-term evolution technology and the rollout of free-to-air digital terrestrial television.

Further, we note with interest the recent MCIT preliminary review relating to cybercrime. The review is the first step towards establishing a Cybercrime Law in Indonesia.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

Generally, the media sector in Indonesia, consisting of print media, electronic media and internet media, is regulated under Law No. 40 of 1999 regarding Press (the Press Law), the EIT Law and the Broadcasting Law, which specifically regulates the broadcasting of electronic media.

According to the Press Law, the press is a social institution and mass communication forum for journalistic activities. Journalistic activities include searching, obtaining, owning, processing and delivering information, either in writing, voice, picture, picture and voice, as data or graphics, or in other forms via print media, electronic media and other available channels. In light of the important role of the national press as a form of information media, education, entertainment and social control, the delivery of information to the public through the broadcasting media is regulated.

The enactment of the Broadcasting Law does not undermine the regulation of the press under the Press Law. Broadcasting media, and the press, are mutually distinct forms of mass communication. Hence, broadcasting media and the press are regulated separately.

Based on the Broadcasting Law, broadcasting activities are performed by broadcasting institutions, private or public institutions, community broadcasting institutions or customised broadcasting institutions. Under the Broadcasting Law, such institutions are subject to prevailing regulations in performing their duties, functions and responsibilities. The implementation of broadcasting activities shall fall under the jurisdiction of the Directorate General of Provisioning Post and Information Technology of the MCIT, particularly under the Directorate of Broadcasting.

In addition, the performance of broadcasting activities is also regulated by the Indonesian Broadcasting Commission (KPI), an independent state institution established under the Broadcasting Law. The KPI is located in central or regional Indonesia as a manifestation of public participation in the broadcasting area.

The MCIT and the KPI have issued several implementing regulations as guidance for broadcasting institutions to comply with their obligations under Indonesian broadcasting regulations.

The MCIT has issued Regulation No. 32 of 2013, which was later amended by MCIT Regulation No. 26 of 2014 on the Operation of Digital Television Broadcasting and Multiplexing Broadcasting through Terrestrial System (the Digital TV Broadcast Regulation) dated 27 December 2013, to increase the reception quality of television broadcast programmes through the implementation of digital terrestrial television.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Yes, the restriction of foreign ownership applies to media services according to the Negative List of Investment. Based on the Negative List of Investment, new private radio broadcasting that falls under Indonesian Standard Classification (KBLI) No. 60102, and any new private television broadcasting falling under KBLI No. 60202, are prohibited from having foreign ownership.

However, in line with Government Regulation No. 50 of 2005 regarding the Broadcasting Operation of Private Broadcasting Institution (the PBI Regulation), the Negative List provides an exemption for existing private broadcasting institutions. Provided the institution was established by a local entity, existing private broadcasting institutions are allowed to increase and develop foreign shareholdings for adding and expanding businesses on the following conditions:
- the foreign shareholding shall not exceed 20 per cent of its total issued and paid-up capital;
- there must at least be two shareholders; and
- the increase of capital through foreign direct investment can only be implemented after the broadcasting trial period has ended and the permanent licence for broadcasting operation has been obtained, which is at least within one year for television broadcasts and six months for radio broadcasts.

With respect to foreign ownership restrictions for newspaper media, based on the current Negative List of Investment, the business activity of newspaper media falling under KBLI No. 58130, namely the press company that is closed for foreign ownership.

Further, based on the PBI Regulation, the cross-ownership between private broadcasting institutions, printed media companies and subscribed broadcasting institutions, directly and indirectly, is restricted as follows:
- one private broadcasting institution of radio broadcasting services and one subscribed broadcasting institutions with one printed media company in the same region;
- one private broadcasting institution of television broadcasting services and one subscribed broadcasting institution with one printed media company in the same region; or
- one private broadcasting institution of radio broadcasting services and one private broadcasting institution of television broadcasting services with one subscribed broadcasting institution in the same region.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Pursuant to the Broadcasting Law, a broadcasting institution must obtain broadcasting operation licences prior to conducting broadcasting activities. The application for obtaining the broadcasting operation licences shall be submitted to the MCIT's online licensing system, which will be assessed by the Directorate General of Provisioning Post and Informatics, Directorate of Broadcasting and KPI/Regional KPI. The MCIT will then issue a decision to approve or reject the application. The

broadcasting operational licence takes at least six months for radio broadcasting and one year for television broadcasting, as of complete submissions.

The validity period of the broadcasting operational licence is: five years for the radio broadcasting operational licence; and 10 years for the television broadcasting operational licence.

The fees payable for obtaining the broadcasting operational licence comprise:

- the broadcasting operational licence fee, consisting of the fee for obtaining:
  - the principal licence (for conducting trial broadcast);
  - the permanent broadcasting licence; and
  - the extension thereof. The amount of the fee varies depending on the type of licence (ie, for radio or television broadcasting, whether principal, permanent or extension licence) and the broadcast area or zone; and
- the frequency spectrum utilisation fee, which is determined based on certain formulae comprising various components, among others, transmitting power (and its basic price and cost index), bandwidth (and its basic price and cost index) and zone.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

According to the PBI Regulation, the content of the television broadcast performed by the private broadcasting institution must contain domestic programmes for at least 60 per cent of the total daily broadcast duration.

The PBI Regulation further provides that the private broadcasting institution can relay the broadcast of other broadcasting institutions. This may be relayed from domestic broadcasting institutions or foreign broadcasting institutions, in the form of regular or irregular programme broadcast relay. The duration of the broadcast relay for regular programmes originating from abroad is restricted to a maximum of 5 per cent for radio broadcasts, and 10 per cent for television broadcasts, of the total daily broadcast duration. An exception exists for internationalised sport programmes that require time extensions. The total number of broadcast relay programmes for regular programmes originating from abroad is restricted to a maximum of 10 per cent for radio broadcasts, and 20 per cent for television broadcasts, of the total programmes broadcast daily.

According to the PBI Regulation, the private broadcasting institution is prohibited from relaying the broadcast of regular programmes originating from a foreign broadcasting institution covering the following types of programmes: news; music programmes with inappropriate content; and violent sport programmes.

Foreign language programmes can be broadcasted in that language. For television broadcasts, the Indonesian text must be provided or, otherwise, the programme may be selectively dubbed into Indonesian.

KPI Regulation No. 02/P/KPI/03/2012 on the Broadcasting Programme Standard (the Broadcasting Standard) further provides that foreign broadcast programmes may be broadcast provided that they do not exceed 30 per cent of the daily broadcasting duration.

For subscribed broadcasting institutions, Government Regulation No. 52 of 2005 concerning Broadcasting Operation of Subscribed Broadcasting Institutions requires it to provide at least one domestically produced programme channel for every 10 foreign-produced programme channels.

As the Broadcasting Law and its implementing regulations only regulate the broadcasting of television and radio, other types of media (eg, online, mobile content) fall outside this regime.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

In general, various aspects of advertising via the broadcast media are regulated by the Broadcasting Law, Law No. 44 of 2008 concerning Pornography (the Pornography Law) and the Indonesian Criminal Code. More specifically, broadcasting media advertising is also subject to the provisions stipulated in the Indonesian Advertising Ethics Rules issued by the Indonesian Advertising Council, requirements issued by the KPI, and other related regulations. The content of broadcast media advertising shall become the responsibility of the broadcasting institutions.

Pursuant to the Broadcasting Law, the duration of the commercial advertising for a private broadcasting institution is limited to a maximum of 20 per cent of the total daily broadcasting duration. At least 10 per cent of the commercial advertising duration shall be allocated to social community service advertising.

The Broadcasting Law further prohibits:

- the promotion of religious teaching, ideology, persons or groups, that offends the feelings or degrades any other religion, ideology, person or group;
- the promotion of liquor or the like and any addictive substances or materials;
- the promotion of cigarettes that shows the physical form of cigarettes;
- any other matter that is against propriety, morality or religious values; and
- exploitation of children under 18 years old.

Online advertising is not regulated by the Broadcasting Law. It is specifically regulated in the Indonesian Advertising Ethic Rules and is subject to the EIT Law, the Pornography Law and the Indonesian Criminal Code.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

The Broadcasting Standard provides that local broadcast programmes must be produced and shown for at least 10 per cent of the daily networked broadcast duration for television, and 60 per cent of the daily duration for radio. In addition, 30 per cent of such local broadcast programme must be shown at prime time. Gradually, the local broadcast programming for television must be increased to at least 50 per cent of the daily networked broadcast duration.

There are no regulations yet that regulate the mechanisms for financing the cost of such obligations.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content, and its delivery, is regulated differently from the traditional broadcast media insofar as new media takes the form of electronic information. New media in electronic form is subject to the EIT Law and its implementing regulations, instead of the Broadcasting Law.

There are no regulations yet that specifically refer to the term 'new media'. Nevertheless, the term 'new media' is defined by the Indonesian Advertising Ethics Rules as non-conventional communication channels that electronically convey advertising messages in the form of text, marks, images or its guidelines, either online or offline, with or without the premium price charges. It involves internet access service

providers, internet content hosts, content developers, ASP aggregators, link providers and telecommunications companies. New media can be in the form of a banner, a bulk email list, contextual search, email marketing, link exchange, pay per-click, SMS, MMS, etc.

The Indonesian Advertising Ethics Rules provide the following rules regarding advertisement on the internet:

- advertisements cannot be displayed in such a way that disrupts the audience's ability or flexibility to browse and interact with the related websites, unless prior warning has been given;
- advertisements must clearly specify the following:
  - the reason why the recipient has been sent the advertisements;
  - clear and easy guidelines on the means for opting out of receiving the advertisements from the same address or party;
  - the complete address of the advertisements' sender; and
  - the guarantee of rights and privacy of the advertisements' recipients;
- online or interactive ads; and
- advertisements that offer a product through certain online or interactive media, shall comply with the following:
  - advertisements do not solicit more information from the audience than is necessary to complete the sale or purchase transaction for the advertised product;
  - advertisements do not use information about the audience for things that are unrelated to a normal transaction; and
  - advertisements ensure that the method of payment that applies to the purchaser is safe from interception or misuse by any party.

In this instance, on the internet-based digital media sector, social media, websites, the MCIT is actively requiring the digital media operator to conduct content filtering. MCIT regulation No. 19 of 2014 on the Management of Internet Sites with Negative Content (Regulation 19/2014), stipulates that internet sites with negative content as websites containing pornography and other illegal activities based on the laws and regulations as determined by sectoral institutions (ie, government ministries or authorised government institutions).

In this instance, there are two types of negative content management efforts that are implemented by the MCIT:

- negative content in domain name sites – the MCIT maintains a list of websites with negative content, called 'TRUST+Positif'. All internet service providers must block the access to websites that are included in the TRUST+Positif; and
- negative content in non-domain-name sites – the Directorate General of Application and Informatics (DGAI) is authorised to submit a request to the website operator or owner to block or delete negative content in non-domain-name sites. The DGAI may request the website operator or the owner to block or remove the negative content (if the sites are in the non-domain-name sites), or the 'Take Down Request' (TDR). In urgent condition, the DGAI may place the site address in 'TRUST+Positif' list within the 12–24 hour as of receiving the complaint report (depending on whether the complaint was submitted by the society, ministry, institution or law enforcement institution or judiciary institution) and communication with the ISP will be conducted.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The Digital TV Broadcast Regulation replaces MCIT Regulation No. 22/PER/M.KOMINFO/11/2011 (Regulation No. 22/2011), which was revoked by the Supreme Court Regulation No. 22/2011, concerning the switchover from analogue to digital broadcasting. Unlike Regulation No. 22/2011, which required the shutdown of the analogue television broadcast (analogue switch-off (ASO)) after the end of the simulcast period (the transition period where the analogue and digital television are broadcasted simultaneously), the Digital TV Broadcast Regulation does not stipulate the expiry of the simulcast broadcast period and the implementation of ASO. Consequently, it leaves open the possibility that some analogue television broadcasts may continue to operate after the simulcast broadcast period ends. Initially, the radio frequencies freed up by the switchover from analogue to digital are planned to be used by or allocated to the mobile broadband operation. The issuance of the Digital TV Broadcast Regulation may create uncertainty over the time frame for the completion of the initial plan for mobile broadband implementation.

Based on the MCIT press release of No. 42/HM/KOMINFO/06/2016, the non-commercial digital TV terrestrial broadcasting trial would be conducted by a number of content providers for six-month period. According to the news, the trial has been extended for a year. However, currently there is no further update on the development of non-commercial digital TV terrestrial broadcasting.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

MCIT Regulation No. 23/PER/M.KOMINFO/11/2011 as amended by No. 8 of 2013 on the Masterplan on Radio Frequency for the Purpose of Terrestrial Digital TV Broadcast on 478–694MHz Radio Frequency Band (the Masterplan) states that the radio frequency band for the Terrestrial Digital TV Broadcast is 478–694MHz, which is divided into: 478–526MHz for the terrestrial digital TV broadcast to be further regulated; and 526–694MHz for the free-to-air digital terrestrial TV broadcast (FTA). MCIT Regulation No. 5/PER/M.KOMINFO/2/2012 on FTA Standard stipulates that the FTA standard in Indonesia is digital video broadcasting – terrestrial second generation (DVB-T2).

The Masterplan further provides that every radio frequency used for FTA purposes shall fulfil the following technical requirements:

- bandwidth to be used per channel is 8MHz;
- protection ratio for co-channel is 20dB;
- adjacent channel for both lower adjacent channel and upper adjacent channel is –30dB; and
- field strength on the location of the test or measurement point in every service area is restricted to a maximum of 42.6db|uV/m.

Further, the Digital TV Broadcast Regulation provides that the private broadcasting institutions operating the multiplexing broadcast through the terrestrial system may use the single frequency network method in accordance with the radio frequency allocation in every broadcast service region. This provision aims to improve the quality of broadcast reception.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The Broadcasting Law requires that the content of broadcasts contains information, education, entertainment and benefit to the formation of intellectual, character morals and advancement. Broadcasts must also promote the nation's strength, maintain unity and oneness, and apply Indonesian religious and cultural values.

KPI Regulation No. 01/P/KPI/03/2012 on Broadcasting Behaviour Guidelines (the Broadcasting Guidelines) directs broadcasting

institutions to, among other things, respect and honour Indonesia's norms, religious values and multiculturalism. The Broadcasting Guidelines and the Broadcasting Standard further require broadcasting institutions and programmes to respect ethnicity, religion, race and intergroup differences. This includes diversity of culture, age, gender and economic or social life. The regulations also prohibit broadcasters from showing programmes that lower, humiliate or cause conflict among different ethnic, religious, race or interracial groups. This includes groups based on diversity of culture, age, gender or economic social life.

The Broadcasting Standard provides the process for assessing or regulating media plurality in Indonesia. Broadcast content is supervised and assessed by the KPI. The KPI has the authority to perform research, make assessments and impose administrative sanctions. The administrative sanctions that may be imposed by the KPI are:

- a written reprimand;
- temporary cessation of the problematic programme after going through a certain procedure;
- limiting the broadcast duration and time;
- an administrative fine;
- freezing broadcasting activities for a certain period;
- refusal to approve the extension of the broadcasting operation licence;
- revocation of the broadcasting operational licence; and
- ordering the broadcasting institution to broadcast and issue a statement if a complaint by a person or group regarding any violation to the Broadcasting Standard and Guidelines is proven to be true.

Currently, the MCIT is intensively monitoring digital content that is distributed via the internet on various platforms. The MCIT is actively requesting digital media operators to take down negative contents by issuing TDRs to the digital media operators. Contents that are often being requested to be taken down include pornography, distribution of hoax or fake news, hate speech, defamation, indecency, radicalism and terrorism. There are several cases where the MCIT has decided to block access to the platform due to non-compliance with the TDR, such as due to terrorism content (Telegram), and due to pornography and indecency content (Tumblr, Bigo, Tiktok and Vimeo).

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

Recently, the hottest topic in media regulation in Indonesia has been the distribution of hoax news and hate-speech content in social media. Considering the ease of social media access, hoax news and hate-speech content distribution and circulation is recently common, especially in connection with the Presidential election that was completed in April 2019. Further, the distribution of hoax news and hate-speech content has become a significant issue and made it into the headlines, as many Indonesian people tend to directly believe any information distributed via the internet without further verification.

As a preliminary precaution, the government has made an amendment to the EIT Law, which includes a prohibition on the distribution of hoax news and hate-speech content, whereby the violation to such prohibition is subject to the criminal sanction of a maximum six-year imprisonment or penalty or a fine of a maximum 1 billion rupiah. In practice, there are a great number of recent cases regarding the enforcement of this provision whereby people are being reported to the police for distributing hate-speech content through social media (eg, Facebook, Instagram and Twitter).

Currently, the government, which is initiated by the MCIT, is planning to issue a new Data Protection Law, which will be considered as the fundamental basis of data protection in Indonesia. Based on the currently available bill, we note several significant provisions, in comparison to the currently available regulation (ie, Regulation No. 20/2016):

- categorisation of personal data into general personal data and specific personal data;
- differentiation of personal data processor and personal data controller;
- rights of the personal data owner to withdraw his or her consent;
- rights of the personal data owner to submit objections to automated monitoring;
- restriction on visual data processing devices;
- requirements on personal data transfer in the event of acquisition, merger, split-off and consolidation; and
- establishment of the Personal Data Management Commission.

The bill is currently under intensive review and discussion at the MCIT, and there is no specific information on when the bill will be enacted as a law. We expect that the enactment of the bill as a law will impact many electronic system operators in Indonesia, as the law demands strict compliance and requirements, to reach the purpose of the law, which is full protection towards personal data and data sovereignty.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

In general, the communications and media sectors are under the jurisdiction of the MCIT and its divisions and subdivisions, namely: the Directorate General of Provisioning Post and Information Technology overseeing both sectors, the Directorate of Telecommunications for the telecommunications sector and the Directorate of Broadcasting for the media sector. Nevertheless, the MCIT has also coordinated closely with certain entities to supervise the implementation of the regulations, as follows: the BRTI for the telecommunications sector and the KPI for the broadcasting and media sector.

There are no mechanisms to avoid conflicting jurisdiction as each sector has its own or separate regulatory body, which in practice may overlap with each another.

The communication and media regulator is separated from the antitrust regulator. In Indonesia, competition is supervised by the KPPU.

Although there is no specific mechanism to ensure the consistent application of competition and sectoral regulation, in practice the separate application of competition and sectoral regulation by different regulators has been quite consistent.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

The decisions of the regulators can be challenged under the following process.

State Administrative Court

If the decision of the regulator constitutes a state administrative decision, which is defined as a written ruling issued by the State Administrative Agency or state administrative official containing state administrative legal acts based on valid legislation that is concrete, individual and final,

and creates legal effect on an individual or a legal entity, such decision can be challenged by submitting a lawsuit or claim to the State Administrative Court. The reasons for such claim are restricted to: a decision of the regulator that contradicts prevailing laws or a decision that contradicts the principles of good governance.

Supreme Court

According to Indonesia's hierarchy of legislation stipulated in Law No. 12 of 2011 on the Formulation of Laws and Regulations, legislation in the form of laws is third only to Indonesia's 1945 Constitution and the Decree of the People's Consultative Assembly. Consequently, no forms of legislation lower than legislation in the form of Laws under the Indonesia's hierarchy of legislation ('lower legislation') (eg, government, presidential or regional regulations) may conflict with legislation in the form of laws. The lower legislation will not have force of law and will not be binding once declared contradictory by the Supreme Court in a judicial review process that may be initiated by, among others, Indonesian citizens and public or private legal entities.

Hence, if the regulator issues legislation of a lower rank than legislation in the form of laws, such legislation can be challenged under judicial review procedures. A challenge is initiated when an objection is submitted to the Supreme Court. The reasons or grounds for such objection are restricted to the fact that the decision conflicts with the laws and regulations from a higher level in the hierarchy of legislation in Indonesia.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

Recently, the KPPU has given more attention to the telecommunication business in Indonesia. As competition in the telecommunication sector, especially in mobile cellular business, is getting tougher, the big telecommunication service operators are keen to attract more customers by offering lower competitive prices. However, the KPPU suspects that telecommunication services operators are implementing unfair strategy, to offer competitive prices, such as:

- predatory pricing, in which telecommunication services operators are offering very low tariffs, which in many cases are lower than the normal market price, to eliminate their competitors; and
- manipulation of interconnection tariffs, in which case the telecommunication services operators are applying a considerably high charge for interconnection between different telecommunication service operators, which may be up to eight times more expensive than the normal interconnection tariff.

The KPPU, in coordination with the MCIT, is encouraging all telecommunication services operators to implement fair business practice, to benefit the customers, by implementing the cost-based tariff. However, this practice is still common among telecommunication companies, and the KPPU is currently still conducting their investigation on this matter.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The Department of Communications, Climate Action and Environment (DCCAE) is the relevant governmental department responsible for the telecoms and media sector. The regulator is the Commission for Communications Regulation (ComReg).

Ireland has implemented the European regulatory framework governing the electronic communications sector by way of primary and secondary legislation. Primary legislation consists of the Communications Regulation Acts 2002–2016. In 2011, Ireland introduced a number of regulations to transpose the European reform package, namely:

- the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (the Framework Regulations);
- the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (the Access Regulations);
- the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (the Authorisation Regulations);
- the European Communities (Electronic Communications Networks and Services) (Universal Service and User's Rights) Regulations 2011 (the Universal Service Regulations); and
- the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (the Privacy Regulations).

As noted in further detail in question 16, the European Commission launched a review of the regulatory framework for electronic communications and the directive establishing the European Electronic Communications Force entered into force in December 2018. Ireland will have until 21 December 2020 to implement the directive into national law, which will lead to a change to the Irish regulatory framework.

No foreign ownership restrictions apply to communications services.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Authorisation and numbering regime

The provision of communications services is subject to the regime set out in the Authorisation Regulations, which confers a general right to provide an electronic communications network (ECN) or an electronic communications service (ECS) (or both) provided certain conditions are complied with. No distinction is made as to the type of network or service (eg, mobile, fixed (including public Wi-Fi) or satellite).

The notification procedure for obtaining a general authorisation involves the completion of a notification form, which can be completed on the ComReg online portal. Operators are free to commence operations once a properly and fully completed notification has been received by ComReg. A notifying party is, however, immediately subject to the Irish regulatory regime and the conditions set out in the general authorisation. Conditions that may be attached to a general authorisation are set out in the schedule to the Authorisation Regulations.

General authorisations are unlimited in duration. No fee is payable on notification; however, an annual levy (0.2 per cent of relevant turnover) is payable where an operator's turnover in Ireland in the relevant financial year is €500,000 or more.

The European Framework as transposed also governs the granting of rights of use for numbers and radio spectrum. On 1 June 2018, ComReg revised the numbering conditions of use and application process, amalgamating the Numbering Conventions and conditions of use to simplify the rules.

Fixed and mobile service providers may also need to obtain a licence under the Wireless Telegraphy Act 1926 (as amended) in connection with the use of wireless telegraphy apparatus. Non-compliance with the Wireless Telegraphy Act can be prosecuted by ComReg.

Licensing and spectrum regime

ComReg granted liberalised use licences to the then four mobile network operators operating in Ireland (Hutchison 3G Ireland Limited (Three), Vodafone Ireland Limited (Vodafone), Telefónica Ireland Limited (O2 Ireland), Meteor Mobile Communications Limited (Meteor) (owned by eircom Limited (eir)) for liberalised use spectrum in the 800MHz, 900MHz and 1,800MHz bands, following an auction process. There are now only three mobile network operators following the European Commission's approval of Three's acquisition of O2 Ireland.

ComReg does not issue licences of indefinite duration or include any implied or express right of renewal, extension or any other form of prolongation. It considers that periodic predetermined re-release of spectrum is the most appropriate mechanism for the release of new 3.6GHz spectrum rights to maximise the efficient use of spectrum. On 20 December 2018, ComReg published its Radio Spectrum Management Strategy 2019 to 2021, which outlines the priorities for ComReg's radio spectrum work plan, in particular ComReg aims to make available an additional 350MHz of spectrum for wireless broadband. On 22 December 2016 the DCCAE published an article noting that the European Commission had brought forward proposals to coordinate the release of the 694–790MHz (700MHz) spectrum band in all member states by 30 June 2020. The European Commission's proposals will mandate the coordinated release of the 700MHz band to mobile operators and made available for wireless broadband by 30 June 2020 and is a step towards the Commission's plan towards 5G for the EU.

In consultation with ComReg and 2RN (formerly known as RTÉ Networks), the DCCAE is working on a range of issues aimed at delivering a managed migration of broadcasting services from this band within the time frame available. The aim in Ireland is to achieve the release of this spectrum in advance of the June 2020 date, in coordination with the UK.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The legal framework controls ComReg's management of the radio frequency spectrum in Ireland. ComReg issues licences on a technology and service-neutral basis (eg, the 'liberalised use' licences issued following a spectrum auction were issued 'to keep and have possession of apparatus for wireless telegraphy for terrestrial systems capable of providing ECSs'). ComReg considers that spectrum trading is a spectrum management tool that, along with other measures, can increase the efficient use of spectrum rights.

However, ComReg may, through licence conditions or otherwise, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for ECS where this is necessary (eg, to avoid harmful interference, safeguard the efficient use of spectrum, etc).

In February 2014, ComReg published regulations (the Wireless Telegraphy (Transfer of Spectrum Rights of Use) Regulations 2014) and guidelines for spectrum trading in the Radio Spectrum Policy Programme (RSPP) bands and is prioritising the setting out of a spectrum leasing framework for the RSPP bands a priority action as part of its Strategy Statement. ComReg has imposed an ex-ante regime for reviewing notified spectrum transfers to determine whether such transfers would distort competition in the market. Where the transfer forms part of a wider transaction that is subject to merger control scrutiny by the Irish Competition and Consumer Protection Commission (CCPC) or by the European Commission, the framework and guidelines will not apply and the appropriate competition body will be the sole decision-making body. ComReg must be informed of any such merger or acquisition at the same time it is notified to the relevant competition body. The framework and guidelines deal solely with spectrum trading; ComReg has indicated that it will deal with spectrum leasing and sharing or pooling on a case-by-case basis pending further consideration of the same.

ComReg is expected to issue a consultation in H1 2019 in relation to a significant release of spectrum (known as a Multi-Band Spectrum Auction) in relation to the 700MHz, 1.4GHz, 2.3GHz and 3.6GHz bands, which will govern the licensing regime in relation to these ranges. In June 2017, ComReg assigned new spectrum rights of use on a service and technology basis as part of the 3.6GHz band, which is generally utilised for the provision of fixed wireless access to rural customers in Ireland. The award resulted in the following five winning bidders: Airspan Spectrum Holdings Ltd, Imagine Communications Ireland Ltd, Meteor Mobile Communications Ltd, Three Ireland (Hutchison) Ltd and Vodafone Ireland Ltd. In June 2018, ComReg published the results of its 26GHz spectrum award. The award resulted in the following winning bidders: Three, Meteor and Vodafone.

ComReg published its response on the Consultation on the Framework for Spectrum Leases in Ireland in relation to: transfer of spectrum regime under the EU Spectrum Transfer Framework and implementing Irish legislation; the scope of the proposed Spectrum Lease Framework (noting the difference between a spectrum lease or transfer); the procedural framework for spectrum leasing; and how ComReg intends to grant and issue a spectrum lease licence.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The following communications markets are subject to ex-ante regulation.

Fixed communications

- Retail access to the public telephone network at a fixed location: eir has been designated with significant market power (SMP) in this market and the remedies imposed on eir include access and price control obligations, and an obligation not to unreasonably bundle this service with its other services.
- Wholesale call origination on the public telephone network provided at a fixed location: eir has been designated with SMP in this market and the remedies imposed on eir include access, non-discrimination, transparency, accounting separation, price control and cost accounting.
- Wholesale call termination on individual public telephone networks provided at a fixed location: seven fixed service providers (namely, eircom Limited, BT Communications Ireland Limited, Verizon Ireland Limited, Virgin Media Ireland Limited (formerly UPC Communications Ireland Limited), Colt Telecom Ireland Limited, Smart Telecom Holdings Limited and Magnet Networks Limited) have been designated as having SMP. All operators are subject to a price control and cost accounting obligations, with separate price control and accounting obligations applying to eir.
- Wholesale Local Access (provided at a fixed location): eir has been designated with SMP in this market and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations.
- Wholesale Central Access: eir has been designated with SMP in the Regional WCA Market (but not the urban WCA in which ComReg considered there was enough competition in this market) and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations,.
- Wholesale terminating segments of leased lines: eir has been designated with SMP in this market and the remedies imposed on eir include access, transparency, non-discrimination, accounting separation, price control and cost accounting obligations.

Mobile communications

Wholesale voice call termination on individual mobile networks: six mobile network operators were designated as having SMP in this market (namely, Vodafone, O2 Ireland (acquired by Three), Meteor, Three, Tesco Mobile Ireland Limited and Lycamobile Ireland Limited). Remedies imposed on these operators include access, non-discrimination, transparency and price control obligations. The methodology for the price control obligation was challenged and the High Court found in part favour of Vodafone. The Court did not conclude the appeal on the applicable pricing methodology pending completion of a cost model by ComReg. Vodafone was ordered to charge a rate of no more than 2.6 cents per minute in the interim. Following a lengthy consultation process, ComReg published a final decision on the parameters for the bottom-up Pure LRIC/Final mobile termination rates (MTR) Model in February 2016. ComReg adopted the Final MTR Model, which calculates the pure LRIC maximum MTR for Ireland on an annual basis (2016–2018), as follows: 0.84 euro cents per minute for 2016; 0.82 euro cents per minute for 2017; and 0.79 euro cents per minute for 2018. Pursuant to Regulations 13 and 18 of the Access Regulations, for each year of the price control period, each mobile service provider designated with SMP shall ensure that its MTR is no more than the rate determined for that year in accordance with the Final MTR Model.

ComReg took court action against eir seeking to impose significant penalties (circa €10 million) over alleged breaches of the Access Regulations by failing to allow access to its network to other telecom providers. In December 2018, eir agreed to pay ComReg €3 million to settle these enforcement proceedings. As part of the settlement deal, eir also consented to allow independent observers to monitor its internal divisions between its wholesale and retail structures.

The Telecom Single Market EU regulation on mobile roaming was introduced across Europe on 15 June 2017. Now roaming customers are charged the domestic retail price for using their mobile phone when travelling in Europe (seeking to implement a 'roam like at home' experience for customers). This means that customers will be charged their 'domestic price' when roaming in the EU subject to a number of exemptions, namely a fair usage policy and anti-abuse measures. ComReg has issued notifications of non-compliance to a number of operators in relation to implementation of the roaming regulation, including Tesco Mobile Ireland.

Non-compliance with requests for information to inform market analysis or to enable ComReg to carry out its statutory function can be prosecuted by ComReg. ComReg has brought cases in the Dublin District Court against eir, Vodafone and Yourtel in recent years. Eir most recently plead guilty to 10 offences in relation to over-charging customers and paid a total of €23,500 in June 2018. Vodafone had the Probation Act applied to it on condition that it donate €7,500 to charity and Vodafone agreed to make a contribution to ComReg's costs in the amount of €15,000, and Yourtel pled guilty to failing to comply with statutory request for information and was required to make a payment towards ComReg's costs (the *Yourtel* case related to an 'overcharging' complaint). Following a further investigation, ComReg, as of February 2019, applied for and received a restraining order in relation to Yourtel and over-charging of customers (as Yourtel had 89 prior convictions for such an offence).

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Structural separation has not been provided for in the Irish communications regulatory framework. Structural separation can be imposed under the Competition Acts 2002–2017 as a remedy in cases entailing an abuse of dominance contrary to section 5 of the Competition Acts 2002–2017.

Functional separation powers do exist as an exceptional remedy in respect of vertically integrated operators with SMP under the regulatory framework, in circumstances where ComReg concludes that: transparency, non-discrimination, accounting separation, access and price control obligations have failed to achieve effective competition; and where it has identified important and persisting competition problems or market failures in relation to the wholesale provision of certain access markets. As outlined above, following a settlement agreement between eir and ComReg, eir is to impose a revised regulatory governance model to separate its retail and wholesale arms (with independent observers monitoring such a separation for a five-year period).

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

Eir has been designated as universal service provider (USP) for telephony services since 2006.

Most recently in 2016, ComReg designated eir as the USP for AFL USO, for the period 29 July 2016 to 30 June 2021 (following an unsuccessful eir appeal). ComReg stated that the ECS market is likely to change significantly as a result of the National Broadband Plan (NBP) (see below). It does not anticipate that this will be fully implemented before the end of the AFL USO five-year designation period (which appears more unlikely given the lengthy procurement process for the NBP), and it anticipates that the full effect will not be realised for a minimum five years. ComReg stated it will monitor and review developments to evaluate what impact it may have on the provision of basic electronic communications services in Ireland. ComReg stated that it will begin a review three months after the DCCAE has concluded the NBP contract award process. On the basis of the review, it will decide if it needs to commence a new consultation process in relation to AFL USO in the state and it will publish an information notice regarding this.

ComReg decided not to use USO fixed internet access requirements as a mechanism to guarantee access to broadband connections. However, it foresees that USO requirements might play a role in ensuring universal availability of affordable higher-speed broadband outside the NBP intervention area in the future. High-speed broadband is not currently a mandatory component of the USO under national and EU law.

The following points should be noted in relation to the USO:

- eir must satisfy any reasonable request to provide, at a fixed location, connections to the public telephone network and access to a publicly available telephone service (PATS);
- the maintenance of the National Directory Database (NDD) is no longer a USP obligation;
- eir must ensure that public pay telephones are provided to meet the reasonable needs of end users (although ComReg decided in 2014 that where usage of such public payphones falls below a certain level, removal may be permitted). ComReg decided in February 2019 that there is a continued need for a public payphone USO, and that eir remained designated as the public payphone USO until 31 December 2020;
- an accessibility statement being published to ensure equivalence in access and choice for disabled end users is now an obligation of all undertakings and the provision of specialised terminal equipment for disabled end users is no longer an obligation of the USP or any undertaking as of 1 January 2016; and
- eir must adhere to the principle of maintaining affordability for universal services.

In December 2018, ComReg decided that PortingXS (a Dutch company) would be responsible for the management and maintenance of the NDD from 1 July 2019, after the expiry of the transition period to allow the transfer of functions from Eir. As such, PortingXS must ensure that there exists a comprehensive record of all subscribers of publicly available telephone services in the state, excluding those who have refused to have their details included in the NDD. In August 2015 ComReg specified certain requirements to be complied with by all undertakings to ensure equivalence in access and choice for disabled end users (previously only eir as the USP had obligations in respect of a Code of Practice concerning the provision of services for people with disabilities).

Eir is subject to legally binding performance targets relating to timescales for connection, fault rate occurrence and fault repair times, and was subject to a performance improvement programme for 2015, backed by a financial security mechanism of up to €10 million per year. ComReg issues quarterly reports detailing eir's performance data covering its legally binding and non-legally binding performance targets.

There is currently no USO fund in Ireland. Eir, as the USP, may apply to receive funding for the net cost (if any) of meeting the USO where ComReg determines there is a net cost and that it represents an unfair burden. On 7 April 2017, ComReg published the outcome of

its assessment of Eircom's 2015 compliance with the annual performance targets set out in Performance Improvement Plan 3. Eircom submitted a force majeure claim in June 2016 and sought relief in respect of fault repair time performance only. The submission set out the basis for Eircom's force majeure claim as being the 'exceptional weather events in January, November and December 2015'. In addition, Eircom submitted an expert report on the weather conditions associated with the force majeure claim. In response, ComReg formed the view that it could be considered that force majeure conditions applied in the month of December 2015 but that the January and November 2015 weather events did not constitute force majeure events within the meaning of the Performance Improvement Programme (PIP3). Eircom paid ComReg a penalty of €3,094,000 in December 2016 for its failure to meet the PIP3 agreed USO quality of service performance targets for 2015. In light of the above, ComReg does not intend to take further enforcement action against Eircom for the 2015 period. In March 2017, eir initiated High Court proceedings against ComReg in relation to fault repair time obligations imposed on eir. In January 2017, ComReg imposed a 48-hour deadline on eir to repair faults in its telecoms lines (pursuant to complaints from eir's competitors).

In June 2017, ComReg applied to the High Court for declarations of non-compliance in relation to eir's transparency, non-discrimination and access obligations to provide access to its network to other operators, seeking a financial penalty of up to €10 million (which would be the largest in the state) in relation to these regulatory breaches. In December 2017, eir launched counter proceedings against the Minister claiming the EU telecoms regulations have been wrongly applied in Ireland (Access Regulations) and that ComReg has overstepped its remit in trying to impose civil penalties 'of the kind it is proposing under existing law'. In December 2018, eir agreed to pay €3 million to ComReg to settle these enforcement proceedings. As part of the settlement deal, eir also consented to allow independent observers to monitor its internal divisions between its wholesale and retail structures.

ComReg will continue to closely monitor eir's USO performance and publishes quarterly reports on its USO performance.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

All operators providing a PATS must provide number portability to subscribers at no direct charge. Operators must ensure that the porting of numbers is carried out within the shortest possible time; numbers must be activated within one working day and loss of service during the process may not exceed one working day. ComReg may specify the payment of compensation to subscribers for delays in porting. ComReg has set a maximum wholesale porting charge for fixed and mobile operators.

ComReg has confirmed as part of 2013 and 2017 decisions on machine-to-machine numbering, that number portability is in principle an entitlement of machine-to-machine number holders.

ComReg is tasked with the management of the National Numbering Scheme, including attaching conditions to Rights of Use for numbers and generally makes allocations and reservations of numbering capacity from the scheme to notified network operators, who each sub-allocate individual numbers to service providers and end users. ComReg's tasks include:

- assigning numbers for existing services;
- developing frameworks for new and innovative services;
- ensuring numbers are used in accordance with conditions of use set out in the Numbering Conditions of Use; and
- monitoring number utilisation and number changes when required.

Applications for allocation are made via an application form and numbers are granted on a 'first come, first served' basis except when starting allocation from newly allocated number ranges. Allocation is carried out in an open, transparent and non-discriminatory manner. Number allocation occurs in two stages: primary allocation (allocation of blocks of numbers by ComReg) and secondary allocation (subsequent allocation of individual numbers by primary assignees to own customers or users). ComReg currently does not charge fees to recipients for allocations of numbers.

In December 2018, ComReg introduced measures regulating the costs of using non-geographic numbers. As of 1 December 2019, the cost of a call to a non-geographic number cannot exceed the cost of calling a landline number. In addition, the number of non-geographic number ranges available in Ireland will be reduced from five to two by 1 January 2022.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Operators providing a publicly available ECN or ECS must provide certain standard contract conditions to consumers in a clear, comprehensive and easily accessible form (eg, details of price and tariffs, duration of contract, etc). Operators must notify customers one month in advance of any proposed changes to their terms and conditions and of their right to withdraw without penalty if they do not accept the changes. Failure to do so may be prosecuted as a criminal matter as failure to comply is an offence. It is a defence to establish that reasonable steps were taken to comply, or that it was not possible to comply, with the requirement. ComReg also has the choice of bringing a civil action for non-compliance to the High Court. ComReg has not specified a medium to be used for contract change notifications, but provides that notifications must be presented to customers clearly, unambiguously and transparently, and must include certain minimum information. ComReg has initiated enforcement actions regarding a number of alleged breaches of the rules and most recently issued notices of non-compliance against eir, Vodafone, Virgin Media and Sky in 2018 for failure to notify customers in the prescribed manner as required under the Universal Service Regulations.

ComReg has also issued a number of requirements in relation to bills and billing mediums. By way of example, consumers must have a choice about whether to receive paper bills or alternative billing mediums, and a paper bill must be provided free of charge where access to online billing is not possible.

ComReg's enforcement powers in relation to consumer contracts derive from the European Union (Consumer Information, Cancellation and Other Rights) Regulations (following the EU Consumer Rights Directive, ComReg re-iterates in its most recent Strategy Statement and that it intends to use the powers provided for by these regulations to improve consumers' experience of contracts and switching). For example, ComReg has recently (in 2017 and 2018) notified Yourtel, Vodafone, Virgin Media, Three and Sky of findings of non-compliance with respect to the operators' obligations under the Universal Service Regulations including implementing a contract change without notifying customers of the change and of their right to withdraw without penalty from such contract if they did not accept the modification. ComReg successfully brought a prosecution against Yourtel in February 2018 for failure to respond to a statutory request during its investigation into consumer complaints.

In July 2015, ComReg notified eir of a finding that, during the period November 2011 to July 2015, eir did not comply with the transparency obligation imposed in respect of its Bitstream product. It did not publish on its website sufficient information to identify and justify

any differences between the services and facilities set out in the wholesale broadband access reference offer and the comparable services and facilities that eir provided to itself during this period.

In relation to the premium rate services (PRS) sector, ComReg has initiated investigations against operators and published a finding in March 2015 of non-compliance against Dragonfly Mobile Ltd with the PRS Code of Conduct and breaches of its licence resulting in €390,000 being refunded to 12,000 end-user consumers. It has also issued a notice of non-compliance against Zamano Limited in May 2017. ComReg also withdrew the allocated 57,741 and 57,575 short codes.

Finally, ComReg and the CCPC have each stepped up enforcement action in relation to consumer issues.

ComReg brought enforcement action against a number of service providers (eir, Virgin Media, Vodafone, Yourtel) in relation to the incorrect charging of customers for electronic communication services. The cases were brought in the Dublin District Court and total fines of €76,000 (Yourtel), €11,000 (eir) and €11,500 (Vodafone) were imposed. Each of the companies committed to putting remediation plans in place to prevent such issues arising in future. In July 2018, Eircom was fined €23,500 and received 10 separate criminal convictions in relation to 10 counts of incorrect charging of customers for electronic communications services.

During 2015, the CCPC (under its consumer law powers) initiated a number of enforcement actions by way of compliance notice against certain providers of telecommunication services (ie, Vodafone, Three, eir, Meteor, Virgin Media) for failing to make available information to customers, including the right to cancel distance contracts and the right to return the contract goods or services. No fines were applied to the respective undertakings to the extent that compliance was demonstrated within 14 days of the notice.

In 2016 ComReg has increased its enforcement and after an investigation imposed a €255,000 fixed penalty notice on Virgin Media under section 85 of the Consumer Protection Act 2007 for failure to provide 26,046 of its customers with a contract in a durable form in contravention of the Consumer Information Regulations 2013. ComReg investigated Virgin Media as a result of complaints from Virgin customers who claimed the lack of a contract in durable form made it difficult for the affected Virgin Media customers to recognise and see exactly what they were being charged for by the company. This was the first time that ComReg has imposed fixed penalty notices (FPNs). ComReg has the power to issue FPNs under the Consumer Protection Act 2007 for breaches of the Consumer Information Regulations 2013.

In 2017 ComReg initiated an investigation into the way in which Vodafone notified its customers of changes to their roaming terms and conditions (to include an automatic opt-in provision). ComReg determined Vodafone incorrectly notified its customers of this change and imposed a fine of €250,000 and forced Vodafone to remediate its customers to the tune of €2.5 million. Vodafone also made binding commitments not to use 'auto opt-ins' in future.

In 2018, Sky made a settlement and paid ComReg €117,000 in relation to an alleged failure to provide customers with a contract on a durable medium, and breaches of their right to a cooling-off period. As part of this settlement, Sky agreed to take remedial action to prevent any further breaches of these consumer obligations.

In 2018, ComReg brought proceedings against Yourtel in relation to billing customers for a service that it was alleged was never received. In February 2019, Yourtel consented to orders before the Commercial Court requiring it to cease its contraventions.

In November 2018, ComReg announced Formal Dispute Resolution Procedures for End-Users of Electronic Communication Services and Networks, introducing structures and timelines for disputes in relation to any regulations under which ComReg has the power to resolve disputes. This will apply to disputes that remain unresolved by the Service Provider for more than 40 working days, and will come into force on 2 September 2019.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The Telecom Single Market Regulation, effective from June 2017, laid down measures regarding open internet access and net neutrality. ComReg has stated that its approach to network neutrality will be informed by ongoing Body of European Regulators for Electronic Communications (BEREC) work.

BEREC published its Guidelines on Net Neutrality to National Regulatory Authorities (NRAs) on 6 September 2016 providing guidance for NRAs to take into account when implementing the rules and assessing specific cases. After meetings with European-level stakeholders in December 2015 and a workshop with high-level academic, legal and technical experts in February 2016, BEREC launched a six-week public consultation on the draft Guidelines, receiving an unprecedented 481,547 contributions.

ComReg has published its 2018 Report on the Implementation of EU Net Neutrality Regulations in Ireland (as obliged under the TSM Regulation) and outlines how ComReg will:

- safeguard open internet access;
- ensure transparency measures are in place for open internet access;
- supervise and enforce breaches of the TSM Regulation; and
- implement the penalties for such breaches.

ComReg notes that the lack of enforcement powers and the lack of Irish legislation on penalties for breaches will hinder its progress in enforcing net neutrality under the TSM Regulation. For example, ComReg notes that it has not commenced formal assessment of ISP traffic management practices in the absence of enforcement powers.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Other than Part 8 of the Broadcasting Act 2009, which provides for digital broadcasting and the associated migration from analogue television, no legislation or guidelines have been introduced in Ireland in relation to digital platforms to date. To the extent that a digital platform provides an ECS or ECN (or both), it would be subject to the authorisation regime set out in the Authorisation Regulations, which confers a general right to provide ECN or ECS (or both) subject to certain conditions.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

In November 2018, ComReg issued a decision concluding that Eircom continued to hold SMP in the wholesale broadband access market and, as such, imposed a series of remedies on Eircom. Such remedies are designed to ensure telecoms operators have access to Eircom's wholesale services, including the imposition of price control obligations in relation to the Fibre to the Cabinet wholesale market through a cost orientation obligation. This decision was based on a Market Review carried out by ComReg examining the nature and structure of the wholesale broadband access markets.

In 2013–2014, the DCCAE conducted a national broadband mapping exercise to identify areas where government intervention remains necessary to ensure the roll-out of the NGA in line with an NBP and to assess where further state-funded broadband schemes were required. Following a stakeholder consultation, the government approved an allocation of €275 million for a new NBP that will provide the initial stimulus required to deliver high-speed broadband to every city, town, village and individual premises in Ireland. On 4 April 2017, the DCCAE announced the publication of an updated High Speed Broadband Map which includes over 500,000 premises that will have access to commercial high speed broadband by the end of 2020. There were a number of delays in the design and procurement phases of the NBP owing to negotiations with another commercial provider (eir) seeking to provide high speed broadband to some of the areas originally designated under the NBP. Currently there is only one bidder left for the NBP project, although it has not yet been formally selected as the preferred or final bidder.

The NBP follows a number of previous state-funded broadband schemes in operation in Ireland:

- the Metropolitan Area Networks Scheme, which aims to create open-access fibre networks in over 120 Irish towns at a cost of €170 million with support from EU structural funds;
- the National Broadband Scheme, operated by Three provided mobile broadband to all premises in locations where no services were available or likely to be made available by the market (this contract expired in August 2014); and
- the Rural Broadband Scheme, which aims to provide broadband to parts of Ireland where it is not commercially available and was designed to meet the needs of the last 1 per cent of the population not covered by any service.

The Minister for Communications, Climate Action and Environment, with the Minister for Culture, Heritage and the Gaeltacht established a Mobile Phone and Broadband Taskforce to identify immediate solutions to broadband and mobile phone coverage deficits and to investigate how better services could be provided to consumers prior to full build and rollout of the network planned under the National Broadband Plan State Intervention. The taskforce has published its report in 2017 outlining the issues considered and setting out its recommendations and actions to alleviate barriers to mobile reception and broadband access and the DCCAE publishes quarterly updates on how the recommendations are being implemented. While ComReg does not have direct responsibility for implementation of the NBP, the Mobile Phone and Broadband Taskforce outlines a number of regulatory actions that can assist in the rollout of the NBP and ComReg has announced it will undertake such action areas that support the objectives of the Mobile Phone and Broadband Taskforce.

Separately to the NBP, in June 2018, ComReg decided to legalise some mobile phone repeaters in an attempt to boost coverage of mobile phone services in respect of indoor reception. This was a key recommendation of the government's Mobile Phone and Broadband Taskforce. ComReg decided to make certain mobile phone repeaters licence-exempt provided certain technical conditions as outlined in the ComReg decision are met.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The communications sector is subject to the general Irish data protection regime as set out in the Data Protection Act 2018.

The Communications (Retention of Data) Act 2011 sets out a specific regime for the retention of certain communications data for the purpose of, inter alia, the investigation, detection and prosecution of criminal offences. A regime is also in place for the interception of communications by the Irish police force and the defence forces. The Court of Justice of the European Union (CJEU) recently found that the Data Retention Directive (2006/24/EC) (Data Directive), the basis for the Communications (Retention of Data) Act 2011, was invalid. As a result of the CJEU decision, no specific legal act at the EU level obliges Ireland to maintain a data retention regime in place. In December 2018, the Irish High Court ruled that the 2011 Act is incompatible with EU and ECHR law. While the 2011 Act formally remains law in Ireland, the government has published the General Scheme of the Communications (Retention of Data) Bill 2017 designed to replace the 2011 Act.

The 2011 Privacy Regulations from the EU electronic communications reform package referred to above also apply pending the publication of the proposed ePrivacy Regulation.

On 25 May 2018, the General Data Protection Regulation (No. 2016/679) (GDPR) came into force across the EU, and is implemented in Ireland through the Data Protection Act 2018. This follows a two-year implementation period following which the GDPR will replace the existing Data Protection Directive No. 95/46/EC. The aim of the GDPR is to harmonise data protection across the EU and will affect the way in which the communications sector operates.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Criminal Justice (Offences Relating to Information Systems) Act 2017 is the first piece of national legislation specifically relating to cybercrime and is designed to modernise the Irish framework relating to such crimes (previous legislation referred to 'unlawful use of a computer' which did not adequately address problems facing a more modern society). This legislation introduced a number of new offences such as: (i) Accessing an information system without lawful authority; (ii) interfering with an information system without lawful authority so as to intentionally hinder or interrupt its functioning; (iii) interfering with data without lawful authority; (iv) intercepting the transmission of data without lawful authority; and (v) use of a computer, password, code or data for the purpose of the commission of any of the above offences.

In addition, DCCAE policy is outlined in the 2015 National Cyber Security Strategy, a high-level policy statement from the government acknowledging the challenges with facilitating and enabling the digital economy and society. The strategy is based on key principles such as the rule of law, subsidiarity, noting that we are ultimately responsible for our own security, and proportionality in response to key risks and threats facing us. Key measures include:

- formally establishing the National Cyber Security Centre, encompassing the national/governmental Computer Security Incident Response Team (CSIRT-IE) and focusing on the protection of critical national information infrastructure in key sectors such as energy and telecommunications;
- delivering improved security arrangements, in partnership with government departments and key agencies involving situational awareness and incident management;
- introducing primary legislation to formalise arrangements in law and to comply with EU requirements on capabilities, cooperation and reporting; and
- cooperating with key state agencies, industry partners and international peers in the interests of protecting critical infrastructure, improving situational awareness and incident management along with facilitating education, training and public awareness initiatives.

An updated National Cyber Security Strategy is expected to be published (there is a public consultation ongoing until 1 May 2019).

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

No new data protection legislation has been introduced in Ireland to deal specifically with big data, so the debate has focused on the application of general data protection rules to each new way in which personal data are collected, stored, used and analysed.

For instance, current data protection law requires that personal data is only used for specific purposes which, naturally, restricts the trend in big data to make use of data in previously unknown ways. This means that big data systems should ideally be set up with this purpose limitation in mind, with each new use of personal data generating its own risk profile. There have been discussions around the use of techniques to effectively anonymise or pseudonymise personal data as a solution to this, so that the data falls outside the scope of data protection rules, though achieving this can sometimes be difficult.

While this may somewhat limit the ability to commercially exploit big data, the enforcement of data protection law in Ireland is not static, and is adaptable to each new innovation. The Irish Data Protection Commissioner takes a pragmatic approach to the treatment of big data and considers meaningful consultation with organisations operating in this space, including the many leading multinational technology companies based in Ireland, as essential to this strategy.

The Edward Snowden allegations of large-scale access by US authorities of EU citizens' personal data have brought the treatment of 'big data' to the forefront of political discussion in Europe, including Ireland. Significant changes are likely to come about as a result of the GDPR, implemented in Ireland by the Data Protection Act 2018.

In relation to big data, the GDPR provides in section 22 that, 'the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. Section 57 of the Data Protection Act 2018 outlines the rights of the individual in relation to automated decision making, implementing article 22 of the GDPR. As such, automated processing is only permitted with the express consent of the individual, when necessary for the performance of a contract or where authorised by EU or member state law. In addition, where automated processing is permitted, measures must be in place to protect the individual (eg, the right to present their point of view). Automated processing can apply to sensitive personal data (as outlined under the Data Protection Act 2018) on the basis of express consent or reasons of substantial public interest.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no laws or regulations that require data to be stored locally in Ireland. The Data Protection Act 2018 not detail specific security measures that a data controller or data processor must have in place, though the European Communities (Electronic Communications Networks and Services) (Privacy and Communications) Regulations 2011 detail some requirements specific to the electronic communications services sector. Instead the Data Protection Act 2018 places an obligation on data controllers to ensure that data is processed in a manner that ensures 'appropriate security of the data'. The measures used by the data controller must ensure that a level of security is provided that is proportionate to the harm that may result from destruction, loss, alternation or disclosure of the data.

Data controllers and data processors are also obliged to ensure that their staff and 'other persons at the place of work' are aware of security measures and comply with them. The legal obligation to keep personal data secure applies to every data controller and data processor, regardless of size.

Section 96 of the Data Protection Act 2018 specifies conditions that must be met before personal data may be transferred to third countries. Organisations that transfer personal data from Ireland to third countries (ie, places outside of the European Economic Area) need to ensure that the country in question provides an adequate level of data protection. Some third countries have been approved for this purpose by the EU Commission. The adequacy decision of the European Commission that underpinned the US 'Safe Harbour' arrangement has now been invalidated by a decision of the CJEU of 6 October 2015 (Case C-362/14). Consequently, it is no longer lawful to make transfers on the basis of the EU–US Safe Harbour framework. This was replaced by the EU-US Privacy Shield, which imposes stronger obligations on US companies to take measures to protect personal data.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

In its Strategy Statement for 2017–2019, ComReg identified the main trends it considers will both shape the sector and pose regulatory challenges over this period. These are:

- continued evolution of fixed and mobile networks: future electronic communications networks such as, for example, 5G where standards are still evolving may potentially have differing regulatory requirements and it is as yet unclear what the effective regulation of these evolving networks will entail;
- an increase in connected 'things': while the current electronic communications ecosystem focuses primarily on how people connect, the next wave of innovation is anticipated to be in relation to connected 'things', aka the Internet of Things;
- changing regulatory framework: as part of a broader digital strategy in Europe, the regulatory framework for electronic communications introduced in 2002 (and updated in 2009) is under revision;
- non-uniform end-user experiences: accessibility and connectivity have not evolved uniformly, and the experience of end users has not always kept pace with changes in expectations;
- expanding set of related markets relevant to the regulation of electronic communications: effective regulation requires an understanding of the complex electronic communications ecosystem, especially when electronic communications are an enabler of innovation in related markets; and
- mobile coverage is an issue of national importance as highlighted by its inclusion as a priority in the programme for government, and the formation of a Mobile Phone and Broadband Taskforce. ComReg has initiated a work stream to better understand the factors affecting the mobile consumer experience.

In September 2016, the European Commission launched a review of the regulatory framework for electronic communications with the publication of a draft Directive to establish the EECC. The Directive establishing the European Electronic Communications Force entered into force in December 2018. Ireland will have until 21 December 2020 to implement the directive into national law. Elsewhere, the new media merger regime (described in question 18) has been in effect since 31 October 2014. Since then, 24 media mergers have been both notified to and approved by the CCPC and the Minister for Communications.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The broadcasting sector in Ireland is regulated by the Broadcasting Act 2009 (as amended) (the Broadcasting Act), which established a content regulator, the Broadcasting Authority of Ireland (BAI) and sets out the regulatory framework for the media and broadcasting sector in Ireland. ComReg's role in respect of the broadcasting sector is limited to the issuing of licences under the Wireless Telegraphy Acts, in respect of wireless equipment and assignment of required radio spectrum. In July 2013, ComReg also analysed the wholesale access to the national terrestrial broadcast transmission services market and the wholesale access to the digital terrestrial television multiplexing services market, finding RTÉ Transmission Networks Limited and RTÉ to have SMP respectively. ComReg has imposed obligations of access, non-discrimination, transparency, accounting separation, price control and cost accounting.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Non-EU applicants for broadcasting contracts are required to have their place of residence or registered office within the EU or as otherwise required by EU law.

The framework for the ownership and control policy of the BAI is set out in the Broadcasting Act, which requires the BAI, in awarding a sound broadcasting contract or television programme service contract (or consenting to a change of control of the holder of a broadcasting contract), to have regard, inter alia, to the desirability of allowing any person or group of persons to have control of or substantial interests in an 'undue number' of sound broadcasting services, or an 'undue amount' of communications media in a specified area. The BAI has also issued an Ownership and Control Policy, setting out the regulatory approach that the BAI will take and the rules that will be enforced regarding ownership and control of broadcasting services. The policy will be used by the BAI to assess applications for broadcasting contracts and requests for variations to ownership and control structures of contract holders. In December 2018, the BAI launched a public consultation on its updated Ownership and Control Policy. Noteably, the BAI decided not to update its understanding of 'control' under the revised policy.

The Competition and Consumer Protection Act 2014 (the 2014 Act) radically amended the existing media merger control regime. As a result, media mergers must be now notified to both the CCPC and the Minister for Communications. The CCPC is responsible for carrying out the substantive competition review to determine whether the merger is likely to give rise to a substantial lessening of competition. It is the role of the Minister for Communications to assess 'whether the result of the media merger will not be contrary to the public interest in protecting the plurality of the media in the State' and this includes a review of 'diversity of ownership and diversity of content'. The 2014 Act provides for a set of 'relevant criteria' by which the Minister for Communications must assess whether the media merger will be likely to affect plurality of the media in the state. In particular, the relevant criteria include considering, inter alia, the undesirability of allowing one undertaking to hold significant interests within a sector of media business, the promotion of media plurality and the adequacy of the existing state-funded broadcasters to protect the public interest in plurality of the media in the state.

The DCCAE published Media Merger Guidelines in May 2015. In the interests of transparency, the Minister now publishes summary details of the rationale for clearing media mergers (following the *Sky/21st Century Fox* media merger in 2017).

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The BAI is responsible for the licensing of the national television service, and content on digital, cable, multimedia displays and satellite systems. The licensing of content on these systems is an ongoing process with no time frame for applications and no competitive licensing process.

The BAI is responsible for the licensing of independent radio broadcasting services in Ireland and Part 6 of the Broadcasting Act sets out the mechanism by which the BAI shall undertake the licensing process for commercial, community temporary and institutional radio services.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The European Communities (Audiovisual Media Services) Regulations 2010 and the European Communities (Audiovisual Media Services) (Amendment) Regulations 2012 (the AVMS Regulations) implement the Audiovisual Media Services Directive 2010. The AVMS Regulations provide that broadcasters, where practicable and by appropriate means, must progressively reserve for European works a majority proportion of their transmission time (excluding the time appointed to news, sporting events, games, advertising and teletext services) having regard to their various public responsibilities. In 2018, both the European Parliament and Council approved updates to the Audiovisual Media Services Directive, and this will lead to changes to the Irish regime following implementation and there is an ongoing consultation in relation to the implementation of this revised legislation.

Further, where practicable and by appropriate means, broadcasters must progressively reserve at least 10 per cent of their transmission time (excluding the time applied to news, sports events, games, advertising and teletext services) for European works created by producers who are independent of broadcasters, or reserve 10 per cent of their programming budget for European works that are created by producers who are independent of broadcasters, having regard to its various public responsibilities.

The AVMS Regulations require member states to ensure that on-demand audiovisual media services also promote European works; however, quotas for European works are not imposed on non-linear audiovisual services.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The BAI is tasked with the development, review and revision of codes and rules in relation to advertising standards to be observed by broadcasters, and consideration of and adjudication on complaints concerning material that is broadcast, including advertising. The Broadcasting Act provides that advertising codes must protect the interests of the audience and in particular, any advertising relating to matters of direct or indirect interest to children must protect the interests of children and their health. By way of example, the BAI has issued General and Children's

Commercial Communications Codes, including rules to be applied to the promotion of high fat, salt and sugar foods to children. Further rules are set out in the AVMS Regulations in relation to 'audiovisual commercial communications' on on-demand services. On 28 March 2017, the BAI launched its revised General Commercial Communications Code, which sets out the rules with which Irish radio and television stations must comply when it comes to airing advertising, sponsorship, product placement and other forms of commercial communications. The revised Code came into effect on 1 June 2017. It was developed by the BAI following a statutory review of the current Code and a public consultation on a revised draft. Last-minute changes made to the code before the launch included rules regarding commercial communications for financial services and products and the provision of greater clarity on the distinction between sponsorship and product placement. Alcohol advertising bans near schools or play areas are due to come into effect in November 2019.

The Broadcasting Act does not apply to broadcasting services that are provided through the internet or to non-linear services, but this is likely to change pending the implementation of the revised Audiovisual Media Services Directive.

A voluntary self-regulatory code is also in operation and is administered by the Advertising Standards Authority of Ireland (ASAI), which sets out guidelines for advertising in relation to a range of topics including food, financial services and business products. This code is applicable to online advertising. On 1 March 2016, the new ASAI Code of Standards for Advertising and Marketing Communications in Ireland came into effect. The Updated Code features new sections on e-cigarettes and gambling and revised sections on food (including rules for advertisements addressed to children), health and beauty and environmental claims.

In addition to the above, broadcasters should observe relevant national and European rules on advertising of specific types of products and services (eg, tobacco, health foods, air fares, etc) and consumer protection rules on types of advertising practice permitted (eg, consumer information requirements, misleading information rules, etc).

Must-carry obligations

22 | Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

The Broadcasting Act requires 'appropriate network providers' to ensure, if requested, the retransmission by or through their appropriate network of each free-to-air television service provided for the time being by RTÉ, TG4 and TV3's free-to-air service. Appropriate network is defined as an ECN provided by a person (the 'appropriate network provider') that is used for the distribution or transmission of broadcasting services to the public. The appropriate network provider is not permitted to impose a charge for the above-mentioned channels.

A public service broadcasting charge was suggested by previous governments as a means of funding public broadcasting in light of the changing ways that viewers now access public service broadcasting. However, such plans have been shelved and, the current Minister for Communications recently announced that there was little chance of this being introduced and the government would not introduce the necessary enabling legislation.

Regulation of new media content

23 | Is new media content and its delivery regulated differently from traditional broadcast media? How?

The Internet Services Providers Association of Ireland (ISPAI) has responsibility for supervising the ongoing evolution of self-regulation of the internet in Ireland and has set out guidelines in its Code of Practice and Ethics (the Code) that ISPAI members should take into account when operating.

In its statement of policy, the ISPAI acknowledges that its members must observe their legal obligation to remove illegal content when informed by organs of the state or as otherwise required by law. The general requirements of the Code issued by the ISPAI include a requirement on all members to use best endeavours to ensure that services (excluding third-party content) and promotional material do not contain anything that is illegal, or is likely to mislead by inaccuracy, ambiguity, exaggeration, omission or otherwise. They must also ensure that services and promotional material are not used to promote or facilitate any practices that are contrary to Irish law, nor must any services contain material that incites violence, cruelty, racial hatred or prejudice or discrimination of any kind.

Members' ISPs are also required to register with www.hotline.ie, which is a notification service to facilitate the reporting of suspected breaches under the Child Trafficking and Pornography Act, 1998 (as amended by the Child Trafficking and Pornography (Amendment) Act, 2004) and the removal of illegal material from internet websites.

The On-Demand Audiovisual Media Services Code of Conduct is an industry developed code which covers on-demand audiovisual services in Ireland, addressing topics such as advertising, content standards and dispute resolution.

Digital switchover

24 | When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Digital switchover occurred on 24 October 2012. The 800MHz band had been used for analogue terrestrial television services. This spectrum was auctioned off (along with the 900MHz and 1,800MHz spectrum) in autumn 2012 for use in electronic communications services.

Digital formats

25 | Does regulation restrict how broadcasters can use their spectrum?

As required by the legislative framework, ComReg has moved towards a position where it will issue licences on a technology and service-neutral basis and that new rights of use will issue on a service and technology-neutral basis. For example, ComReg awarded the 3.6GHz spectrum band in 2017, following a lengthy consultation process on a service and technology-neutral basis (ie, holders of the new rights of use may choose to provide any service capable of being delivered using the assigned spectrum). For instance, they could distribute television programming content, subject to complying with the relevant technical conditions and with any necessary broadcasting content authorisations or they could adopt some other use.

As mentioned in question 3, ComReg may, through licence conditions or otherwise, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for ECSs where this is necessary (eg, to avoid harmful interference, safeguard the efficient use of spectrum, etc).

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The Competition Acts 2002–2017 provide for special additional rules for 'media mergers' (ie, a merger or acquisition in which two or more of the undertakings involved carry on a media business in the state, or alternatively that one or more of the undertakings involved carries on a media business in the state and one or more of the undertakings involved carries on a media business elsewhere).

A 'media business' means the business (whether all or part of an undertaking's business) of:

- the publication of newspapers or periodicals consisting substantially of news and comment on current affairs, including the publication of such newspapers or periodicals on the internet;
- transmitting, retransmitting or relaying a broadcasting service;
- providing any programme material consisting substantially of news and comment on current affairs to a broadcasting service; or
- making available on an electronic communications network any written, audiovisual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making such material available.

As mentioned in question 18, media mergers are notifiable to both the CCPC and the Minister for Communications (regardless of the turnover of the undertakings concerned) to assess whether the media merger would be contrary to the public interest in protecting the plurality of the media in the state. The 2014 Act provides for a set of 'relevant criteria' by which the Minister for Communications must assess whether the media merger will be likely to affect plurality of the media in the state. In particular, the relevant criteria include considering, inter alia, the undesirability of allowing one undertaking to hold significant interests within a sector of media business, the promotion of media plurality and the adequacy of the existing state-funded broadcasters to protect the public interest in plurality of the media in the state. As mentioned in question 10, the BAI may play a role in assessing media plurality should the transaction be referred to a Phase II process by the Minister for Communications.

In terms of steps the authorities may require companies to take as a result of a media merger review, the Minister for Communications may determine that the media merger be put into effect, determine that the media merger be put into effect subject to conditions or determine that the media merger may not be put into effect.

The DCCAE's Media Merger Guidelines provide guidance on the media merger process and the DCCAE now publishes information regarding its process and a summary of each media merger determination in the interests of transparency.

Further to the BAI's Statement of Strategy 2017–2019, in December 2018, the BAI launched a public consultation on a draft Media Plurality Policy designed to set out how the BAI understands media plurality in the Irish market.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

In February 2017, the BAI published a strategy statement for 2017–2019 setting out seven strategic goals and objectives for the period. The implementation of these strategies remains ongoing. The chairperson of the BAI, Professor Pauric Travers outlined its commitment to ensuring that Irish audiences have access to a range of quality content at the launch of the strategy statement 2017–2019.

There has been a marked increase in the number of media mergers in the state, a trend that can be seen across the EU as traditional media outlets need to consolidate to ensure continued survival in a difficult environment. Twenty-four media mergers have been notified and cleared by the CCPC and the Minister for Communications since the introduction of the media merger regime in 2014. There has only been one Phase II media merger in the state, which involved the proposed acquisition of the Celtic Media Group by Independent News & Media and was referred to the BAI for a full media merger examination (first Phase II in the state). No ministerial decision was made by the Minister for Communications as the parties terminated the transaction during the lengthy process by mutual consent. The proposed acquisition of the *Irish Examiner* by the *Irish Times* received CCPC clearance on 24 April 2018 and in June 2018, the Minister for Communication also cleared the transaction.

The primary legislative focus for the Department of Communications will be the drafting and implementation of the revised Audiovisual Media Services Directive, which may impact significantly on how non-traditional media companies and broadcasters operate in Ireland through enhanced regulation and potentially introducing a licensing regime for the first time. In relation to traditional broadcasters, it remains to be seen whether Ireland will impose financial contributions (direct investments or levies payable to a fund) on broadcasters and providers who are targeting their national audiences from other member states (the revised legislation leaves this decision to each member state's discretion).

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The BAI is responsible for the regulation of the broadcasting and audiovisual content sector.

The CCPC is responsible for administering and enforcing the Competition Acts 2002–2017 across all sectors.

ComReg is responsible for the regulation of the electronic communications sector and ComReg has co-competition powers with the CCPC that enable it to pursue issues arising in the electronic communications sector under competition law and to take action in respect of anticompetitive agreements and abuse of dominance. ComReg and the BAI are each party to a cooperation agreement with the CCPC to facilitate cooperation, avoid duplication and ensure consistency between the parties insofar as their activities consist of, or relate to, a competition issue.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

A decision of ComReg may either be challenged by way of judicial review or for decisions made under the Regulatory Framework a merits-based appeal in accordance with the Framework Regulations in the High Court. Under the Framework Regulations, the appeal must be brought by a user or undertaking that is 'affected' by the decision, and must be lodged within 28 calendar days of the date after the user or undertaking has been notified of the decision. An appeal can be brought on the basis of law or errors of fact. Where the appeal is made to the High Court, either party may seek for the matter to be transferred to the Commercial

Court, which is a specialist part of the High Court that generally hears appeals within six months of the date the appeal is lodged. Lodgement of an appeal against a decision of ComReg does not automatically 'stay' that decision, unless an application for a stay or for interim relief has been made.

Judicial review proceedings should be launched at the earliest opportunity or in any event within three months from the date when grounds for the application first arose (eg, date of a ComReg decision (although this can be extended by the court if it considers that there is good and sufficient reason to do so)). The Irish courts have jurisdiction to examine the procedural fairness and lawfulness of decisions of public bodies in judicial review proceedings, rather than the merits of a decision.

Any other procedures available to remedy the matter must usually be exhausted before bringing judicial review proceedings.

A decision of the BAI may be challenged by way of judicial review in the High Court (as above). In addition, a decision by the BAI to terminate or suspend a contract made under part 6 or part 8 of the Broadcasting Act may be appealed by the holder of the contract to the High Court pursuant to section 51 of the Broadcasting Act.

A decision by the Minister for Communications in respect of a media merger must be brought in the High Court not later than 40 working days from the date of determination. Alternatively, this period may be extended by the High Court if it considers that there is a substantial reason why the application was not brought in the period and it is just to grant leave to appeal outside the period.

Competition law developments

30 | Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

As set out in question 27, there has been a marked increase in the number of media mergers notified since the 2014 media merger regime was implemented. Twenty-four media mergers have been notified and cleared by the CCPC and the Minister (with an additional two reviewed by the Minister following European Commission clearance).

Some notable media mergers include:

- the 2016 proposed acquisition by Independent News & Media of seven regional newspapers that made up the Celtic Media Group. No ministerial decision was made as the parties terminated the transaction by mutual consent during the extended merger process;
- the 2017 clearance of *21st Century Fox/Sky* with no commitments; and
- the 2018 clearance of *Trinity Mirror/Northern & Shell* with binding CCPC commitments.

As noted above, the *Irish Times* notified the CCPC of its intention to purchase the *Irish Examiner* (the effect of which would reduce the number of 'quality daily broadsheets' from three to two) and received Phase II CCPC clearance on 24 April 2018. In June 2018, the Minister for Communication made a determination that the proposed merger would not adversely affect the plurality of media in the state. The Minister noted that, because of the financial position of the target company, the proposed transaction may in fact preserve the diversity of content and thus protect media plurality in the state.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The primary legislation governing the communication sector in Italy is Legislative Decree No. 259 of 1 August 2003 – Electronic Communications Code (Electronic Communications Code) that results from EU 2002 directives regulating the electronic communications networks and services, the authorisation of electronic communications networks and services, the interconnection of electronic networks and user rights.

In addition, the Italian Communications Authority (the Authority) issues resolutions as secondary legislation containing detailed rules in the offering of electronic communication services and networks. Indeed, the Authority, established by Law No. 249 of 31 July 1997, is a regulatory agency designed to actively promote the integration between the telecommunication and media markets and to supervise and monitor the markets.

Moreover, the Data Protection Authority issues resolutions containing specific obligations for operators in the storage, processing and use of personal data information.

The Ministry of Economic Development – Communications Department (the Ministry) is in charge, inter alia, of issuing authorisations and allocating the spectrum.

A general authorisation is required to offer electronic communications services in Italy. Such authorisation can be issued only to: entities with a permanent establishment in Italy or in a country within the European Economic Area (EEA); member states of the World Trade Organization; and countries granting Italian citizens reciprocal rights of access to the relevant telecoms activity (article 25 of the Electronic Communications Code).

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

In accordance with articles 25 and 26 of the Electronic Communications Code, an operator who intends to provide electronic communications networks and services or to establish and operate network equipment at a point of presence in Italy shall apply with the Ministry for the issuance of the above-mentioned general authorisation. The request must describe the services to be rendered and information about the applicant, such as the legal representatives of the relevant entity and the number of employees.

Following the filing of the relevant request, the operator can provisionally exercise the activity. Within 60 days of the application, the Ministry can deny the authorisation or request further clarifications. If the Ministry does not respond within this deadline, the authorisation shall be deemed as issued (the *silenzio assenso* mechanism).

The operator shall be registered with the Register for Communications Operators kept by the Authority.

The Ministry also grants authorisations for the use of numbers and radio frequency spectrums in mobile or satellite services. In respect of radio frequencies for which individual rights of use are required, the operator must obtain such rights before commencing use of the radio frequencies.

The duration of an authorisation depends on the type of services offered. As a general provision, the authorisations and licences last for up to 20 years and may be renewed.

General authorisations are subject to payment of an annual contribution to the Authority, calculated on the basis of the net turnover of the operator and to be paid by 1 April of each year. In accordance with Decisions No. 463/16/CONS and No. 62/17/CONS of the Authority, the 2017 fees shall be paid through an online procedure available on the following website: www.impresainungiorno.gov.it.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The spectrum licences specify the permitted spectrum use. In accordance with article 14 of the Electronic Communications Code, the Ministry prepares the master plan for the use of spectrum licences, while the Authority is in charge of the allocation plan. The most up-to-date master plan is the Ordinary Supplement No. 49, published in the Italian Official Gazette on 19 October 2018 No. 244. It provides the principles for the allocation of the frequencies between 0 and 3,000GHz to each type of service (eg, fixed, mobile, satellite, radio navigation), the authorities to which the frequencies shall be required (eg, the Ministry of Economic Development, the Ministry of Defence) and the frequency bands and (if any) the international provision applicable.

Individual rights of spectrum use are granted within the limits set out in the master plan and any holders of such rights shall be compliant with the spectrum use allocated.

Article 14-ter of the Electronic Communications Code allows the transfer of rights relating to radio frequency spectrum to comparable operators or providers, with a prior notification to the Authority and the Ministry.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

According to EU Recommendation No. 879 of 17 December 2007, the electronic communications sector that is subject to ex-ante regulation

can be divided into two groups: markets for fixed networks (eg, services for the access to new generation networks) and markets for interconnection services on fixed and mobile networks (eg, interconnection services on fixed networks). The EU Recommendation No. 710 of 9 October 2014 has modified the number and list of markets that are subject to ex-ante regulation. In particular, the latest Recommendation has included fixed and mobile call termination markets in the list, as well as wholesale broadband access markets.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

In accordance with article 16 of the Electronic Communications Code, companies with exclusive or special rights for public communication networks installation or communication services provision shall provide networks or electronic communication services accessible to the public only through their subsidiaries or affiliated companies (ie, structural separation). This limitation does not apply to companies that generate an annual turnover lower than €50 million with the provision of electronic communication networks or services in Italy.

Legislative Decree No. 70 of 28 May 2012 has also introduced functional separation as an exceptional remedy for competition problems or market failures. Article 50-bis of the Electronic Communications Code allows the Authority to require functional separation where it assesses that other available remedies have failed to achieve effective competition. If the Authority intends to impose a functional separation, it shall notify its proposal to the European Commission, explaining the grounds of such proposal.

The Electronic Communications Code also provides for a specific procedure for voluntary separation by vertically integrated companies. Pursuant to article 50-ter of the Electronic Communications Code, operators holding a significant market power may adopt a structural separation of some of their access network assets to offer wholesale services to retail providers, including their retail units.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

The services that must be made available to end users and must be provided by all operators as universal service obligations are the following: access to end users from a fixed workstation (article 54 of the Electronic Communications Code); public pay telephones (article 56); and special measures for disabled and low-income users (articles 57 and 59.2 of the Electronic Communications Code).

If the Authority finds that an undertaking is subject to an unfair burden, it will decide, on request, to share the net cost of universal service obligations among providers of electronic communications networks and services using the ad hoc fund established by the Ministry (article 62 of the Electronic Communications Code).

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

Fixed and mobile operators must provide portability to customers.

With Resolution No. 274/07/Cons (article 6 et seq), the Authority has set the standards for activation and migration of fixed number procedures and 'pure' number portability (it will take place without being accompanied by transfer of physical access resources).

In accordance with article 80 of the Electronic Communications Code, users have the right to change operator for mobile phone, voice and data services, while keeping their own mobile number (mobile number portability). The relevant inter-operator procedures are regulated by Resolution No. 339/18/CONS.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

As a general principle, the Italian Legislative Decree No. 70 of 9 April 2003 (implementing Directive 2000/31/CE) establishes a regulatory regime concerning the provision of mandatory information to the final consumer. Moreover, the Italian Legislative Decree No. 206 of 6 September 2005 (Consumer Code) protects consumers from unfair business-to-consumer commercial practices. In addition, the Electronic Communications Code provides for specific terms and conditions to be included in communications contracts, such as the services provided, the minimum service level, the procedures used by the company for measuring the network traffic (article 70 of the Electronic Communications Code). Furthermore, specific rules apply to tele-selling practices and to distance contracts (article 49 et seq of the Consumer Code).

The customer has the right to withdraw, free of charge and without any penalty, in case of amendments to the terms and conditions. The withdrawal has to be notified within 14 days from the effective date, as provided by article 52 of Directive 2011/83/EU; the final term is raised to one year, if the mandatory information has not been fulfilled.

In accordance with the Italian Legislative Decree No. 72 of 7 March 2005 (Digital Administration Code), it is possible to implement the probative value of an informatics document through the using of a certified digital signature.

Finally, the vacated legislative space is taken by Soft Law, as the *lex mercatoria*.

Net neutrality

9 | Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Net neutrality is regarded as a fundamental principle recognised by the Authority to ensure democratic internet service provision. Net neutrality is regulated by the EU Regulation No. 2015/2120, and in Italy, the competent Authority has issued a specific Resolution No. 348/18/CONS in relation to the net neutrality Regulation. Several legislative discussions have resulted in the Declaration of Internet Rights of 14 July 2015 approved by the Italian parliament, which addresses various internet issues including net neutrality.

Article 4 of Law No. 167 of 20 November 2017, which introduces article 16-bis of the Electronic Communications Code, has raised the maximum penalty that can be imposed by the Authority, in the case of a violation of net neutrality, to a limit of €2.5 million.

On 15 March 2017 (Resolution No. 123/17/CONS), the Administrative Authority imposed upon an Italian mobile operator to correctly use the zero-rating services to be compliant with the net neutrality principle and not to discriminate zero-rated services and non-zero-rated services once a user's data cap is reached. As a matter of fact, the company allowed the user to continue using the zero-rated services after reaching a data cap. The resolution was appealed but the Administrative Court rejected it on January 2019.

The resolution concerning the abolition of net neutrality in the United States, taken by the Federal Communication Commission on 14

December 2017, does not seem to have influenced the activity of the Italian legislator yet.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

No specific legislations or regulations have been enacted yet in Italy in relation to digital platforms. However, preparatory works for a law project have been carried out in recent years and a draft law concerning the regulation of digital platforms for the sharing economy was presented to the Italian Chamber of Deputies on 27 January 2016. The draft law began its parliamentary procedure on 4 May 2017, denominated as the Act 3564 on 'Discipline of digital platforms for the sharing of goods and services and provisions for the promotion of the sharing economy'.

In any case, the following legislation may apply to various aspects of the digital platforms: the e-commerce regulation provided by the Legislative Decree No. 70 of 9 April 2003, the Consumer Code and the data protection rules provided by GDPR and by Legislative Decree No. 101/2018 (Data Protection Code).

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

On 15 November 2009, the Authority issued the 'Program ACGOM ISBULWP 1.1 – Network infrastructures NGAN sets', focused on the current situation and access systems, solutions examined, strategy of evolutions for Italy and development techniques.

In March 2015 the Council of Ministers approved the National Strategy for Next Generation Access Network, a national ultra-broadband plan. The plan aims at developing a high-speed access network throughout the country to create a future-proof telecommunication infrastructure.

In relation to the national and regional broadband financial instruments, the Council of Ministers has approved the investment plan for the broadband and next-generation access broadband penetration with Resolution CIPE No. 65-2015 (for example, €2.2 billion in ultra-broadband investments).

Moreover, on 11 February 2016, the Council of Ministers and the Conference of the Regions approved the 'Framework agreement on developing of the NGA as European target 2020', allocating €3 billion to the above-mentioned project, subdividing the funds to the regions, according to their population, and strengthening the management of the project.

The new portal on the NGA strategic plan is online on the website of the Ministry of Economic Development at the following link: http://bandaultralarga.italia.it/piano-bul/il-monitoraggio/.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

The provisions applicable to the communications sector are contained in the Data Protection Code and in the resolutions of the Data Protection Authority.

In particular, articles 121 to 132 of the Data Protection Code apply to the processing of personal data connected to the provision of electronic communication services accessible to the public on public communications networks.

The retention of data in the terminal equipment of a user or the access to information already stored is permitted only on condition that the user has given his or her consent after being informed in a simplified manner. This does not prohibit any technical archiving or access to information that has already been archived if it is solely aimed at transmitting a communication over an electronic communication network, or as strictly necessary for the provider of an information society service explicitly requested by the user to provide this service.

Traffic data concerning users processed by the provider of a public communications network or an electronic communication service accessible to the public are erased or anonymised when they are no longer necessary for the transmission of electronic communications.

The provider of an electronic communication service accessible to the public may process user data to the extent and for the duration necessary for the marketing of electronic communication services or for the provision of value-added services, only if the user to whom the data relates has previously expressed their consent, which is however revocable at any time.

The processing of personal data relating to traffic is allowed only to subjects authorised to process and operate under the direct authority of the provider of the electronic communication service accessible to the public or, as the case may be, of the provider of the public communications network and that deal with billing or traffic management, analysis on behalf of customers, fraud detection, or marketing of electronic communication services.

If the calling line identification is available, the service provider of electronic communication accessible to the public assures the calling user the possibility of preventing, free of charge and through a simple function, the presentation of the calling line identification, call by call.

Location data other than traffic data, referring to users can be processed only if anonymised or if the user has previously expressed his or her consent, revocable at any time.

Without prejudice to the provisions of articles 8 and 21 of Legislative Decree 9 April 2003, No. 70, the use of automated call or call communication systems without the intervention of an operator for sending advertising material or direct sales or for carrying out market research or commercial communication is permitted only with the user's consent.

Finally, the provisions of the GDPR (articles 16 et seq) shall be integrated into the processing of data, including data protection impact assessment (article 35).

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Following the entering into force and effect of the EU Directive No. 2016/1148 (NIS Directive), on 17 February 2017 the Italian Prime Minister published a new decree containing the approach for cybersecurity and national computer security. The decree provides for a general simplification of the institutional structure relating to the cybersecurity, being fundamental the interaction between the Ministry, the Agency for Digital Italy, the bodies of the Ministry of Defence and the Interministerial Committee for the Security of the Republic.

One of the pillars of the information assurance is the integrity of data. This pillar should ensure that all data are real, accurate and cannot be altered by an unauthorised person or programme. Integrity involves maintaining the consistency, accuracy and trustworthiness of data over their entire life cycle. The other pillars are authentication, availability, confidentiality and non-repudiation.

On 17 March 2017, the Agency for Digital Italy issued the Circular No. 1, concerning the 'Minimum information and communication security measures for public administrations'. Pursuant to this circular, there

are three levels of implementation: minimum, the baseline to which each administration must comply; standard, which represents the reference situation for most of the administrations; and advanced, which should be adopted by all the administrations most exposed to risks.

As far as network security is concerned, under article 16-bis of the Electronic Communications Code, network providers and telecom operators are obliged to comply with the network security measures set out by the Ministry and to provide the latter with information about any security or integrity breach.

Moreover, GDPR's provisions on privacy by design and by default must be considered when dealing with cybersecurity, as telecom operators must comply with such obligation even before implementing a new product or service.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There are no specific rules on big data in Italy.

However, big data often includes personal data and in many cases it is not possible to separate these data from non-personal data; therefore, the privacy risks deriving from the use of big data are different:

- the processing of personal data outside the purposes for which it was collected;
- the use of incorrect or outdated information;
- discrimination or prejudice against certain individuals or groups resulting from the application of certain profiling algorithms; and
- the processing of personal data in excess of what is necessary to process them.

Considering therefore that the accuracy and reliability of a huge set of data may not be accurate but rather approximate, big data itself is contrary to a fundamental principle of the GDPR, namely that every organisation or entity must respect the principle of accuracy of the personal data relating to a subject.

As a general principle, moreover, article 22 of the GDPR provides that 'the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'.

In conclusion, an efficient way to avoid GDPR's non-compliance would be to adopt anonymisation or pseudonymisation processes.

Moreover, GDPR provides for some exceptions to its principles. As a matter of fact, data controllers can re-use personal data for purposes compatible with the initial purposes and, if the processing is carried out for the purpose of public interest, scientific or historical researches or for statistical purposes, compatibility is implicit.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Pursuant to Italian law, there are no specific provisions expressly requiring that any kind of data shall be strictly retained within Italy's national borders.

However, certain limitations may apply with reference to specific types of data.

By way of example, pursuant to article 39 of Presidential Decree No. 633 of 26 October 1972 (relating to VAT application to the sale of goods and services), any accounting document shall be retained by means of electronic archives and stored in a foreign country only to the extent that there are reciprocal assistance rights.

The GDPR imposes on the data controller, established outside the EU, but using instruments located in the national territory, to appoint a local representative, which will be subject to national legislation and responsible for data processing on the territory.

Pursuant to article 45 of the GDPR, the transfer of data from a data controller established in one of the member states of the European Union to a controller of a third country or an international organisation is allowed if the European Commission has decided that the third country or international organisation ensures an adequate level of data protection.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The Authority has reported that the mobile market is one of the most active and competitive communications markets of recent years.

As a result of the merger between the second and third biggest Italian mobile operators (ie, H3G SpA and Wind Telecomunicazioni SpA) some radio frequencies used by the merging operators have been freed up and transferred to Iliad, a new French mobile operator that has just started operating in Italy.

The Italian Antitrust Authority (AGCM) has intervened with a note of November 2018, on the issue of the extension (from 2023 to 2029) of the licence for the right of use of the 3.4–3.6GHz frequencies.

The Authority has notified the Economic Development Ministry (MISE) and the Italian Telecommunication Authority (AGCOM) of its negative opinion about the extension of any such licence without the implementation of new competitive procedures, as such praxis negatively affects the competition on the relevant market and does not allow the entrance into the market of new operators and the growing of the most efficient ones.

Another hot topic concerning data in telco business is the new 'ePrivacy Regulation' which will repeal Directive 2002/58 and will be considered as a *lex specialis* to the GDPR. This is a complementary regulation to the GDPR that establishes specific rules for the protection of data processed for the purpose of supplying and using electronic communication services. In fact, the GDPR has left numerous interpretative doubts, as well as not having analysed some relevant issues, which will be provided for in the future by the ePrivacy Regulation. This legislation contains some interesting innovations in terms of consent requests, aggressive marketing, soft spam, cookies as well as extending the applicability of the privacy regulations to 'over-the-top' (OTT) services (such as WhatsApp, Skype, Facebook etc) and to content and metadata deriving from electronic communications. Moreover, the same high sanctions as the GDPR will be applicable with just six months to adapt its business.

MEDIA

Regulatory and institutional structure

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

The provision of radio and audiovisual services is governed by Legislative Decree No. 177 of 31 July 2005 (Consolidated Audiovisual Media Act), as subsequently amended by the government to implement European legislation and, in particular, Directive 2007/65/EC.

In November 2018, the European Parliament and Council issued the New Audiovisual Media Services Directive 1808/2018/EU, 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.

Legislative Decree No. 44 of 15 March 2010 has simplified the provision of linear services, regulated the provision of non-linear services (such as download and on-demand services), and introduced some limits with reference to advertisement crowding, as well as specific dispositions for the protection of European works.

The two main institutional bodies are the Authority and the Ministry.

The Authority is vested of all powers and responsibility for development and policymaking activities in connection with the provision of radio and audiovisual services.

The Department of Communications of the Ministry has the power, among others, to grant licences, general authorisations and spectrum.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

The Consolidated Audiovisual Media Act is aimed at protecting the media market as well as ensuring the pluralism in the provision of the relevant audiovisual services through the implementation of certain ownership restrictions for broadcasters. Such restrictions should be applied regardless of the nationality of the broadcasters.

In particular, when the digital broadcasting spectrum has been fully allocated, no content provider shall be permitted to hold, directly or through subsidiaries, an authorisation to broadcast more than the 20 per cent of television programmes (or 20 per cent of all radio programmes, as the case may be) nationwide by means of terrestrial technologies.

In addition, the Consolidated Audiovisual Media Act provides that no registered communications operator may earn, directly or through subsidiaries, revenues exceeding 20 per cent of the communications integrated system (CIS) (which includes all media and telecom sector activities), as measured by the Authority on an annual basis. Telecoms operators that earn, also through subsidiaries, 40 per cent of their overall revenues in the telecom sector are not allowed to earn revenues exceeding 10 per cent of the CIS.

In relation to the cross-ownership of media companies, paragraph 12, article 43 of the Consolidated Audiovisual Media Act prevents television companies operating nationwide and having revenues exceeding 8 per cent of the CIS, as well as electronic communications operators having revenues exceeding 40 per cent of this market or sector, from acquiring, until 31 December 2018, any interest in enterprises that publish daily newspapers. This term has been extended several times since its first deadline set on 31 December 2010 and it is likely it will be further extended for years to come.

Also refer to question 21 below on the New Audiovisual Directive

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Pursuant to Decision No. 353/11/CONS of the Authority relating to the licensing of digital terrestrial radio and television broadcasting (DTT Regulation), digital terrestrial television (DTT) network operators must have a general authorisation to operate a DTT network issued by the Ministry and must obtain the right to use the relevant radio frequency spectrum. The DTT Regulation provides for various requirements for DTT network operators, including the number of programmes to be broadcast, coverage requirements and, in particular circumstances, 'must carry' obligations.

Service providers must apply for a general authorisation before providing their services.

The broadcasting authorisation is issued by the Ministry for a maximum of 12 years, renewable for a successive period of equal duration upon request to be sent 30 days before the expiry date. Applications may be filed only by entities established in Italy, other states of the EEA or other countries applying reciprocal treatment to Italians willing to operate as broadcasters in such countries. No authorisation is required for retransmission of programmes by broadcasters established and legitimately operating in countries that are signatories of the European Convention on Transfrontier Television. The Ministry decides within 60 days of the application.

Each broadcaster shall pay a one-off fee of €7,000, reduced to €500 if the broadcasting is limited to a local area.

The six-year renewable authorisation procedure for satellite broadcasters (including pay-TV channels) is provided by Decision No. 127/00/CONS of the Authority. The Authority has 60 days to decide on any application for satellite broadcasting or cable transmission. The satellite broadcasting and cable distribution of television programmes is subject to a one-off fee of €6,027.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The broadcasting of European programmes is regulated by article 44 of the Consolidated Audiovisual Media Act.

All television broadcasters and content providers must reserve a majority proportion of their transmission time for European programmes. The time used for news, sports events, games, advertising, talk shows, teleshopping and teletext services shall not be taken into account.

In addition, all broadcasters are required to reserve 10 per cent of their transmission time for European programmes produced within the previous five years. The national public broadcaster (RAI) is obliged to reserve 20 per cent of its transmission time on any platforms to European programmes produced within the previous five years.

In accordance with article 44, third paragraph, of the Consolidated Audiovisual Media Act:

> *broadcasters, including pay-per-view providers, must, whether or not scrambling their transmissions, also reserve 10 per cent of their net revenues deriving from the advertising, teleshopping, sponsorship, private and public contributions' and pay-TV offerings for non-sporting events for which it is the editor for the production, financing, pre-purchase and purchase of audiovisual programmes of European independent producers.*

With regard to foreign programmes, article 29 of the Consolidated Audiovisual Media Act sets out that the authorisation released to local broadcaster association includes the right to transmit in Italy foreign companies' programmes for a maximum of 12 hours per day. In case of interconnection with satellite channels or foreign television broadcasters, this shall not take more than 50 per cent of the maximum time provided for the interconnection.

The New Audiovisual Directive provides that member states shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 per cent share of European works in their catalogues and ensure prominence of those works. (See also question 21.)

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Article 36-bis et seq of the Consolidated Audiovisual Media Act regulate the broadcast media advertising.

As a general rule, the advertising shall not be hidden, subliminal and shall be respectful of human rights. There are specific items for which advertising is forbidden, such as cigarettes and other tobacco products.

Article 37 provides that news, features films, films for television (excluding series, serial and documentaries) shall be interrupted by spots of free-to-air national broadcasters no more than every 30 minutes.

The advertising slots of RAI shall not exceed a weekly threshold of 4 per cent and an hourly threshold of 12 per cent. The advertising slots of pay-TV broadcasters shall not exceed a daily threshold of 15 per cent and an hourly threshold of 18 per cent.

The daily threshold may be increased up to 20 per cent if there is a combination of advertising slots with other forms of advertisement such as tele-selling.

As regards radio advertisements carried out by non-public broadcasters, the hourly threshold is equal to 20 per cent for national broadcasting, 25 per cent for local broadcasting.

The major innovation of the New Audiovisual Media Services Directive 1808/2018/EU is that, if a media service provider has its head office in one member state but editorial decisions on the audiovisual media service are taken in another member state, the media service provider shall be deemed to be established in the member state where a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in each of those member states, the media service provider shall be deemed to be established in the member state where it has its head office. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in neither of those member states, the media service provider shall be deemed to be established in the member state where it first began its activity in accordance with the law of that member state, provided that it maintains a stable and effective link with the economy of that member state.

Moreover, the New Audiovisual Directive provides that member states shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 per cent share of European works in their catalogues and ensure prominence of those works.

The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising, teleshopping, or both, once for each scheduled period of at least 30 minutes. The transmission of children's programmes may be interrupted by television advertising once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. The transmission of teleshopping shall be prohibited during children's programmes. No television advertising or teleshopping shall be inserted during religious services. The proportion of television advertising spots and teleshopping spots within the period between 6am and 6pm shall not exceed 20 per cent of that period. The proportion of television advertising spots and teleshopping spots within the period between 6pm and 12am shall not exceed 20 per cent of that period.

Italy has not implemented the new Directive yet.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There are no regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks.

However, in accordance with article 15, sixth paragraph of the Consolidated Audiovisual Media Act, broadcasters providing contents of 'particular value' shall have privileged access to the digital broadcasting network. In accordance with Resolution No. 253 of 3 August 2004, contents of 'particular value' at national or at local level are those containing, inter alia, a high educational value, news and facts, socio-economic, cultural and political context, improvement of the relationship between citizen and the public administration.

No particular mechanism is provided to finance this kind of obligation.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

In accordance with article 1, paragraph a, of the Consolidated Audiovisual Media Act, the definition of audiovisual services shall include the audiovisual services provided by television, both analogue and digital television, live streaming, television transmission through the internet (such as webcasting) and on-demand televisions (such as the video on demand), with no difference between the services provided through traditional television and the internet.

The Italian Legislative Decree No. 44 of 15 March 2010, deriving from the EU Directive 2007/65, has modified, inter alia, the provision of the audiovisual non-linear services (video on demand). It has introduced a minimum legal standard applicable to audiovisual linear services as well as to audiovisual non-linear services (for example, with regard to the protection of minors and prohibition of hidden advertising). However, there are some specific provisions that shall not apply to audiovisual non-linear services. The main example concerns advertising. Because the audience may easily avoid advertising, the daily threshold for the audiovisual non-linear advertising spots does not apply. In addition, broadcasters may freely choose where to insert advertising spots.

As already pointed out in answer 21, the entering into force of the amendments to the Audiovisual Media Services Directive may lead to some changes to equalise the applicable provision, reducing the gap between traditional and new media content and their delivery.

The Italian budget law for 2018 (No. 205 of 2017) introduced rules for the reorganisation of the frequencies destined for radio and television broadcasting, following the destination of the frequencies of the 700 MHz band (694–790MHz) for the development of fifth generation radio-telephone connections.

In relation to this process of the reorganisation of the frequencies of the 700Mhz band, the Ministry of Economic Development, with its decree of 4 September 2018, established the creation of a board of coordination called 'TV 4.0' aimed at harmonising and coordinating the release activities of the 700MHz band, outlined by the law of 27 December 2017, No. 205, as well as to develop tools aimed to favour the digital transformation of the television sector.

New provisions about the reorganisation and effective implementation will be provided in 2019.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover procedure in Italy started in October 2008; the complete switchover from analogue to digital television in Italy occurred on 4 July 2012.

The rules and procedure for the reallocation of radio frequencies freed up by the switchover were contained in Resolution No. 550/12/CONS of the Authority. The television frequencies have been reallocated by means of the principle of the 'higher economic offer'. In particular, the resolution provided for the allocation of 21 national multiplexes, which enable various signals to be combined into a common flow of data and the transmission of several digital terrestrial television services simultaneously. It was, in addition, provided that, at the end of the selection procedure, no operator could obtain more than five national multiplexes.

With two decisions dated 26 July 2017 (*Europa Way* and *Persidera*), the European Court of Justice has ruled that the Italian switchover from analogue to digital terrestrial television was violating EU laws, failing to allocate one multiplex for each analogue channel.

Moreover, Italy has set a deadline of 30 June 2022 for the transition from DVB-T to the new second-generation digital broadcasting standard DVB-T2/HEVC. The date is mentioned in the 2018 Budget that refers to efficient spectrum use and the transition to 5G technology.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

There are no specific regulations restricting the use of the spectrum by the broadcasters. As a general principle, broadcasters shall ensure an efficient use of the radio spectrum (article 42 of the Consolidated Audiovisual Media Act). This means that they shall minimise the environment impact, avoid risks for human health, and ensure that there are no interferences with other broadcasters' spectrum.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

In accordance with article 5, paragraph 1 of the Consolidated Audiovisual Media Act, the Italian media services system shall guarantee the media plurality, forbidding the creation or maintenance of positions against the pluralism and ensuring the transparency of broadcasters' corporate assets (eg, having more than 20 per cent of the total television programmes or of the total radio programmes or 40 per cent of the total revenue of such sector). Article 43 sets out a specific procedure for preventing dominant positions and the rules for the assessment by the Authority.

The Ministry and the Authority have the competence to monitor and ensure media plurality. The Authority may take appropriate measures, including the prohibition of proposed transactions.

The Authority has recently dealt with the case of Vivendi SA, a French company holding a significant stake in Telecom Italia SpA (TIM) and Mediaset and active in the market for wholesale access to digital terrestrial networks for broadcasting TV channels. On 18 April 2017, with Resolution No. 178, the Authority found that Vivendi's position in the Italian markets for media and content is in violation of Italian media plurality rules and in particular with article 43, paragraph 11, of the Consolidated Audiovisual Media Act. Therefore, the Authority prescribed Vivendi to remedy its position within 12 months by means of separating its business in the two companies. In this regard, Vivendi presented a 'plan of action' to the Authority in September 2017, undertaking to transfer part of its participation in Mediaset to a third independent party, acting as agent. The Authority is currently supervising the effective enforcement of this plan by Vivendi.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The New European Electronic Communications Code issued in December 2018 (and not yet implemented in Italy) has introduced lots of changes with regard to the telco sector. The Electronic Communication Code identifies three types of electronic communication services subject to regulation: internet access services (ISPs); interpersonal communication services (which also covers OTT services); broadcast of signals (as in TV or M2M services). The OTT service will now have to provide each customer with information on the quality of the service offered, just like a telco, and with a compensation if the service provided does not match the guaranteed one.

In particular, and this can be considered as a key trend in Italy, the effective regulation of OTT services and big online players can now be compared to that of the telcos.

The Italian Communications Authority has decided that 'the web-advertising agencies that earn revenues in Italy, also with registered office abroad, are obliged to register in the Register of Communication Operators'. Therefore, online advertising agencies and the companies that are based abroad are also obliged to present the 'economic information system' (EIS) to the Agcom, which is the declaration that obliges the media operators to communicate, among other things, the accounting and non-accounting economic data on the activity performed. The decision follows a ruling by the Administrative Court of 14 February 2018, which established the strict dependence between the obligation to communicate the data relating to the EIS, already imposed on the aforementioned concessionaires, and registration to the Roc. The Court, which rejected an appeal brought by Google Ireland Limited and Google Italy, established the same obligations for off and online companies: even companies active on the web and abroad must submit to Agcom the EIS by which they disclose the accounting and non-accounting economic data on the activity carried out.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

As anticipated in question 17, the two main bodies vested of the powers to regulate the communications and media sectors are the Authority and the Ministry – Department of Communications.

The Authority grants licences and authorisations for public broadcasting, regulates the relationship between telecom companies and settles disputes between operators or between operators and end users.

The Ministry is responsible for receiving requests of general authorisations to provide electronic communications networks and services and for public broadcasting. It is also responsible for the approval of the national spectrum allocation plan.

While the Authority regulates both the communications and the broadcasting sector, the antitrust regulation pertains to the ICA. The ICA has exclusive competence over the enforcement of Italian competition rules in the telecoms and broadcasting sectors. The Electronic Communications Code provides for further collaboration and consultation between the Authority and the ICA in overlapping matters. The two bodies entered into an agreement defining the modalities for such cooperation.

Moreover, the Data Protection Authority is the authority responsible for supervising the compliance of telecom operators with the Italian Privacy Law.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Any act, decision or resolution of the Authority or of the ICA may be appealed, also regarding the merit of facts, to the TAR Lazio by any individual or legal entity that has been directly affected by such act, decision or resolution. TAR Lazio's judgment may be appealed to the Council of State.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The major competition law trend may be identified in the new text of the annual competition Law No. 124 of 4 August 2017, which entered into force on 29 August 2017.

The idea behind this law is to open up entire sectors of Italy's economy to more competition.

The law is a collection of measures regarding about 20 sectors including telecommunications, energy, insurance and pharmacies.

With regard to telecommunications, the main change concerns the transfer of phone services. In particular, pursuant to such law, expenses incurred in the event of a withdrawal or transfer of a service to another telephone operator must be proportional to the value of the contract and the actual costs borne by the operators. Moreover, customers now have the right to inform the operators electronically of the change. In addition, contracts including promotional offers shall not be longer than 24 months.

In March 2018, the ICA sanctioned WIND Tre SpA for having violated the Italian Consumer Code with a fine of €4.25 million.

Another remarkable decision by the ICA was issued in February 2019, to Sky on television rights concerning soccer and in particular for having disinformed the consumers about their contractual options. The sanction was for €7 million.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The supply of telecommunications services is governed by the Telecommunication Business Act (the Telecom Act), the Radio Act and the Wire Telecommunications Act. It is administered by the Ministry of Internal Affairs and Communications (MIC).

The Telecom Act governs entry into and withdrawal from a telecommunications business, telecommunications facilities and rights of way (public utility privilege).

In addition, if telecommunications carriers construct a network using radio equipment, they must comply with regulations under the Radio Act concerning radio station licences, radio equipment, radio operators and operations of a radio station, etc.

Since the telecommunications market was liberalised in 1985, some 14,000 telecommunications carriers have entered it. Telecommunications services are provided mainly by Nippon Telegraph and Telephone East Corporation (NTT-East), Nippon Telegraph and Telephone West Corporation (NTT-West), KDDI Corporation (KDDI) and SoftBank Corp (SoftBank).

Foreign ownership restrictions apply to Nippon Telegraph and Telephone Corporation (NTT Corporation), which holds all the issued shares of NTT-East and NTT-West. These are that the aggregate voting rights of shares in NTT Corporation may not be held by any person who does not have Japanese nationality; any foreign government or its representative; any foreign juridical person or entity; or other persons or entities with shares directly held by foreign persons or entities may not exceed one-third of the total voting rights of the issued shares of NTT Corporation.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Upon commencing a telecommunications business, a telecommunications carrier installing large-scale telecommunications circuit facilities must register with the Minister of MIC (the Minister); a telecommunications carrier installing no or only small-scale telecommunications circuit facilities need only submit a notification to the Minister.

Telecommunications circuit facilities qualify as 'small-scale' if the following two requirements are met: terminal system transmission line facilities remain within one city, town or village; and transit system transmission line facilities remain within areas in one prefecture.

Telecommunications circuit facilities that fail either of these requirements are 'large-scale' and shall register with the Minister. Other requirements include:

- upon registration, an application form including:
  - name and address of the applicant and, in the cases where the applicant is a juridical person, name of the representative;
  - service areas; and
  - outline of telecommunications facilities; and
- other documents, such as:
  - a document indicating that the applicant does not fall under the reasons for disqualification of registration;
  - network diagrams;
  - documents concerning telecommunications services to be provided;
  - an outline of businesses conducted by the applicant other than the telecommunications business; and
  - documents specified in the applicable MIC ordinance shall be submitted to the Minister.

The Minister shall, except in cases where refusing a registration as below, register the following matters on the telecommunications carrier's registration book:

- name and address of the applicant and, in the cases where the applicant is a juridical person, name of the representative;
- service areas;
- outline of telecommunications facilities; and
- date and registration number.

Where a person falls under any of the following items, the Minister shall refuse the registration of said person:

- any person who has been sentenced to a fine or more severe penalty in accordance with the provisions of the Telecom Act, the Radio Act or the Wire Telecommunications Act and a period of two years has not yet elapsed since the day on which the person's sentence or suspended sentence was served out;
- any person whose registration was revoked and if a period of two years has not yet elapsed since the day of revocation;
- any juridical person or association that has as an officer or employee who falls under any of the preceding two points; or
- any person where it is deemed that the launch of a telecommunications business of said person is inappropriate for the sound development of telecommunications.

There are no payable fees to register. An application for registration would take about 15 days if there is no substantial issue.

Upon submitting a notification of intending to operate a telecommunications business to the Minister, the applicant shall submit the following documents:

- a notification form including:
- name and address of the applicant and, in the cases where the applicant is a juridical person, name of the representative;
- service areas;

- outline of telecommunications facilities (limited to the cases where the person installs telecommunications facilities for the telecommunications business); and
- other documents such as network diagrams, documents concerning telecommunications services to be provided and documents specified in the applicable MIC ordinance.

There are no payable fees to give notification.

In addition to registration or notification above, to conduct a telecommunications business by installing telecommunications circuit facilities, the telecommunications carrier that intends to exercise the right of way (public utility privilege) for installing transmission lines may, separately from any telecommunications business entry procedures such as registration or notification, be granted a public utility privilege for all or part of its telecommunications business by obtaining approval from the Minister.

A telecommunications carrier providing universal telecommunications services shall, where they intend to establish or change tariffs concerning terms and conditions including charges relating to the carrier's universal telecommunications services, submit those tariffs to the Minister seven days prior to their date of implementation. Where they intend to establish or change the tariffs, the telecommunications carrier shall submit the notification describing the date of implementation.

Any telecommunications carrier who intends to obtain an assignment of telecommunications numbers, which will ultimately be assigned to end users, must submit certain documentation to the Minister for examination.

Licences or registration under the Radio Act (such as a radio station licence) are required for a telecommunications business utilising radio communications.

Under the wire allocation plan, fixed service means wireless telecommunications services between specific fixed points; and mobile service means wireless telecommunications services between mobile stations and land stations or mobile stations. Satellite-related services are categorised as:

- fixed satellite services;
- services between satellites;
- mobile satellite services;
- land mobile satellite services;
- marine mobile satellite services; and
- aeronautical mobile satellite services.

The 2G mobile service that used the Personal Digital Cellular system was used from March 1993 to 2012 in Japan, and is currently not used. 3G based on IMT-2000 has been used in Japan since 2001. 3.9G (known as long-term evolution) and 4G are widely used in Japan. The spectrum was allocated by the MIC. 5G will be used partly in 2019 or 2020.

Public Wi-Fi services are provided by local governments, public services (subways), shops and restaurants for visitors, and the services will be expanded looking forward to the Tokyo Olympics and Paralympics in 2020.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The Minister allocates spectrum when the Minister grants a licence to a telecommunications carrier in accordance with the Radio Act. The Minister assesses the use of spectrum, formulates a plan to restructure the assignment of spectrum, and discloses a plan for the assignment of spectrum once every three years for each of the three categories of spectrum (714MHz or less, 714MHz to 3.4GHz and 3.4GHz and more).

There is no auction system for spectrum use.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Not applicable.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

No.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

Universal service systems were introduced in 2002 for subscriber telephones, optical internet protocol (IP) telephones (provided through optical lines), which are used as a substitute for subscriber telephones, certain kinds of public telephones, and emergency calls (police, coast guard, firefighting and ambulance). Fixed VoIP services using 0AB-JIP numbers, which maintain the same quality of service as fixed-line (wired analogue) telephones using the same fixed-line 0AB (0AB-J) number, are also under universal service.

Financial obligations have been imposed since 2006 on mobile telephone service carriers, subscriber telephone service carriers, and IP telephone providers for whom (i) profit in the preceding year exceeded ¥1 billion and (ii) they were assigned telephone numbers by the Minister and then assigned such numbers to their end users.

Universal service carriers (ie, NTT-East and NTT-West) must establish tariffs and submit these to the MIC prior to implementation of the services. The Telecommunications Carriers Association collects sums for universal services from telecommunications carriers that fail to comply with (i) and (ii) above and assigns the amount collected to NTT-East and NTT-West to facilitate the provision of universal services.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

Telephone numbers are allocated by the Minister in accordance with Regulations on Telephone Numbers.

Local telephone numbers (10 digits) are allocated as the following:

National prefixes	Area codes (one to four digits	Local exchange prefixes (one to four digits)	Subscriber's number (four digits)
0	▲ (3 for Tokyo, 6 for Osaka)	XXXX	YYYY
0	▲ ▲ (11 for Sapporo, 45 for Yokohama)	XXX	YYYY
0	▲ ▲ ▲	XX	YYYY
0	▲ ▲ ▲ ▲	X	YYYY

The international prefix number is 010, and it is necessary to dial 010+ (national number, for example, 1 for the USA) followed by the local number to make international calls.

Mobile number portability was introduced on 24 October 2006, and number portability between mobile phones and personal handy-phone systems was introduced on 1 October 2014.

Number portability of subscriber telephones (local numbers) is partly available for users who have used a subscriber telephone provided by NTT-East or NTT-West when it is within the same location.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

Explanation of terms and conditions

Any telecommunications carrier or agent shall, before the conclusion of a contract of services for general consumers, explain the service contents, such as types of service, name of telecommunications carrier, contact points for the telecommunications carrier including business hours and contents of telecommunications services to users. Basically, the telecommunications carrier (or agent) shall deliver documents containing matters to be explained and subsequent verbal explanations shall be given to potential users.

Prior notice to users pertaining to suspension or discontinuation of business

When a telecommunications carrier intends to suspend or discontinue part or all of its telecommunications business, it must inform users of the full effect prior to implementation. The notice must be made by way of a reliable method (eg, delivery of written documents, transmission of emails, etc) and enable users to understand the suspension or discontinuation of business operations in a reasonable time period (about one month) prior to implementation.

Appropriate processing

A telecommunications carrier shall properly and promptly process complaints and enquiries from users concerning telecommunications services or operations methods. Whether this has been 'appropriately and promptly process(ed)' or not shall be judged by the telecommunications carrier on a case-by-case basis. If there is no contact point for accepting complaints and inquiries or the contact points exist but are not accessible by consumers, complaints and enquiries cannot be considered 'appropriately and promptly process(ed)'.

Net neutrality

9 | Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

There are no limits on net neutrality. No telecommunications service carrier may engage in unfair and discriminatory treatment with regard to the provision of telecommunications services in accordance with the Telecom Act, and secrecy of telecommunications is protected by the Constitution (net neutrality is discussed as an issue of fairness of telecommunication in Japan). However, the protection of minors is an exemption. This being said, internet service providers are under obligations with regard to the protection of minors and the regulation of adult entertainment.

Internet access service providers must provide filtering services to protect minors, and mobile phone providers may only provide internet access to minors with filtering unless there is a possible opt-out by guardians. Hosting service providers must endeavour to prevent access by minors to adult content.

'Zero-rating' of data transmission is permitted in practice because there are no specific regulations or guidelines that prohibit it. In addition, bandwidth throttling is permitted in practice; for example, to limit telecommunications services for heavy users.

Telecommunications service carriers shall, when a natural disaster, accident or any other emergency occurs or is likely to occur, give priority to communications on matters that are necessary for disaster prevention or relief efforts, for securing transportation, communications or electric power supply, or for the maintenance of public order. The same shall apply to other communications that are specified by the Ordinance of the MIC to be performed urgently for the public interest.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no specific legislation or regulation relating to digital platforms.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are no specific regulatory obligations applicable to NGA networks.

The MIC promotes the research and development of fifth-generation mobile communication systems, that realise more advanced mobile services, intelligent transport systems that support safe driving and broadband systems for public services that enable video communications with high mobility in case of emergency, wireless broadband that enables wireless connections between all domestic information appliances and IoT (Internet on Things). MIC is planning to allocate three categories of spectrum (3.6 to 4.2GHz, 4.4 to 4.9GHz and 27.0 to 29.5GHz).

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

Data protection in Japan is generally regulated under the Act on the Protection of Personal Information (APPI) and subsidiary laws, regulations and guidance. In addition to the APPI, the guidelines issued by the Personal Information Protection Commission (PPC) (general guidelines, guidelines on data transfer to a third party in a foreign country, guidelines on confirmation and records for providing to a third party, and guidelines on anonymously processed information), and the Guideline on Personal Information Protection in Telecommunication Business issued by the MIC (the Telecom Guideline) applies to entities in the sector.

In addition, the Telecom Act provides that a telecommunications carrier shall not censor any communications handled by it or violate the secrecy of such communications.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Basic Act on Cybersecurity aims to comprehensively and effectively promote cybersecurity policy by: stipulating basic principles of national cybersecurity policy; clarifying the responsibilities of the national government, local governments and other concerned public parties; stipulating essential matters for cybersecurity-related policies such as the cybersecurity strategy formulation; and establishing the Cybersecurity Strategic Headquarters and so forth, and as a result, attempting to enhance economic and social vitality, sustainable

development and realising social conditions where people can live with a sense of safety and security, and contributing to the protection of international peace and security as well as national security.

Critical Information Infrastructure (CII) operators that provide infrastructure that is the foundation of people's living conditions and economic activities and the functional failure or deterioration of which would risk enormous impacts on them (CII operators, which include telephone service providers and the media) are to make efforts to: deepen their awareness and understanding of the critical value of cybersecurity; ensure cybersecurity voluntarily and proactively; and cooperate with the measures on cybersecurity laid down by the national government or local governments.

Secrecy of communication under the Telecom Act and the Radio Act also protects cybersecurity in Japan.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Many companies in Japan rather hesitated to use 'big data' because some of such data relates to personal information and privacy and there was a grey area regarding the use of such information due to ambiguities in the former APPI. The APPI was amended and came into effect on 30 May 2017. As amended, the APPI defines 'encrypted anonymous information' (ie, personal information that has been modified so that it is not possible to identify the data subject) and allows the use of such encrypted anonymous information without the approval of the data subject. This amendment has enabled greater use of big data in Japan, and we see a considerable amount of usage of big data today (see question 16).

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no general laws or regulations that require data to be stored locally in Japan.

However, the transfer by a data controller of personal information to a third party in a foreign country (other than in reliance on a general exception) shall be subject to the following requirements to such transfers:

- where consent to the transfer is given by the data subject, it must be clear that it covers the transfer to a third party in a foreign country; and
- in the absence of such consent, if the transferor wishes to rely on the opt-out exception or the related-party exception to the requirement to obtain the data subject's consent to the transfer, it will also be necessary that the transferee:
    - is in a country that is on a list of countries issued by the Commission as having a data protection regime equivalent to that under the APPI; or
    - implements data protection standards equivalent to those that data controllers subject to the APPI must follow.

In addition, the Act on the Protection of Specially Designated Secrets protects national secrets regarding defence, foreign affairs, prevention of designated harmful activities and terrorism and limits transfer specific information to designated counties.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Since 30 May 2017, the amendments to the APPI have begun to comprise the most extensive revision of Japan's privacy laws for some time, and include the introduction of a new oversight regime based on the PPC (which was established on 1 January 2016) and clarification of the scope of existing laws.

The amendments that have the most significant impact on data protection are the following:

- Traceability requirement: a data handler must conduct an identity check and information source check when receiving personal information from a third party, and keep a record of the checks, and (subject to certain exceptions) keep a record of disclosures of personal information to third parties, although the former APPI requires that a data handler must comply with the prohibition on obtaining personal information from a third party by fraudulent means.
- Use of encrypted anonymous data: through clarification of the definition of 'personal information' and defining 'encrypted anonymous information', use of such encrypted anonymous information will be liberalised and accelerate use of big data.
- Transferring personal data overseas: the former APPI had no rules specifically addressing the transferring of personal data to a foreign country, though domestic transfer restrictions were generally treated as applying. The amended APPI allows disclosure of personal data to a third party in a foreign country without the data subject's consent under an 'opt-out' provision (which the amended APPI requires to be filed with and reviewed by the Personal Information Protection Commission in advance) or a 'joint use' provision, but only if it is to a transferee in a country on a list to be issued by the Personal Information Protection Commission (effectively countries with sophisticated data protection regimes) or to a transferee satisfying criteria to be issued by the Personal Information Protection Commission, although the list of countries has not been published.

The PPC has discussed with the European Commission to establish a framework on the APPI to ensure the smooth and mutual transfer of personal data between Japan and the European Union. With the enforcement of the General Data Protection Regulation (GDPR) on 25 May 2018, the PPC has begun to guide and support businesses that have connections with European countries. The PPC obtained a decision of an 'adequate level' of protection from the European Commission. On 17 July 2018, the EU and Japan agreed to recognise each other's data protection regimes as providing adequate provisions for the protection of personal information. This resulted in a new regime of frictionless transfers of personal information between Japan and the EU coming into effect on 23 January creating what the EU Commission described as 'the world's largest area of safe transfers of data based on a high level of protection for personal data'. The PPC has issued supplementary rules to the APPI to give effect to the adequacy decision.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

Media is governed by the Broadcast Act (the Broadcast Act), the Telecom Act, the Radio Act and the Wire Telecommunications Act, and administered by the MIC.

The regulatory and institutional structure of broadcasting and telecommunications was reorganised in November 2010 for the first time in 60 years.

The Broadcast Act classifies broadcasting as a basic broadcast (which uses a specific spectrum assigned exclusively or preferentially to a broadcasting station in accordance with the Radio Act) and a general broadcast, which is any broadcast other than a basic broadcast.

A basic broadcast needs authorisation from the Minister for broadcasting in accordance with the Broadcast Act and a licence for establishing radio stations from the Minister in accordance with the Radio Act.

A general broadcast requires registration in principle in accordance with the Broadcast Act. In the case of small broadcasting (for example, cable television or cable radio), a general broadcast requires the submission of a report.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

The authorisation of a general broadcast will not be granted to:

- any person who does not have Japanese nationality;
- any foreign government or its representative;
- any foreign juridical person or entity; and
- other persons or entities, 20 per cent or more of whose shares are held directly or indirectly by foreign persons or entities.

If foreign ownership exceeds 20 per cent, the Minister shall cancel the authorisation of the Basic Broadcast Company.

Further, the business operator of a basic broadcast (the Basic Broadcasting Company) may reject a record of share transfer to a foreign person or entity into the shareholders' list where such transfer would result in foreign ownership of over 20 per cent.

There is no specific regulation to prohibit foreign ownership of newspapers. However, foreign ownership of major daily newspapers is restricted in practice because many publishers of daily newspapers have articles of incorporation restricting foreign ownership in accordance with the Act on Restriction on Transfer of Shares in Stock Companies whose Business Purpose is the Publication of Daily Newspapers.

There are regulations under the Radio Act in relation to the cross-ownership of media companies that attempt to restrict cross-ownership, though some exceptions exist and there are media groups that own television, radio and newspapers.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

A licence is necessary for a Basic Broadcasting Company with broadcasting stations under the Radio Act.

The period for the acceptance of applications for each frequency band shall be set by the MIC for a period of one month or longer and the MIC must give public notice of such period, the zone area where the applicant for radio station licence may install the radio equipment of the radio station, and other particulars to supplement the licence application. After the set periods, no further applications will be accepted.

Such companies obtain a licence by submitting an application to the Minister together with a document describing:

- the purpose of the station;
- the need to establish the radio station;
- the persons with whom the radio communication is conducted and communication subjects;
- the location of radio equipment;
- the operating area;
- the type of radio waves, desirable frequency range and antenna power;
- the hours desired for use of the station;
- the construction design, and scheduled completion date of the construction of the radio equipment (including equipment installed); and
- the expected commencement date of operation.

The fee for an application is ¥10,200 (payable on submission of the application papers) or ¥7,300 (when applying through the internet).

When receiving an application, the Minister shall examine without delay (there is no specific set period) whether the construction design conforms with the technical regulations, whether it is feasible in terms of frequency assignment, and if it conforms to essential standards necessary for the establishment of radio stations.

When determining, as a result of the examination above, whether the application conforms to each requirement, the Minister shall issue a pre-permit of the radio station to the applicant designating:

- completion date of the construction work;
- type of radio waves and frequency;
- call sign call name, and identification signal specified in the applicable MIC ordinance;
- antenna power; and
- permitted operations hours.

When the construction work has been completed, the company must submit a notification to the Minister and an inspection must be carried out in relation to the radio equipment, the qualifications of radio operators, the necessary number of radio operators, timepieces and documents.

The Minister shall grant a licence to the applicant without delay when the inspection referred to above is satisfactory.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

There are no specific regulations concerning the broadcast of foreign-produced programmes.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Advertising in Japan is regulated under a number of statutes, including the Act against Unjustifiable Premiums and Misleading Representations (AUPMR), the Act on Specified Commercial Transactions, and other acts and guidelines in respect of specified industries. There is also a 'fair commission code', voluntary rules by trade associations such as the alcohol beverage industry, the real estate industry, the automobile industry, etc, in accordance with the AUPMR to standardise expressions in advertising appropriate for each industry. Because each fair commission code is authorised by the Minister of the Consumer Affairs Agency and the Fair Trade Commission, a member company that obeys its fair commission code will not be censured for infringement of the AUPMR.

Each industry generally has its own code of practice in addition to 'fair commission codes' in certain industries. These are voluntary rules, but members generally follow these rules once formulated. Advertising agencies and media companies are also generally familiar with, and comply with, the rules specific to their clients' industries.

Online advertising is subject to the general regulations above.

In addition to the general regulations above, under the Broadcast Act, a basic broadcasting company may not broadcast any advertising that may disturb education by schools when the company broadcasts an educational programme for schools.

Under the Broadcast Act, Nippon Hoso Kyokai: Japan Broadcasting Corporation (NHK), the only public broadcaster in Japan, may not broadcast any advertising of other businesses.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There is no basic package of programmes that must be carried, though a basic broadcasting company shall endeavour to make broadcasts to prevent or mitigate any disasters such as a storm, heavy rain, flood, earthquake or conflagration.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

Regulations of general broadcasts (ie, broadcasts other than a basic broadcast) and other media are less strict than those for basic broadcasts that must deliver well-balanced programmes (such as cultural and educational programmes, news and entertainment) and, accordingly, they can broadcast more freely than traditional broadcast media.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover from analogue to digital broadcasting was effected on 31 May 2012 in Japan. The switchover from analogue to digital for satellite broadcasting was effected on 24 July 2014.

Multimedia broadcasting for mobile terminals commenced in April 2012 using 207.5MHz to 222MHz frequencies, which were previously used for analogue broadcasting. The MIC assigned 'white space' (which can be used for purposes other than broadcasting even though it is assigned for broadcasting) in UHF to limited area broadcasting.

The MIC has been considering what the 90MHz to 108MHz frequencies in VHF, which were previously used for broadcasting, will be used for.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

No.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The Broadcast Act prohibits the centralisation of media, and MIC ordinances prohibit a basic broadcasting company, its owner or its subsidiary from obtaining another authorisation as a basic broadcast from the Minister.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The Japan Commercial Broadcaster Association (the Association) is deciding whether to discuss the possible discontinuance of AM radio broadcasting and the shift to Wide FM radio broadcasting by AM radio stations with MIC.

There are two main radio broadcasting systems – Amplitude Modulation (AM; which uses 526.5 to 1606.5kHz) and Frequency Modulation (FM; which uses 76 to 90MHz) – in Japan. Since 2014, Wide FM has broadcast the contents of AM broadcasting using the spectrum for FM radio (76.1 to 94.9MHz). This is to solve difficulties in picking up radio waves (especially in mountainous and densely populated areas) and as a useful measure in times of disaster, to convey news and information.

Due to the expansion of internet use, profits made by AM radio stations have reduced by half compared to the 1990s. Meanwhile, Wide FM has become popular because of the good quality of its sound. However, broadcasting both in AM and Wide FM is too heavy a burden for an AM radio stations. Considering the cost of renewing old equipment for AM radio stations, switching to Wide FM radio stations could be a survival solution for private radio stations.

The Association will require amendments to the Radio Act and other related regulations by 2028, this being the second term to renew radio station licences, which are required every five years.

NHK, the only public broadcaster in Japan, will continue AM radio broadcasting because it is obliged to do so by the Radio Act.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The MIC regulates the communications and media sectors. Antitrust is regulated by the Fair Trade Commission in accordance with the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade.

There is no specific mechanism to ensure the consistent application of competition rules. However, the MIC and the Fair Trade Commission jointly published guidelines regarding antitrust in the telecommunications industry, and communicate on both communications and antitrust issues to ensure the consistent application of competition and sectorial regulations.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Decisions of the Minister (such as granting of radio station licences, authorisation of a basic broadcast, and cancellation of authorisation of a basic broadcast) may be challenged by lodging an objection with the Minister in accordance with the Radio Act or the Broadcast Act. The Minister must ask the Radio Regulatory Commission to discuss the issue raised by the applicant with the Radio Regulatory Commission unless the objection is rejected by the MIC. The Radio Regulatory Commission must start to hear the case within 30 days of the Commission receiving the case, assigning an examiner or, when the issue is extremely important, a commission member, to hear the case. The objecting party and any interested party may retain counsel for the hearing and the Minister may assign government officers to join the examination. On conclusion of the hearing, the examiner or commissioner shall prepare an opinion and submit it together with records of the hearing to the Radio Regulatory Commission, which will then publish the records and the opinion, and the case must then be resolved in accordance with the findings of the examiner. The Minister then issues a decision in the case in accordance with the resolution based on the findings of the examiner within seven days of the resolution. An applicant or interested party who disagrees with the Minister's decision may appeal to the Tokyo High Court, and the court shall be bound by the facts found by the Radio Regulatory Commission.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The Japan Fair Trade Commission and the MIC updated the Guidelines on Promotion of Competition in the Telecommunications Industries on 9 January 2018.

The Guidelines state the necessity of guidance in the industries, and provide for many questionable activities in connection with:

- telecommunications facilities and co-locations;
- lending of telegraph poles and tubes;
- telecommunication services;
- providing contents; and
- manufacturing and sales of telecommunication facilities.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The Ministry of Information Communication and Technology (MoICT) sits at the apex of the institutional structure of Kenya's communications sector. The MoICT has two departments: Broadcasting and Telecommunication, and ICT and Innovation.

The Communications Authority of Kenya (CA) and the Information Communication and Technology Authority (ICTA) rank second to the MoICT. The former, established under the Kenya Information and Communications Act, 1998 (KICA), is tasked with the licensing and regulation of postal, information and communication services in accordance with the provisions of the KICA.

The ICTA, which is established under the Information and Communications Technology Authority Order, 2013, is mandated with, among others, setting and enforcing ICT standards and guidelines for human resources, infrastructure, processes, systems and technology for public office and public service.

The Media Council of Kenya (MCK), established under the Media Council Act, No. 46 2013 (MCA) is mandated with, inter alia, the setting of media standards and ensuring compliance with those standards as set out in article 34(5) of the Constitution.

Applicants for commercial licences in the communications sector are required, as a minimum condition, to:

- be registered in Kenya as a company, sole proprietor or partnership;
- have a duly registered office and permanent premises in Kenya;
- provide details of shareholders and directors;
- issue at least 20 per cent of its shares to Kenyans on or before the end of three years after receiving a license; and
- provide evidence of compliance with tax requirements.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The CA has adopted a Unified Licensing Framework, a technology and service neutral regime effectively leading to broad market segments under which operators and service providers are licenced.

These broad categorisations are as follows.

National Network Facilities Providers (NFP)

The NFP licence has three tiers: NFP Tier 1, NFP Tier 2 and NFP Tier 3. There are presently three Tier 1 licensees, 23 Tier 2 licensees and 29 Tier 3 licensees.

NFP Tier 1 and Tier 2 licences allow for the deployment of communication infrastructure, using any technology, countrywide. The former guarantees national spectrum reservation and allocation, particularly for mobile services, while the latter guarantees regional spectrum reservation.

NFP Tier 1 and Tier 2 licences are valid for 15 years. Application fees of 5,000 Kenya shillings and an initial operating fee of 15 million Kenya shillings are payable with respect to each licence. In addition, an annual operating fee of 0.4 per cent of the annual gross turnover or 4 million Kenya shillings for NFP Tier 1, or 800,000 Kenya shillings for NFP Tier 2, whichever is higher, is payable.

NFP Tier 1, Tier 2 and Tier 3 licensees pay an additional annual spectrum utilisation fee based on transmitters, bandwidth and coverage. NFP Tier 1 licensees pay further spectrum fees comprising initial spectrum fees and annual spectrum reservation.

NFP Tier 3 licences are valid for 15 years with an application fee of 5,000 Kenya shillings, initial operating fee of 200,000 Kenya shillings and an annual operating fee of 0.4 per cent of the annual gross turnover or 160,000 Kenya shillings, whichever is higher, being payable. The licence allows for the use of any technology, save satellite communication in the deployment of communication infrastructure within a specific region.

Other categories

The remaining categories are:

- International Gateway Systems and Services Licence;
- Submarine Cable Landing Rights Licence;
- Applications Service Providers (ASP) Licence; and
- Content Service Providers (CSP) Licence.

The satellite landing rights authorisation licence is subject to a non-refundable application fee of 5,000 Kenya shillings or its equivalent in US$ and a one-time registration fee of US$12,500 only.

There are presently four players in the 4G market. Three of them are holders of the NFP Tier 1 Licence and each has an equal 10MHz of the 800MHz frequency spectrum band. The forth one, a NFP Tier 2 licensee, is licensed under the 700MHz band that was cleared following the successful digital migration in Kenya. The CA maintained that it granted the spectrums, and especially under the 700MHz band, through a beauty contest. The contest, however, was not public.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Kenya's current frequency spectrum regime is quite rigid and is limited on aspects such as spectrum sharing and subdivision and assignment. It is likely that we would be moving to a flexible regime in the near future. This follows the publication of the Draft Wireless Broadband Spectrum Policy, 2017, which notes the importance of flexible spectrum use.

The Draft Policy proposes the consideration of the benefits of flexibility of spectrum use with regard to harmonised spectrum use in assessing efficient spectrum use. It also proposes spectrum sharing and spectrum reframing (redeployment) among other measures necessary for more efficient and maximised spectrum use in light of the growing demand for wireless services in Kenya.

The CA licensed spectrum is site or radius specific, applying either nationally or regionally. Also, the CA may decide to associate spectrum with a service operator licence, as is the case with the 4G licences under the frequency spectrums 800MHz and 700MHZ. These conditions therefore prevent the transfer of spectrum to other users, sites or regions without the CA's approval.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

While there is no explicit market and segment that is subject to ex-ante regulation, Regulation 3 of the KICA (Tariff Regulations) 2010 provides a three-criterion test for assessing whether a market or a segment thereto is susceptible to ex-ante regulation, namely whether: effective competition among existing licensees cannot develop; there are strong and non-transitory barriers to entry in the identified market segment; and there is no other competition law that is sufficient to deal with the competition concerns.

There are at least five retail markets namely:

- retail mobile communications market;
- retail mobile money market;
- retail fixed narrowband market;
- retail fixed broadband market for enterprises and leased line market; and
- retail fixed broadband market for consumers.

There are at least eight linked wholesale markets namely:

- ducts and poles and dark fibre;
- lit fibre and wholesale leased lines;
- international capacity and IP transit;
- fixed wholesale broadband access;
- towers;
- call and SMS termination on mobile networks;
- call termination on fixed networks; and
- USSD and STK access on mobile networks.

Of these eight, two (call and SMS termination on mobile networks and call termination on fixed networks) are currently subject to ex-ante regulation in the form of termination rates set by the CA pursuant to its Interconnection Determination No. 2 of 2010, which takes into account the access and interconnection, price controls and cost accounting remedies.

A recent report by Analysys Mason, titled 'Telecommunication Competition Market Study in Kenya' shows Safaricom Limited, an NFP Tier 1 licensee and major player, as a dominant player in the retail mobile communications market and the retail mobile money market and in towers under the wholesale.

Access and interconnection, transparency, price controls and cost accounting, and accounting separation are among the remedies available for ex-ante intervention as contained in the KICA: Tariff Regulations 2010; Fair Competition and Equality of Treatment Regulations 2010; and Interconnection, and the Provision of Fixed Links, Access and Facilities Regulations, 2010.

To that end, the CA exercises its ex-ante and ex-post jurisdiction under sections 84Q, 84R, 84S and 84T of the KICA to assess, monitor and evaluate the relevant markets to assess any susceptibility for ex-ante regulation and, where applicable, impose the relevant remedies.

The CA exercises its discretion in relation to remedies both explicitly and implicitly. While the CA does not limit itself to the explicit remedies above, which are not in any case exhaustive, these remedies are provided for in the interests of certainty and transparency. The CA may, however, consult the Competition Authority of Kenya (CAK) on alternative remedies that may be more proportionate and justified.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is presently no explicit legal basis requiring structural or functional separation between an operator's network and services, especially following the bundling up of the licences under the unified licensing framework.

There have, however, been contemplations and even an attempt at introducing structural or functional separation. It was indeed proposed in the above-mentioned Analysys Mason report, where it was noted that the CA could exercise its discretion to enforce such a remedy. The CA, however, seems reluctant to enforce the same against Safaricom limited, which was found to be a dominant player in both retail mobile communication and retail mobile money services.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Universal service obligations are anchored in section 84J of the KICA, which establishes the Universal Service Fund (the Fund) being administered by the CA. The Kenya Information and Communications (Universal Access and Service) Regulations, 2010, section 84J (3) of the KICA provides for a universal service levy, which is mandatory and charged on all licensees offering communications systems and services on a commercial basis, including telecommunication network and service provider licensees, postal and courier licensees and broadcasting licensees.

In addition to the universal service levy, the fund is financed through: such monies as may be provided by parliament for that purpose; income from any investment made by the Fund; and any gifts, donations, grants and endowments made to the Fund.

The services covered under the fund are:

- mobile telephone network expansion;
- community broadband networks;
- ICT content and applications;
- ICT capacity building and awareness; and
- special USF projects.

The Community Broadband Networks service seeks to enhance broadband connectivity into towns and villages where broadband is scarce, through last mile connectivity by ensuring the establishment of broadband connections at major public institutions within each designated location.

The successful deployment, by the government of Kenya, of the National Optic Fibre Backbone Infrastructure to the headquarters of the 47 counties has been a great boost in achieving the universal service objective.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

Kenya's number allocation scheme is guided by the Kenya Information and Communications (Numbering) Regulations, 2010 (Numbering

Regulations), whose Regulation 4 establishes the National Communications and Numbering Plan.

Kenya's current Telecommunication Plan (2017) uses both ITU-T E 164 and Non-E 164 numbers. The ITU-T E 164 numbering plan is applicable for geographical numbers. It was updated in 2017. The previous one, which was published in 2012, did not apply the Recommendation ITU-T E 164. It allows a minimum number length (excluding the country code) of seven digits and a maximum number length (excluding the country code) of nine digits.

The plan covers geographical numbers, assigned toll free numbers; premium rate numbers for voice premium rate services; international signalling point codes, assigned in accordance with ITU-T Recommendation Q708; GSM national network colour codes; mobile network codes and short codes, among others.

Licensed operators requiring numbers for their operations are eligible for assignment of numbers from the national numbering resources. These operators and others who have been assigned numbers by the CA may give secondary assignments to end users and other service providers including the CSPs and ASPs. Secondary assignments are governed by the principles of transparency, non-discriminatory and equitable access to resources.

Assigned numbering resources are not transferable without the CA's approval and should be operationalised within six months of being issued. The CA may conduct regular audits on the utilisation of the numbering resources.

Regulation 5(6)(e) of the Numbering Regulations provides that the numbering and addressing plan may set out rules on the portability of assigned numbers and addresses. While the current plan does not do so, number portability is allowed in Kenya and is available to any post-pay and prepay mobile subscriber and to any network.

The number portability regime is governed by the Procedures and Guidelines for the Provision of Mobile Number Portability Services in Kenya (Procedures and Guidelines) issued by the CA on 7 October 2010. These Procedures and Guidelines are used complementarily with commercial agreements between mobile network operators (MNOs) and number portability service providers.

While these procedures and guidelines do not specify all the details of the internal procedures and processes that each operator shall need to undertake to support the required functionality, they specify the different stages of the mobile number portability process from the point when a subscriber requests to transfer or port a number from their current mobile service provider (donor operator) to another mobile service provider (recipient operator), to the point when the subscriber has an active account on the recipient operator and the account on the donor operator has been closed and all other operators have been informed of the number porting.

Win-back of subscribers who have made a porting request or those who have successfully ported is prohibited. Any such attempt amounts to a breach of the licence conditions on the part of the MNOs.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Customers are generally protected by the Competition Act No. 12 of 2010. The Kenya Information and Communications (Consumer Protection) Regulations, 2010 provides the framework for customer terms and conditions.

These Regulations seek to enhance and protect customers' rights to, among others:

- receive clear and complete information about rates;
- see terms and conditions for available and proposed products and services;
- be charged only for the products and services they subscribe to; and
- have equal opportunity for access to the same type and quality of service as other customers in the same area at substantially the same tariff, limiting variations to available or appropriate technologies required to serve specific customers.

In addition to the rights and obligations of the customers, the Consumer Protection Regulations also provide for the requirement of customer care systems, complaints handing procedures and protection of children, among others.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

While there is no express provision on net neutrality, a generous interpretation obligates licensees to 'provide equal opportunity for access to the same type and quality of service to all customers in a given area at substantially the same tariff limiting variations to available or appropriate technologies required to serve specific customers', effectively creating the corresponding right for consumers under Regulation 3(1)(g) of the Kenya Information and Communications (Consumer Protection) Regulations, 2010, covering net neutrality.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

While there is no specific legislation or regulation in place, at present, relating to digital platforms and their regulations, the CA, in conjunction with the National Cohesion and Integration Commission, did in July 2017 issue 'Guidelines on Prevention of Dissemination of Undesirable Bulk and Premium Rate Political Messages and Political Social Media Content via Electronic Communications Networks' pursuant to sections 23 and 25 of the KICA and Regulation 21 of the Kenya Information and Communications (Consumer Protection) Regulations, 2010.

It is noteworthy that the Guidelines targeted political messages, unsolicited messages and the dissemination of hate speech through social media. Nothing suggests that the Guidelines relate to the general regulation of platforms. They are nonetheless indicative that should a reason or urge to regulate platforms arise, the CA can resort to the above provisions.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The licensees in the communications sector have no regulatory obligations at present with regard to the NGA networks. While the Connected Kenya 2017 Master Plan identifies next-generation super broadband as a core project and a foundational pillar for Kenya's vision as Africa's ICT Hub, there hasn't been much activity in the deployment of these categories of broadband. Similarly, a financial scheme has not yet been established to cater for its deployment.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

There is no specific data protection regime applicable in the communications sector, save for piecemeal provisions in the KICA and its regulations. The Data Protection Bill, 2012 is Kenya's best attempt at enacting a specialised law on data protection.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

There is presently no specialised legislation governing cybersecurity in Kenya. Piecemeal provisions are to be found within the KICA and other Acts of Parliament, which provisions are proving to be inadequate with the growing trend of cybersecurity threats.

The Computer and Cybercrimes Bill, 2017 is presently in parliament at the committee stage, before it is presented for the second reading. It is hoped the Bill will be passed into law.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is presently no legislation or regulation in place regarding big data. The Draft National Information Communication and Technology (ICT) Policy, 2016 (Draft ICT Policy) identifies big data as the next frontier that requires government input in the:

- development of policy and legislation on information privacy and data ownership;
- development of policy around accessibility of geo-location data;
- development of a Big Data Strategy in consultation with stakeholders; and
- promotion of big data commercialisation, as well as the development of hardware and software products for big data applications, among others.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There is presently no law governing data localisation in Kenya. The Draft ICT Policy has one of its policy objectives as the development and enactment of legislation on localisation to support growth in IT service consumption – as an engine to spur data centre growth.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Following the successful digital migration in Kenya and the clearing of the 700MHz band frequency spectrum, part of which was issued to a NFP Tier 2 licensee for the deployment of 4G, we are looking forward to further deployments. The CA had previously indicated that it would be reserving the band to Tier 2 licensees and there are reports presently that two applicants, each a consortium of five NFP Tier 2 licensees, have applied to the CA for the allocation of the spectrum. The CA, however, is yet to make the information public and disclose the names of those companies.

Jamii Telecommunications Limited operationalised its 4G licence in December 2017 in a move in which it sought to shake the broadband segment of the market. Its minimal infrastructure, however, slowed down the absorption of its products but was a wake-up call to the dominant players who had to come up with ingenious products to counter the effect.

The above-mentioned Analysys Mason report prepared for the CA to find Safaricom Limited, an NFP Tier 1 licensee and major player, as a dominant player in the retail mobile communications market and the retail mobile money market, and in towers under the wholesale. It recommended to the CA to consider structural or functional separation, a remedy the CA was not ready to impose, and which invited uproar in the market.

It is likely that the pressure will be sustained, and that the CA might reconsider its position, especially now that the CAK is still undertaking an independent study on Safaricom's dominance in the retail mobile communications market and the retail mobile money market.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The MoICT sits at the apex of the institutional structure of Kenya's media sector. The CA regulates the media sector in Kenya, insofar as the same relates to, inter alia, licensing of broadcasters, and granting of frequency spectrum subject to its availability.

The CA derives its mandate under section 5 and Part IVA of the KICA and the Broadcasting Regulations, 2010. The CA is mandated, under section 46A of the KICA, to, inter alia:

- facilitate and encourage the development of Kenyan programmes;
- carry out such other functions as are necessary or expedient for the discharge of all or any of the functions conferred upon it under this Act;
- administer the broadcasting content aspect of this Act;
- develop media standards; and
- regulate and monitor compliance with those standards.

It is notable that the KICA excludes print media and book publishing from the definition of media in its section 2. The MCA Act defines 'media' to include print media but excludes book publishing.

The MCK is concerned mostly with the regulation of the conduct of journalists, media enterprises and practitioners. The MCK is mandated by the MCA to, inter alia, promote and protect the freedom and independence of the media; prescribe standards for journalists, media practitioners and media enterprises; and facilitate resolution of disputes between the government and the media, between the public and the media and intra media.

The Kenya Film Classification Board (KFCB), established under section 11 of the Films and Stage Plays Act, Cap 222, Laws of Kenya is mandated under section 15 thereof to, inter alia, regulate the creation, broadcasting, possession, distribution and exhibition of films through examining and classification of films and posters thereof submitted to it under the Act, imposing age restriction on viewership; giving consumer advice with due regard to the protection of children and women against sexual exploitation or degradation in cinematograph films and on the internet.

KFCB works in tandem with the CA, as the Code requires broadcasters to have their programmes rated by KFCB before they are aired, a default of which is a breach of the licence conditions inviting sanctions.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Broadcasting services licensees are presently required to maintain a minimum of 30 per cent local shareholding for the duration of a licence term. The CA may amend the minimum shareholding from time to time through sector policy.

Licensees are required to notify the CA of any change in the ownership, control or proportion of the shares held in them, at least 90 days before effecting such changes. However, where the changes involve a stake in excess of 15 per cent of the issued share capital, or where an existing shareholder acquires at least 5 per cent additional shares, the written consent of the CA shall be necessary before any such change is effected.

While there are presently no express regulations on cross-ownership of media companies, no broadcaster other than the public broadcaster is directly or indirectly entitled to more than one broadcast frequency or channel for radio or television broadcasting in the same coverage area. Cross-ownership may be indirectly regulated through broadcasting regulations and competition laws.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

There are two licensing regimes in Kenya. The first is the first in time principle – first come, first served – which applies to all broadcasting licences that do not require the assignment of the frequency spectrum resource.

The second one – applicable to licences for broadcasting services requiring assignment of the frequency spectrum resource – is dependent on the availability of such spectrum. The CA initiates the process through public advertisements, in batches or whole, of the spectrum available, inviting interested parties to apply for the licences. The advertisements or notices include, inter alia, the time frame within which the applications are to be made, and the type of frequency or channel, and location or site.

The applicants then submit their applications and supporting documents, together with the non-refundable application fees. The Communications Licensing Committee then vets the application and may recommend that a licence be not awarded; a licence be awarded; or the applicant be subjected to further process prior to being recommended for a licence award.

The CA promises to process broadcasting services licences within 60 days, which include a 30-day period when a Kenya Gazette 'intention to licence' publication runs and within which period the CA receives any representation or objections and may require the applicant to provide any clarification or explanation when sought.

Upon payment of the licence fee and acceptance of the licence's terms and conditions, the CA issues a draft licence together with a 6 to 12 month construction authorisation permit to set up a station. Upon completion, the CA inspects the station and if satisfied, issues a broadcasting licence.

The fees presently payable for the broadcasting licences include:

Broadcast licence category	Licence duration (years)	Application fee (Kenya shillings) (payable when submitting application form)	Initial licence fee (Kenya shillings) (payable after approval and before issuance of licence)	Annual operating fee (Kenya shillings) (payable on or before 1 July of each year)
Commercial FM Radio Licence	5	10,000	100,000	0.5 per cent of annual turnover or 100,000, whichever is higher
Subscription Management Service Broadcasting Licence	5	10,000	100,000	"
Terrestrial Subscription Broadcasting Service (Pay Radio or Television)	5	10,000	100,000	"
Internet Protocol Television (IPTV) (Radio or TV)	5	10,000	100,000	"
Commercial Free-to-Air Television (on DTT Platform)	7	10,000	200,000	"
Commercial Free-to-Air Radio (on DTT Platform)	5	10,000	100,000	"
Commercial FM Radio Licence	5	10,000	100,000	"
Satellite Subscription Broadcasting Service (Pay Radio or Television)	7	10,000	100,000	"
Cable Subscription Television Licence	7	10,000	100,000	"
Landing Rights Broadcasting Service	10	10,000	12,500	0.00/Nil
Community Free-to-Air Television (on DTT platform)	4	1,000	30,000	30,000
Community Free-to-Air Radio (on DTT platform)	3	1,000	15,000	"
Community FM Radio	3	1,000	15,000	"

Frequency fees are charged separately where spectrum is utilised.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The CA is responsible for the administering of 'The Programming Code for Free-To-Air Radio and Television Services in Kenya' by the Communications Authority of Kenya (the Code), which requires licensees to ensure that at least 40 per cent of their programming, within a year of being licensed, is local content, and to increase it to 60 per cent within four years.

The Code defines local content as the total of all television or radio programmes, excluding news and advertisements, and fulfils any five of the following conditions:

- the production is made in either Kenya's indigenous or official languages;
- production and post-production was wholly or partly done in Kenya;
- the content deals with issues that are unique and relevant to Kenyan audiences;
- at least 20 per cent of the shares of the production company are owned by Kenyans;
- at least 50 per cent of the leading actors and major supporting cast appearing in the programme and technical crew are Kenyans;
- the location of shooting, in case of audio-visual programmes or performance, was wholly or partly in Kenya; and
- the authors of the programme are Kenyan (whether or not the programme is produced in conjunction with a co-producer, an executive producer or director who is not Kenyan).

Regulation No. 35(2) of the Kenya Information and Communications (Broadcasting) Regulations, 2010 (Broadcasting Regulations) empowers the CA to prescribe, from time to time, a minimum local content quota for foreign broadcasting stations that broadcast in Kenya.

The Code's definition of local content seems to focus on television and radio programmes while remaining uncertain as regards online and mobile content. Be that as it may, a generous interpretation of the relevant provisions of the Broadcasting Regulations and the Code – especially on the appreciation that most of the content published on by broadcasters' online channels is more or less similar to that aired through radio and television channels – favours the application of the local content quota to these channels as well.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Section 46I of the KICA obligates licensed broadcasters to ensure that advertisements, either in terms of content, tone or treatment, are not deceptive or repugnant to good taste. The obligations are further expanded by Regulation No. 33 of the Kenya Information and Communications (Broadcasting) Regulations, 2010.

In addition to the foregoing, advertisements should also be congruent with the Code of Conduct for the Practice of Journalism, provided for under section 45 of the MCA and the Second Schedule thereto.

The Code further defines the regulation of advertising in the broadcast media. Consequently, the watershed period between 5.00 am and 10.00 pm applies to advertisements that are required to be suitable for family listening and viewing.

The Code further prohibits the airing of advertisements of products or services that are not suitable for children or that might cause physical, mental, psychological or moral harm, either in or adjacent to children's programmes, news or programmes where children are likely to be part of the audience.

Licensed broadcasters are further required to ensure that advertisements aired on its station contain at least 40 per cent local content footage.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

There are presently no regulations with must-carry obligations. Section 46K(c) of the KICA, however, empowers the Cabinet Secretary for the MoICT, in consultation with the CA, to make regulations mandating the carriage of content, in keeping with public interest obligations, across licensed broadcasting services.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

There is presently no special treatment for new media content. The regulations applicable to traditional broadcast media apply with necessary modifications.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Kenya's successful digital migration, from analogue television to digital television that concluded in 2015 resulted in spectrum clearing and thus availing spectrum for redeployment, notably the 700MHz band that was issued under a 4G licence to Jamii Telecommunications, currently a NFP Tier 2 licensee. We await further 4G redeployments.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The KICA and the Kenya Information and Communications (Radio Communications and Frequency Spectrum) Regulations, 2010 are silent on the broadcasters' use of spectrum, save where such spectrum is used contrary to the licence conditions or in furtherance of a crime.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There is presently no process for assessing or regulating media plurality in Kenya. The present legal and regulatory framework of broadcasting in Kenya encourages media plurality as a form of enhancing diversity and in support of the local content quota. Section 46A(d) of the KICA mandates the CA to promote diversity and plurality of views for a competitive marketplace of ideas.

In addition, section 46K(a) of the KICA, however, empowers the Cabinet Secretary for the MoICT, in consultation with the CA, to make regulations on the facilitation, promotion and maintenance of diversity and plurality of views for a competitive marketplace of ideas.

While there has been a proliferation of radio stations and television stations – the latter being experienced following the digital migration – the plurality is still minimal as regards content diversity, as most of the stations are owned and operated by similar persons or entities.

Government interferences have also, in the recent past, contributed in diminishing the notion of media plurality in Kenya, as the government seeks to silence independent and divergent opinions.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

Recent events in Kenya suggest government censorship is taking place on the independence of media, which is a violation of articles 34 and 35 of the Constitution of Kenya. On 3o January 2018, the CA switched off three free-to-air television stations and one free-to-air radio station for allegedly airing live coverage of a mock presidential swearing-in ceremony by the National Supper Alliance Political Coalition – Kenya's opposition party. The switch-off was easy to execute thanks to the digital migration, which resulted in only two entities being licensed signal distributors.

The constitutionality of the switch-off was, however, challenged in court with the court ordering for the immediate restoration of the services of the four licensees. Journalists have also been subjected to ridicule, embarrassment and occasional violence at the hands of police.

Debates and agitation for media independence by the MCK and other stakeholders, including the judiciary, will likely be brought to the fore before the campaign mood and spirit wears off, which might take a while as politicians have already started engaging in rhetoric aimed at the 2022 presidential elections.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The CA is the converged regulator for the communications and media sectors. While it has the power and mandate to handle antitrust issues under its ex-ante and ex-post jurisdiction as established under sections 84Q, 84R, 84S and 84T of the KICA, the CAK is the antitrust regulator and collaborates with the CA when the concerned sectors fall within the CA's jurisdiction and mandate.

The MCK is responsible for the regulation of the conduct of journalists, media enterprises and media practitioners in Kenya, establishing the applicable standards and monitoring the compliance thereof, whereas the KFCB regulates, inter alia, the creation, broadcasting, possession, distribution and exhibition of films.

There are presently no mechanisms to avoid conflicting jurisdiction, save that the default position would be considering the intention of the parent act establishing the various agencies.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Persons aggrieved by the CA's or MCK's decisions may appeal against such decisions, in the first instance, before the Communications and Multimedia Appeals Tribunal (the Tribunal) pursuant to section 102F(1) of the KICA. The Tribunal, which is established under section 102 of the KICA following its amendment in 2013, may, pursuant to section 102F(1) of the KICA, make procedures for appeal.

The appeals procedure is presently governed by the Kenya Communications (Appeals) Rules, 1999, as amended (Appeals Rules). While the Appeals Rules require appeals to be lodged within 30 days of the impugned decision, various provisions of the KICA provide for varying time frames including: within 60 days; 30 days; and 15 days of the impugned decision. It is noteworthy that section 102F(1) of the KICA sets the time frame at 60 days. This apparent ambiguity needs to be addressed to avoid unnecessary miscarriages of justice.

The appeals should be lodged by way of a Memorandum of Appeal signed by the appellant setting out concisely, under distinct heads, numbered consecutively, the grounds of appeal without argument or narrative and accompanied with a copy of the decision appealed against and a statement of facts, signed by the appellant and setting out precisely all the facts on which the appeal is based and referring specifically to documentary or other evidence that it is proposed to adduce at the hearing of the appeal and the attachment thereof.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The past year saw little development of the competition law, especially on antitrust issues, in the communications and media sector. This may be attributed to the existing media plurality, at least as far as the proliferation of television and radio stations and digital platforms – which has lowered entry barriers, allowing for smaller players to leverage on technology and relay their content through the internet. Also, there is no one player who can be considered dominant in the communications and media sector.

Notable mergers in these sectors include the acquisition of Kenya Buzz, an online lifestyle and events site, by the Nation Media Group, a leading media player in print media, radio and television broadcasting, seeking to diversify its portfolio.

Two other acquisitions include the acquisition of a 51 per cent stake by Trinc Limited in Gukena Frequency Modulation, a radio broadcaster, thus increasing the foothold of Radio Africa Group in the media sector

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and the acquisition of 100 per cent stake in Air Media Kenya Limited, a radio broadcaster, by Newtekk Multi Media Services Company.

We are likely to experience major mergers and acquisitions in the sectors, especially with the mooting of a possible acquisition of around a 40 per cent stake in Nation Media Group by the businesses allied to Kenya's First Family, a stake currently held by the Agah Khan, who would like to divest interests in the Kenya media and communications sector.

* *The information in this chapter is accurate as of May 2018.*

Korea

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The regulatory framework is set out in the Telecommunications Business Act (the TBA) and the Radio Waves Act (the RWA). The Ministry of Science and ICT (the MSIT) and the Korea Communications Commission (the KCC) are the main regulatory bodies that are responsible for the administration of these regulations.

The requirements for the entry into and withdrawal from a telecommunications business are set out in the TBA, and if any telecommunications carrier constructs a network using radio equipment, it must comply with the requirements set out in the RWA.

Traditionally, under the TBA, there were three types of telecommunications businesses (each category as defined in the TBA):

- core telecommunications service (CTS) with respect to the transmission of sound, images or other data in an unmodified manner, including internet connectivity as well as mobile, landline phone and Voice over Internet Protocol (VoIP);
- special category telecommunications service (SCTS) that utilise CTS networks; and
- value-added telecommunications service (VATS), which are online services using the CTS or SCTS networks, including internet-based services, such as cloud, email, e-commerce and internet search

A bill to amend the TBA was passed in 2018, and from 25 June 2019, when the amendments to the TBA come into effect, the current distinction between CTS and SCTS will be abolished, and SCTS will be absorbed into the broadened class of CTS. Any existing SCTS provider will automatically become a CTS provider.

Foreign ownership restrictions under the current TBA apply only to CTS providers (for which there is a maximum 49 per cent foreign ownership permitted, although such foreign ownership restrictions for entities from a particular foreign country may be alleviated if a free trade agreement exists between that foreign country and Korea). From 25 June 2019, the 49 per cent foreign ownership restriction will apply only to CTS providers that surpass a size threshold.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

These are set out in the TBA. Under the current TBA, any CTS provider must receive prior approval from the MSIT, a challenging process involving broad discretion on the part of the MSIT and a review process that typically takes two to six months. In contrast, any SCTS provider needs only to register with the MSIT, and the requirements for this registration are considerably lower, with little scope for MSIT discretion. The registration process also takes just one to two months to process.

The amendments to the TBA relax the current regulatory framework, replacing the former approval process required for any CTS provider with a simpler registration process, similar to the current process applicable to SCTS providers. Furthermore, enterprises primarily engaged in businesses other than telecommunications but that sell (in their own name) goods or services that incorporate telecommunications-enabled components, such as connected vehicles and appliances, will not be required to obtain any licence or registration, and are only required to file a report regarding such business. There is no distinction, in the applicability of the requirements under the amended TBA, between the different means of communication (fixed, mobile or satellite) or technology applied (for example, 2G, 3G or 4G, in the mobile communication context). However, for any telecommunication business using radio waves (for example, in relation to mobile or satellite services), there are additional requirements to be satisfied in order to be assigned radio frequencies that are set out in the RWA.

VATS providers must submit a report with respect to their business to the MSIT. This process usually takes a few days and the review of such report is usually a formality. However, peer-to-peer service providers and text messenger service providers who use CTS or SCTS network must register with the MSIT, even though these service providers are VATS providers. There is no change to this requirement under the amended TBA. Moreover, VATS providers with less than 100 million won in capital are exempt from the filing requirement.

The central government, provincial governments and shops and restaurants provide Wi-Fi services, typically free of charge. It is expected that the scope of free Wi-Fi services will expand as part of the government's efforts to increase internet accessibility.

No fees are payable in relation to any authorisation or licence obtained under the TBA.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The use of radio spectrum is authorised by the MSIT, and the MSIT licence would specify the permitted use.

A spectrum licence may be transferred or sub-licensed three years after the original date of issuance, with approval from the MSIT. The transferee or sub-licensee must satisfy all the requirements applicable to the original licence holder and must obtain prior approval from the MSIT.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Telecommunications service providers must provide telecommunications services without unjustifiable discrimination. Telecommunications service providers are required to file a report to the MSIT with regards to their business status, facilities, users, etc.

The CTS providers are also required to produce separate accounts in relation to their telecommunications business and non-telecommunications business. There is a further requirement to produce separate accounts in relation to CTS and VATS, to distinctly set out the assets, expenses and profits relevant to each such category.

The CTS providers must file a report to the MSIT for their customer terms and conditions, and any CTS provider surpassing certain thresholds in terms of subscriber numbers and market share must receive prior approval from the MSIT with respect to its customer terms and conditions. As part of the approval process, the MSIT can require adjustment of the proposed tariffs for the CTS telecommunications service, if it deems the tariffs to be excessive, considering the cost of supply, revenue, classification of costs and revenues by service, and impact on the fair competition environment.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

If the KCC determines that effective competition in a particular market is deterred by a dominant telecommunications service provider's actions that undermine fair competition or users' interests, the KCC may, after public consultations with the MSIT, order structural or functional separation between network and service activities of that service provider.

However, an order for structural or functional separation is an extraordinary measure that has not been used to date in Korea.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Under the TBA, all CTS and SCTS providers (except for small size operators) are divided into categories that either provide universal service or compensate for expenses arising from the provision of universal services by other service providers.

Those service providers that are obliged to provide universal services must submit a report to the MSIT on the expenses incurred in the process of providing universal services. The MSIT arranges for such expenses to be compensated, based on the level of sales, from the proceeds received from those service providers that are required to compensate for other service providers' provision of universal service.

Universal services include: (i) the provision of wire telephone services; (ii) the provision of telephone services for emergency calls; and (iii) the reduction or exemption of service charges to disabled and low-income persons for toll call services, mobile telephone services and LTE services, among other services.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The MSIT has the authority to establish and enforce rules on the allocation of telephone numbers and mobile phone numbers. Under the TBA, telephone numbers are provided to business operators based on the type of telecommunication service they provide (for example, 070 is allocated to VoIP business operators and 010 to mobile operators).

Also, under the TBA, operators are required to provide number portability when customers switch operators, regardless of whether the numbers are assigned geographically or non-geographically.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Yes. Under the TBA, the customer terms and conditions of any CTS provider must be reported to the MSIT, and any CTS provider surpassing certain thresholds in terms of subscriber numbers and market share must receive prior approval from the MSIT with respect to its customer terms and conditions. This approval is subject to fulfilling certain criteria, such as reasonable consideration of cost and profit and refraining from unfair discrimination against specific users.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

In principle, the TBA prohibits telecommunications service providers from imposing unreasonable or discriminatory conditions or limitations that would amount to any control or prioritisation in the type or source of data delivered. This prohibition, however, is currently not binding – the prohibition would only be enforceable as and when KCC promulgates an enforcement decree to give it effect, but the KCC has yet to do so.

The KCC also released a guideline in 2011 (separate from and unrelated to the above-mentioned prohibition) regarding net neutrality, addressing areas such as protection of users' rights, transparent management of internet traffic, and discouraging the blocking of legitimate content, applications, services and devices that are not harmful to the internet. However, this is only a guideline and does not have the force of law.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Digital platforms are categorised as VATS under the TBA, and they are also regulated by the Act on the Promotion of Information and Communications Network Utilisation and Information Protection (the IT Networks Act).

Under the TBA, a VATS provider must file a report with the MSIT, with this report to include a schematic diagram of the telecoms network to be used, a detailed description of user protection measures and details of the company's technical measures to prevent online copyright infringement. VATS providers with less than 100 million won in capital; however, are exempt from this filing obligation. Upon filing of the report, a VATS provider must commence business within one year of submission, also implementing technical measures to protect minors and to protect against viruses and malicious codes. The amended TBA will authorise the MSIT to conduct a survey on VATS providers requesting them to submit any documents necessary to prove compliance with these requirements.

In addition, the same prohibition on control or prioritisation of data delivery equally applies to VATS providers, although the regulations, as

explained above, are not yet enforceable as the KCC has not promulgated any enforcement decree.

The IT Networks Act regulates digital platforms on issues including data protection, user protection (such as protection of minors and protection from illegal content) and the security of IT networks.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The Framework Act on National Informatisation authorises the MSIT, while referring to submissions from other government agencies, to establish a basic plan for national informatisation every five years, and each basic plan may include plans for the expansion and management of relevant infrastructure and other facilities, support for informatisation of private sectors and procurement and management of funds.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The IT Networks Act sets out the data protection regulations specifically applicable to the communications sector. Data protection in Korea is also generally regulated under the Personal Information Protection Act (the PIPA), although in the case of any conflict, the communications-specific data protection regulations set out in the IT Networks Act prevail.

In practice, the IT Networks Act regulations would apply to any company that collects personal information through its website or smartphone applications, as any IT services provided by any business would fall within the 'communications sector' category. The communications sector-specific regulations are administered by the KCC, and substantially enforced by its related agency, the Korea Internet and Security Agency.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The IT Networks Act requires IT service providers (data controllers) and, if applicable, their data processors to take technical and managerial measures to ensure the protection of personal data. The PIPA also requires very similar security measures. Such measures include requirements to:

- establish and implement an internal personal data management policy;
- prevent unauthorised access to personal data by controlling access authority and implementing technical measures to control access, such as firewalls or intrusion protection systems;
- encrypt personal data;
- implement logs of access to personal data systems and provide measures for preventing fabrication and alteration of such logs;
- utilise security programs, such as anti-virus software; and
- store personal data in a safe area.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Big data is currently not specifically regulated; the existing general data protection regime would apply to big data. It is argued that the current data protection regulations are not helpful in regulating big data, as the scope of personal data is interpreted very widely by courts and regulators, and consent is required for all processing of personal data.

As a reaction to such criticism, the government has recently started to ease some of the restrictions on the processing of big data to promote big data related industries. In August 2018, President Moon delivered a public speech on planned reforms to the data protection regime to promote utilisation of big data, artificial intelligence and self-driving automobiles. He addressed the possibility of encompassing pseudonymous data in the existing data privacy regime, and relaxing some of the requirements for consent for the processing of the new types of data, including big data. However, legislative reforms by the National Assembly would be necessary in order to implement these plans. Bills to amend the current PIPA and IT Networks Act in this regard have been proposed (to free up big data services by, among other things, allowing for pseudonymisation and aggregation), but the prospects for passage of the draft legislation are unclear.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Financial institutions (along with electronic financial enterprises) are prohibited from storing personal credit information on offshore cloud servers. The Financial Services Commission, the primary financial regulatory, recently amended the existing Regulation on Supervision of Electronic Financial Transactions to permit usage of cloud service, but the new framework is confined to Korea-located cloud storage and services.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The main emerging trends in communications regulation in Korea are: (i) tightening of data privacy rules and governance, especially with regard to offshore entities, as evidenced by a newly introduced obligation upon them (depending on certain thresholds) to designate local agents; (ii) loosening of the telecommunications business licensing regime (discussed in questions 1 and 2); and (iii) increased receptiveness to new technologies, as seen in the recent expansion of a 'regulatory sandbox'. These developments in summary are as follows.

Designation of local agent

Under amendments to the IT Networks Act that took effect in March 2019, offshore businesses that offer IT services in Korea meeting certain thresholds in terms of global revenue, local revenue or number of users will be required to designate a local agent for regulatory oversight purposes. This is modelled on a similar system instituted in the EU's GDPR. Designated local agents will be responsible for personal data protection measures, and for notifications and document submissions in case of data mishaps. An offshore business will also be required, regardless of scale, to appoint a local agent if and when it is subject to KCC investigation arising from a (suspected) data incident.

Designation of a chief information security officer

From 13 June 2019, IT service providers must designate a suitably qualified chief information security officer (CISO) and report such designation to the MSIT. Under the IT Networks Act, in its current form, only IT service providers meeting a threshold of scale, or falling within one of various categories of business (such as an internet data centre), are required to designate a CISO, but under the amended statute, this requirement will apply to all IT service providers, except only small businesses. The CISO is responsible for taking preventative measures

against data security breaches, including adoption of internal security policies, and for responding to any incidents as they occur. While the IT Networks Act currently permits a designated CISO to hold other posts, the amended statute, from June 2019, will require the CISO of an IT service provider, meeting any of several threshold (including in terms of assets or user numbers) to serve in the CISO role alone.

Maintaining insurance or reserves for data breach

Also, under the amendments to the IT Networks Act that take effect on 13 June 2019, any IT service provider that maintains personal information with respect to 1,000 or more users will be required to maintain a level of insurance or reserve for potential liability in case of a violation of data protection rules.

Looming changes in governmental oversight of data protection

There has been some legislative push to modify the government administrative framework for data regulation. Under bills presented in the National Assembly in November 2018, authority over data protection currently invested in two agencies – the KCC's authority over online businesses, and the Ministry of Interior and Safety's authority over other businesses – would be combined into one central commission, the Personal Information Protection Commission (the PIPC), which is currently a policy and planning body. This significant proposal is still pending in the legislature; if carried out, the united PIPC may have more resources at its disposal for monitoring and investigation. The re-allocation of authority would seem to be intended, at least in part, to meet GDPR standards for an 'independent regulator', so as to help achieve an adequacy decision freeing up data transfers from the EU to Korea.

Technology innovations expected in the regulatory sandbox

Korea has expanded its regulatory sandbox – a framework for temporary permits and exemptions to enable testing and introduction of innovative businesses, amid an otherwise restrictive or murky regulatory environment. With an amendment in late 2018 to the Special Act on Promotion and Convergence Etc of Information and Communications, regulators have been allowed more latitude in granting temporary permits. Previously under that law, regulators could grant a business a temporary permit for a one-year period, but this was changed to a two-year period (with a possible one time extension). Also newly added, regulators may grant a 'special regulatory exemption for demonstration purposes', to allow limited-scope testing.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The regulatory framework for the media sector is set out within the Broadcasting Act (the Broadcast Act) and the Internet Multimedia Broadcasting Services Act (the IPTV Act). Whereas the IPTV Act specifically sets out the regulations to be followed by Internet Protocol Television (IPTV) operators and IPTV content providers, the Broadcast Act sets out the regulations applicable to operators of other types of broadcasting platforms (such as satellite broadcasting operators, or SBOs), system operators (SOs), terrestrial broadcasting operators (TBOs), broadcasting related business operators (such as relay broadcasting operators, ROs), signal transmission network business operators (NOs) and programme providers (PPs).

The regulatory bodies that administer the media sector are the KCC and the MSIT. The KCC is in charge of regulations applicable to TBOs and PPs that provide general programming or specialised programming for news reports. The MSIT, on the other hand, is in charge of regulations applicable to SBOs, SOs, IPTV operators, ROs, NOs and PPs providing specialised programming in relation to home shopping or other types of specialised programming.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

In general, there are four main types of ownership restrictions applicable to media services: (i) ownership by a specific individual or entity (including his, her or its related parties, such as any relative, executive officer or affiliate company) (related parties); (ii) ownership between broadcasting business operators; (iii) ownership by a conglomerate (including its affiliates) or an entity operating daily newspaper or news communications business; and (iv) ownership by a foreign individual or entity. Details of (iv) restrictions on foreign ownership are as follows:

Operators	Maximum permitted percentage of foreign ownership
TBO	Prohibited
SO	49%
SBO	49%
IPTV operator	49%
IPTV contents provider	20% for those operating general programming or specialised programming for news reports 49% for other instances (100% ownership is permitted for indirect investments through an entity owned by the government, an organisation or citizens of a foreign country that is party to a free trade agreement with Korea and determined and notified by the MSIT to be eligible)
PP	20% for those operating general programming 10% for those operating specialised programming for news reports 49% for others (100% ownership is permitted for indirect investments through an entity owned by the government, an organisation or citizens of a foreign country that is party to a free trade agreement with Korea and determined and notified by the MSIT to be eligible)
RO	20%
NO	49%

Regulators have signalled they will move to liberalise the maximum thresholds for foreign ownership (see question 27).

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The licensing requirements are set out in the Broadcast Act and the IPTV Act. The Broadcast Act regulates the licensing requirements applicable to TBOs, SOs, SBOs and PPs, while the IPTV Act regulates the licensing requirements applicable to IPTV operators and IPTV content providers.

Pursuant to licensing requirements in the Broadcast Act and the IPTV Act, any TBO must obtain prior approval from the KCC to carry out terrestrial broadcasting activities, while any IPTV operator, SO and SBO must all obtain prior approval from the MSIT in relation to their relevant broadcasting activities.

Among PPs, any PP engaging in general programming, or specialised programming of news reports, must obtain prior approval from the KCC. Any PP that engages in specialised programming featuring

and marketing products must obtain prior approval from the MSIT. PPs engaging in any other broadcasting activities must register with the MSIT.

In general, IPTV content providers must register or report to the MSIT, except that IPTV content providers focused on news reporting or general programing must obtain prior approval from the KCC. IPTV content providers focused on presenting and selling goods must obtain prior approval from the MSIT. However, VATS providers, TBOs, SOs and SBOs that only provide content through their internal channels, PPs and community radio broadcasting operators are exempt from the above requirements.

The official fees associated with any one of the approval or reporting processes described above would amount to less than 1 million won.

All broadcasting operators must make contributions to a broadcasting communications development fund. The specific contributions that are required vary depending on the broadcasting operator. In principle, the MIST or the KCC has 30, 60 or 90 days to reach a decision on any application, depending on the type of operator. However, as the lapse of time for these periods may be interrupted by requests for additional information or for correction and modification, in practice the application process can take significantly longer.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The Broadcast Act, Presidential Decree of the Broadcast Act and the Notice on organising broadcasting programmes contain obligations on broadcast operators to organise specific minimum amounts of domestically-produced programme content, depending on the type of broadcasting operator. The minimum amount is highest for TBOs, followed by SOs and SBOs, and lowest for PPs. However, the regulations contain a loophole with respect to IPTV operators as there is no minimum amount of domestically-produced programmes designated specifically for IPTV operators, and there are no such regulations placing such obligations on operators of other types of media (such as online or mobile contents), as these are not considered broadcasting operators under Korean laws.

However, there is no minimum content requirement for broadcasting operators with respect to domestically-produced popular music.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast media advertising in Korea is largely divided into: (i) programme commercials arranged directly before and after a particular programme; (ii) commercial breaks arranged in the middle of a particular programme; and (iii) spot commercials arranged between programmes. Other types of broadcast media advertising include commercial captions, time signal commercials, virtual commercials and product placements.

Each type of broadcast media advertising is subject to different regulations, and there are also different restrictions applicable to the same type of broadcast media advertising on range, time, frequency and method depending on the type of broadcasting operator – by way of example, media advertising by TBOs is the most strictly regulated.

Broadly speaking, however, all broadcast media advertising must clearly distinguish advertising from programmes to avoid any confusion and always display the caption 'commercial' for advertising broadcast before and after any programme mainly viewed by children under the age of 13 years, so that children may distinguish programmes from commercials.

In addition, broadcast media advertising of products such as alcohol and tobacco is subject to restrictions under separate laws, apart from the Broadcast Act.

Laws governing broadcast media advertising aside from the Broadcast Act include the Youth Protection Act, the Act on Promotion of Information and Communications Network Utilisation and Information Protection and the Act on Fair Labelling and Advertising.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Under the Broadcast Act, the Enforcement Decree of the Broadcast Act and the IPTV Act, SOs, SBOs (with the exception of satellite broadcasting operators providing digital multimedia broadcasting) and IPTV operators must include channels provided by public broadcasting stations such as the Korean Broadcasting System 1 and the Educational Broadcasting System as part of their basic package. Other terrestrial broadcasters, such as the Korean Broadcasting System 2, Seoul Broadcasting System and Munhwa Broadcasting Corporation, are not classified as must-carry channels, and fee arrangements for retransmission are negotiated among the relevant operators.

Further, an SO, IPTV Operator, General SBO or Satellite Mobile Multimedia Broadcasting Operator must include broadcasting channels of programme providers engaged in general programming and other programme providers engaged in specialised programming for news reports. Fee arrangements for this obligation are negotiated among the operators.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

Although the concept of traditional broadcast media is fading, there are still different regulations.

As TBOs operate through public funding, they are required under the Broadcast Act to abide by higher standards relating to publicity and public interest compared to other broadcasting operators. For example, unlike SOs, SBOs or IPTV operators, TBOs are not permitted to have commercial breaks arranged in the middle of programmes they broadcast. The Broadcasting Communication Deliberation Committee, which regulates programmes and media advertising, also applies stricter standards to broadcasts by TBOs.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Only TBOs and SOs traditionally provided analogue broadcasting. TBOs completed the switchover to digital broadcasting on 31 December 2012. The 700MHz band frequency previously used by TBOs for analogue broadcasting was reallocated to the public disaster broadcasting system and ultra-high definition broadcasting.

The digital conversion for SOs, on the other hand, is still underway as each SO must go through its own re-approval process.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The MSIT's spectrum allocation system restricts broadcasters' use of their spectrums. The MSIT contributes to KCC's evaluation of a TBO's licence for establishment, or renewal of the licence, by examining whether specific spectrums can be assigned for that TBO within the range of spectrum allocated for broadcasters. Following the recent digital switchover of TBOs, some of the resulting vacant spectrum range was assigned to TBOs' ultra-high definition broadcasting. The MSIT assigns spectrum to SBOs, SOs and NOs by a process including public notices of restrictions on uses of spectrum.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

A single broadcasting business operator and its related parties cannot share audiences that amount to viewer ratings in excess of 30 per cent. Such audience sharing is investigated and calculated by the Media Diversity Promotion Committee, a committee established under the KCC.

If any audience sharing exceeds view ratings of 30 per cent, the KCC may order corrective measures, such as a restriction on the operator from further ownership of broadcasting business, restrictions on commercial airing time or a partial transfer of broadcasting hours, among possible measures.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The regulatory institutions have stated repeatedly that they will relax unnecessary regulations interfering with market forces. Among recent moves in this direction, regulators have:

- relaxed ownership restrictions, such as foreign ownership restrictions where the relevant foreign country has entered into a free trade agreement with Korea;
- adopted a horizontally integrated regulatory framework, by means of comprehensive amendments of the Broadcast Act; and
- taken steps to promote media-related, value-added services.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The agencies with regulatory authority over the communications and broadcasting sectors are the MSIT and the KCC. The MSIT is one of the executive ministries and is directed by the Prime Minister. The KCC is one of the central administrative agencies and is under the control of the President.

Communications sector

- MSIT: regulatory agency supervising the communications business (TBA, ITNA and Protection of Communications Secrets Act); and
- KCC: agency with jurisdiction over the investigation and sanctions of communications operators' violations under the TBA, formulation and implementation of policies to protect communications service users, personal information under the IT Networks Act, and location information under the Act on the Protection, Use, Etc of Location Information.

Broadcasting sector

- KCC: regulatory agency supervising the broadcast industry; and
- MSIT: agency with licensing authority over SBOs, SOs, ROs, PPs (excluding PPs engaging in general programming or specialised programming of news reports), electric signboard broadcasting operators, CATV music broadcasting operators and NOs under the Broadcasting Act; and IPTV operators and IPTV content providers (excluding IPTV content providers focused on news reporting or general programing) under the IPTV Act.

The main antitrust regulator is the Korea Fair Trade Commission (the KFTC), having authority to enforce the Monopoly Regulation and Fair Trade Act (the MRFTA).

If the KCC has issued corrective measures or imposed administrative penalties upon communications operators and broadcasting operators on grounds of engaging in acts prohibited under the TBA or the Broadcast Act, the KFTC is not allowed to issue corrective measures or impose administrative penalties under the MRFTA based on the same cause of action. Nevertheless, the KFTC has a tendency to attempt to pursue enforcement in the broadcast sector pursuant to the MRFTA. With respect to any violation of regulations by IPTV operators, the KCC may impose administrative penalties upon those IPTV operators only after consulting with the KFTC.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

An administrative appeal may be filed: (i) to the Central Administrative Appeals Commission with respect to dispositions and other actions taken by the MSIT, including the refusal of a permit, for example; and (ii) to an administrative appeals commission established under the KCC with respect to dispositions and other actions by the KCC. In addition to such administrative agency level appeals, or in lieu of them, the dissatisfied parties may file an administrative lawsuit to the court with respect to the action by the MSIT or KCC.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The KFTC issued a corrective measure on 18 July 2016, to prohibit: (i) the acquisition of an SO by a CTS provider; and (ii) the subsequent merger of an IPTV operator (CTS provider's subsidiary) and the same SO, on the ground that such a merger would constitute a corporate consolidation that substantially restricts competition in certain transactions. The KFTC's rationale was that such a merger, based on the pay-TV market demarcated for each region, would result in an excessively high concentration in each regional pay-tv market. In January 2019, however, the current chairperson of the KFTC said in a media interview that the KFTC will take a forward-looking approach if the abovementioned SO re-files an application for approval of corporate consolidation.

On 27 February 2019, the KFTC adopted amended Examination Standards for Corporate Consolidation (amended on 27 February 2019, by KFTC Announcement No. 2019-1) to clarify how an effect of restricting

dynamic competition may result from M&A in innovation-based sectors such as semiconductor and IT. The major amendments include:

- inclusion of a clause to define information assets;
- adoption of a method for demarcating relevant markets, in examining M&A in innovation-based industries;
- standards for calculating market concentration in innovative markets; and
- further standards for examining the effect of restricting competition, from M&A in such innovation-based industries.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The regulatory framework for telecommunications in Malta is based on the following primary and secondary legislation:

- the Malta Communications Authority Act (Chapter 418, Laws of Malta);
- the Electronic Communications (Regulation) Act (Chapter 399, Laws of Malta);
- the Data Protection Act (Chapter 586, Laws of Malta);
- the Electronic Commerce Act (Chapter 426, Laws of Malta);
- the Electronic Communications Networks and Services (General) Regulations (Subsidiary Legislation (SL) 399.28, Laws of Malta) (ECNSR);
- the Roaming on Public Mobile Network Regulations (SL 399.29, Laws of Malta);
- the Utilities and Services (Regulation of Certain Works) Act (Chapter 81, Laws of Malta);
- the Rights of Way for Utilities and Services (Fees) Regulations (SL 499.37, Laws of Malta);
- the General Authorisations (Radiocommunications Apparatus) Regulations (SL 399.40, Laws of Malta);
- the Single European Emergency Call Service ('112' number) and the European Harmonised Services of Social Value ('116' number range) Regulation (SL 399.43, Laws of Malta);
- the Authorisation of Frequency Use (Provision of 2GHz Mobile Satellite Services) Regulations (SL 399.44, Laws of Malta);
- the Digital Radio Broadcasting Regulations (SL 350.29, Laws of Malta);
- the Processing of Personal Data (Electronic Communications Sector) Regulations (SL 586.01, Laws of Malta); and
- the Processing of Child's Personal Data in relation to the Offer of Information Society Services Regulations (SL 586.11, Laws of Malta).

There are no restrictions on foreign companies commencing operations in the Maltese telecommunications market and in fact all of the larger telecoms players in Malta have material or controlling foreign interests.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The current authorisation or licensing regime is divided into three broad categories, namely:

- the General Authorisation for the provision of networks and services;
- spectrum licensing; and
- radio communications equipment licensing.

General authorisation for the provision of networks and services

In terms of the Electronic Communications (Regulation) Act (Chapter 399 of the Laws of Malta), undertakings wishing to provide electronic communications are required to notify the Malta Communications Authority (MCA) for a general authorisation to provide such services.

Furthermore, general authorisations established by the ECNSR shall include the following:

- the establishment and operation of a public communications network;
- publicly available telephone services;
- the provision of other publicly available electronic communications services;
- the provision of television and radio distribution services;
- the provision of non-public electronic communications services;
- publicly available telephone directories and directly enquiry services; and
- private electronic communications networks or services.

Before commencing its service, an undertaking wishing to provide an electronic communications network or an electronic communications service must first notify the MCA by completing the relevant notification form. The form must include all the requisite information provided for under Regulation 66 of the ECNSR.

Once the MCA acknowledges the undertaking's submission of notification, the undertaking concerned is deemed to be authorised to provide an electronic communications network or service. However, this is subject to the conditions established in the ninth schedule to the ECNSR. Moreover, administrative charges are specified in the Eighth Schedule (Part A) of the ECNSR.

The duration of a general authorisation to provide an electronic communications service is unlimited, subject to ongoing compliance with the conditions attached to it. If there is a breach of these conditions, the MCA can take any actions that it deems to be suitable.

Spectrum licensing

In line with the Electronic Communications (Regulation) Act, radio frequencies shall only be used in accordance with a general authorisation issued under the act or an explicit authorisation by the MCA. All types of technology used for electronic communications services may be used in the radio frequency bands declared available in the frequency plan in accordance with EU law, provided that restrictions may be imposed where necessary to avoid harmful interference, to ensure technical quality of service, and to safeguard the efficient use of spectrum, among other reasons provided for under article 40 of the Electronic Communications (Regulation) Act.

All types of electronic communications services may be provided in all radio frequency bands that are available in line with the frequency plan, subject to proportionate and non-discriminatory restrictions that may be imposed by the MCA including, where necessary, to fulfil a requirement under the ITU Radio Regulations. A measure that prohibits provision of any other electronic communications service in a specific band may only be provided for where this is justified by the need to protect safety of life.

The duration of a spectrum licence varies, depending on the type of licence.

Radiocommunications equipment licensing

Apart from the above-mentioned licensing categories, Part IV of the Electronic Communications (Regulation) Act addresses the need to obtain a licence for the installation or use of radiocommunications equipment, unless the equipment is covered by a general authorisation or licence exempt. Such licence exemptions are contemplated by the Radiocommunications Apparatus Exemption Order (SL 399.41). This particular order provides a list of radiocommunications apparatus that are exempted from the requirements of article 30 of the Electronic Communication (Regulation) Act.

The grant of individual licences is subject to the payment of the applicable licence fees to the MCA.

The MCA provides for the following application forms:

- application forms for the grant of rights to install or use radiocommunications equipment (eg, aeronautical, amateur radio, private mobile radios, radio links, satellite uplink, etc); and
- notification forms for the installation or use of certain radiocommunications equipment covered by a general authorisation (eg, VHF marine, EPIRBs, etc).

Licences granted under this category may be issued in accordance with the terms, conditions and limitations provided for by the MCA. Furthermore, a licence may also include specific limitations relating to the apparatus that may be installed or utilised by the licensee, and it may also specify the places where such apparatus may be utilised. Notably, such a licence may be rescinded, and the terms and conditions or limitation may be varied by a notice issued by the MCA in writing, either directly to the licensee or by a general notice published in the Government Gazette.

Unless this type of licence is revoked by the MCA, it shall remain in force for such a period as may be specified in the licence.

With regard to public Wi-Fi services, the MCA in association with other entities has been working on a nationwide project with the intention of setting up free Wi-Fi internet points on the Maltese islands. The project was launched with the aim of boosting the use of the internet through the use of portable devices. This service complements the appropriate security measures, which mainly include filters against unlawful and improper content.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

A spectrum licence can be issued subject to such terms, conditions and limitations as listed in Part B of the Seventh Schedule to the ECNSR. In accordance with Regulation 41, radio spectrum for the provision of electronic communications services is assigned on a service-neutral basis.

Article 45 of the Electronic Communications (Regulation) Act states that an undertaking may transfer or lease the individual rights to use radio frequencies in the bands identified in the national frequency plan that may be transferred or leased to other undertakings in accordance with the conditions attached to such rights of use of radio frequencies, provided that conditions attached to individual rights to use radio frequencies shall continue to apply after the transfer or lease, unless otherwise specified by the MCA.

In such cases, the licensed transferring undertaking shall notify the MCA of its intention to transfer rights to use radio frequencies, as well as the effective transfer thereof to the MCA. The undertaking shall also make such intention public. The trading rules established under Part X of SL399.28 apply to any such trading.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Parts III and IV of SL 399.28 implement the EU Directive 2002/21, specifically on the market definition and analysis procedure.

EU Recommendation 2007/879/EC of 17 December 2007 identifies seven markets in which ex-ante regulation may be justified, namely:

(i) access to the public telephone network at a fixed location for residential and non-residential customers;
(ii) call origination on the public telephone network provided at a fixed location;
(iii) for the purposes of this Recommendation, call origination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call transit and for call termination on the public telephone network provided at a fixed location;
(iv) call termination on individual public telephone networks provided at a fixed location;
(v) for the purposes of this Recommendation, call termination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call origination and the market for call transit on the public telephone network provided at a fixed location;
(vi) wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location;
(vii) wholesale broadband access. This market comprises non-physical or virtual network access including bit-stream access at a fixed location. This market is situated downstream from the physical access covered by market (iv) listed above, in that wholesale broadband access can be constructed using this input combined with other elements;
(viii) wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity; and
(ix) voice call termination on individual mobile networks

One of the objectives of the MCA is to impose ex-ante regulatory obligations only where there is no effective and sustainable competition and to relax or lift such obligations as soon as that condition is fulfilled.

In line with EU legislation, NRAs can list other markets specific to national circumstances provided they do so in accordance with the norms under article 15 et seq of Directive 2002/21/EC (as amended). In December 2018, the EU approved a new regulatory framework that has to be implemented by member states by no later than 21 December 2020.

Because Malta is a full member of the European Union, the remedies available to the MCA are in accordance with what national regulatory authorities are permitted to inflict on operators in accordance with the EU regulatory framework. The remedies that may be imposed by the MCA are listed in the ECNSR, which may include an obligation of transparency, obligation of non-discrimination, obligation of accounting separation, and obligations relating to price control and cost accounting.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

The notion of functional separation as contemplated under articles 13A and 13B of the Access Directive has been transposed into Maltese legislation and such provisions are currently provided for under Part IV of the ECNSR. Indeed, it provides for rules requiring vertically integrated undertakings to situate activities relating to the wholesale provision of relevant access products in an autonomously functioning business entity. This separate entity shall supply access products and services to all undertakings, including to other business entities within the parent company on the same timescales, terms and conditions.

Moreover, when the MCA decides to impose this type of obligation, it must first present a proposal to the European Commission, and such a proposal should include all the requisite information that ultimately will enable the European Commission to reach a decision. Once such a decision is reached, the MCA shall undertake to carry out a fully-fledged analysis of the different markets related to the access network.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Part V of the ECNSR provides for universal service obligations (USO) and the first provision under this Part states that the MCA is responsible for guaranteeing such USOs to all end users on the Maltese islands. However, the MCA must take into consideration other factors such as specific national conditions and price affordability. Moreover, it shall be responsible for determining the most effective and suitable approach for ensuring the fulfilment of universal services, while considering the principles of transparency, proportionality, objectivity and non-discrimination. It is pertinent to note that the universal service obligations apply to those undertakings that are designated by the MCA, and including the following obligations:

- provision of access at a fixed location to a public telephone network and access to publicly available telephone services, as well as the provision of functional internet access, while taking into consideration the predominant technologies utilised by the majority of subscribers and to technological viability;
- the availability of an exhaustive directory of subscribers to publicly available telephony services is made available to all end users and a comprehensive and up-to-date telephone directory enquiry service is made available to all end users, including users of public pay telephones;
- the availability of public pay telephones or other analogous services, as well as the availability of the necessary facilities to be able to connect to any national emergency call numbers, without a cost; and
- the provision of specific measures for disabled users with a view to accessing telecoms service at affordable prices.

The MCA shall be responsible for monitoring the affordability of tariffs, while taking into account individuals with low incomes and special social needs.

The ECNSR also caters for the financial aspects of providing a USO. In fact, a designated undertaking obliged to provide any of the above-mentioned universal services may submit a written request to obtain funding for the net costs of meeting these particular obligations. The undertaking's request must be supplemented by the necessary information in order for the MCA to determine whether an obligation may represent an unfair burden on the undertaking itself, and hence it will calculate the net costs of its provision based upon certain criteria. Consequently, where the MCA finds that an undertaking is subject to an unfair burden, it shall introduce a compensation mechanism and it shall also resort to sharing the net cost of USOs between service providers. A sharing mechanism shall be set up in accordance with established principles and in line with the principles provided for under Part N of the Sixth Schedule of the ECNSR.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

Number allocation in Malta is contemplated under the ECNSR and within several documents published by the MCA itself. For instance, the 'National Numbering Conventions, Responses to Consultation and Decision – February 2010', tackles number allocation and defines the concept as 'an allocation is the granting of rights of use over numbers from designated number ranges to authorised providers. Allocation of numbers grants a right to use the allocated numbers in accordance with the Numbering Plan but it is not a property transfer.' Simultaneously, it defines the National Number Plan as specifying the 'subdivision of the Maltese numbering space, the purposes for which each number range may be used and the conditions attaching to such use'.

Indeed, the MCA is responsible for establishing procedures to guarantee that the allocation of numbers is carried out in an objective, transparent, non-discriminatory, equitable and well-timed manner. Moreover, the number plan includes a list of the available numbering ranges and the requisites and standards that apply to them. If these ranges are made available, a prospective applicant can apply for numbers by either submitting an application for new numbers or number blocks or by submitting an application for additional numbers or number blocks.

Moreover, it is necessary to note that the ECNSR empowers the MCA to either revoke, suspend or change number use, for the following instances:

- when such revocation, suspension or change is requested by the undertaking;
- when international harmonisation necessitates such revocation, suspension or change;
- in cases of serious and repeated breaches of the general authorisation conditions or the conditions related to rights of use; and
- when necessary as part of a change to the national telephone numbering plan, provided that the MCA shall give an appropriate period of notice to any party affected by such revocation, suspension or change in numbering use.

With regard to number portability, the ECNSR provides for the facility of changing a provider. Essentially, an undertaking shall make sure that all subscribers that were assigned numbers from the national telephone numbering plan may, upon request, keep their number or numbers independently of the undertaking providing the service. This pertains:

- to the case of geographic numbers at a specific location; and
- in the case of non-geographic numbers at any location.

However, the aforementioned facility provides an exemption with respect to the porting of numbers between networks providing services at a fixed location and mobile networks.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Part VI of the ECNSR on end-user interests and rights, specifically Regulation 35, conforms to the provisions laid out under the EU framework and it requires those undertakings that provide connection to a public communications network or publicly available electronic communications services, to ensure that they provide their subscribers with a contract that shall specify in a clear and comprehensive manner information regarding access, details of prices, tariffs and other applicable charges, information relating to the imposition of certain conditions, details regarding the service quality levels offered, among other standard terms.

Moreover, subscribers must be given at least 30 days prior notice of the undertaking's intention to modify the contractual terms and in such circumstances, a subscriber may dissolve from the contract without incurring a penalty. Additionally, undertakings must offer consumer contracts of 12 months and cannot offer consumer contracts exceeding 24 months.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Regulation No. 2015/2120 laying down measures concerning open internet access (commonly known as the Roaming Regulation) entered into force on 15 June 2017. The Regulation was accompanied by a set of Guidelines published by the Body of European Regulators for Electronic Communications that aim to guide national regulatory authorities when it comes to implementing these rules. The Regulation permits the use of 'reasonable traffic management practices' to avoid an 'impending network congestion'. Nevertheless, the Guidelines clarify that, although the monitoring of generic content, such as the IP packet header, is allowed, the monitoring of specific content (such as the information provided by the user) is prohibited.

The Regulation provides that specialised services, that is, 'services other than internet access services which are optimised for specific content, applications or services, or a combination thereof' fall outside the scope of the Regulation and thus users of specialised services are not protected by the open internet rules as provided in these Regulations.

Zero rating remains a thorny issue under the Regulation, as, although some forms of zero rating are allowed, others are prohibited. Zero rating is prohibited when it is applied to specific applications or services. Once a data cap is reached, and all applications are throttled, the zero-rated applications must also be throttled, otherwise this would be an infringement of the Regulation. On the other hand, zero-rating may be applied to an entire category of applications without being in contravention of the Regulation. Therefore, the latter form of zero rating is allowed.

With regard to bandwidth throttling, the Regulation holds that bar the exception of reasonable traffic management, blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories thereof, are all prohibited.

It is pertinent to note that EU Regulation No. 2015/2120 concerning open internet access, amending the directive on universal service and users' rights relating to electronic communications networks and amending the roaming regulation, was implemented into the Malta Communications Authority Act through Act XVIII of 2016. The MCA also took the opportunity to publish a 'Report on the Malta Communications Authority's work on the implementation of the EU Net Neutrality Regulation'.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Currently, there is no specific legislation or regulation in Malta relating specifically to digital platforms.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are currently no specific regulations obligations in place regarding NGA networks. However, according to the National Digital Strategy 2014–2020, the 'MCA regulatory regime will foster innovation and investment to support the development of NGA Networks in Malta. It will have the objectives of ensuring competition and affordable access to these networks.' Additionally, in 2011 the MCA published an Outline Strategy for the Regulation of Next Generation Access Networks, which includes a detailed overview of the MCA's regulatory perspective with regard to NGA networks.

Nevertheless, with respect to infrastructure access, Part III of the Utilities and Services (Regulation of Certain Works) Act (Chapter 81, Laws of Malta) transposes the provisions of EU Directive No. 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks. Moreover, it is also important to shed light on article 12 and 12A of the Electronic Communications (Regulation) Act (Chapter 399 of the Laws of Malta), which specifically deal with facility sharing and access to in-building physical infrastructure.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

The Processing of Data (Electronic Communications Sector) Regulations (SL 586.01) regulates data protection in the electronic communications sector. Regulation 20 establishes that services providers must retain certain categories of data necessary to:

- trace and identify the source of a communication;
- identify the destination of a communication;
- identify the date, time and duration of a communication;
- identify the type of communication;
- identify users' communication equipment or what purports to be their equipment; and
- identify the location of mobile communication equipment.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Yes. Maltese legal instruments dealing with various aspects of cybersecurity include the following:

- the Maltese Criminal Code provisions dealing with cybercrime under a chapter heading entitled 'Of Computer Misuse';
- Processing of Personal Data (Electronic Communications Sector) Regulations (SL 586.01);
- the Electronic Communications Networks and Services (General) Regulations (SL 399.28); and

- the Council of Europe Cybercrime Convention, to which Malta has been a signatory since 2001, and which was ratified in April 2012.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There are currently no specific laws or regulations in place that govern big data. However, the Malta Information Technology Agency has published a National Data Strategy, which specifically targets the management of data across the whole public administration. The Strategy also includes the necessary components that will be used to help Malta to position itself better in the context of big data.

Furthermore, the eCommerce Malta National Strategy 2014–2020 also briefly touches upon big data and its impact on the Maltese economy.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

In terms of Regulation 18 of the Processing of Personal Data (Electronic Communications Sector) Regulations, a service provider of publicly available electronic communications services or of a public communications network is bound to retain the data mentioned in our answer to question 12 above, to the extent that the data is generated or processed by such providers in the process of providing the communications services concerned.

Furthermore, according to Regulation 3, the Regulations shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in Malta and any other country, including public communications networks supporting data collection and identification devices.

However, there are currently no generally applicable laws or regulations that require data to be stored locally. Having said this, regulated activities such as financial services or remote gaming could be subject to significantly more stringent data storage policies including specific locations for such data to be stored or replicated to be accessible to the relevant regulators.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The Maltese communication sector is working hard to keep up with rapid technological development and new business models for the provision of communication services. Consumer and business needs are changing, in turn driving new demands in various areas such as bandwidth. The use of cloud-based services is on the rise, as is the use of connected devices and services, many of which are bandwidth intensive. The need for data is growing, and showing no signs of stopping – highlighting the need for resilient, consistent and high quality network services for a variety of different customers. Local undertakings within the sector have also started to look into implementing 5G networks that could provide far greater speeds than those currently being offered on the market.

On the other hand, the MCA is also gearing itself towards responding to the above-mentioned demands and advancements in new technology and it also plans to focus on the following matters (among others):

- maintaining conditions for a multi-player scenario in the Next Generation Access environment;
- facilitating the deployment of Next-Generation-Access Networks;
- development of the Radio Spectrum Potential (development of a national radio frequency spectrum management strategy and review of the National Frequency Plan);
- the introduction of a national roadmap for spectrum in the 700MHz band to initiate the process of providing the necessary spectrum for 5G by 2021;
- ensuring that net neutrality principles are adhered to in line with the EU Telecoms Single Market Regulation;
- monitoring mobile operators to ensure that they are observing the obligations set out in the roaming Regulations;
- keeping an eye on the development of the Internet of Things (IoT) with the aim of facilitating innovation and investment;
- monitoring the provisions of the newly implemented national legislation that was required to ensure legal consistency with eIDAS Regulation;
- updating and publishing a revised National Broadband Strategy, which will reflect the European Commission's communication 'Towards a European Gigabit Society' and the 5G action plan; and
- development of satellite and space communications services in line with the Malta National Space Policy.

Market reviews are also on the table. In fact, the MCA will continue to observe the implementation of current ex-ante remedies ensuing from the analysis that it had conducted in the past with respect to the pertinent markets. Moreover, the MCA will continue to assess and observe the relevant electronic communications markets to ensure that markets review decisions remain applicable and that remedies are congruous to any changes in the markets since the previous review. The MCA has declared that it will strive throughout 2018 to review the following wholesale electronic communications markets:

- wholesale local access provided at a fixed location market (Market 3a); and
- wholesale central access provided at a fixed location for the mass-market products market (Market 3b).

On a separate note, the MCA is in the process of revising its Amateur Radio Licensing framework. Currently, the MCA issues licences to individuals holding a valid radio qualification. Because the general principles regarding the current amateur radio licensing framework were drawn up a long time ago, the MCA deems that it is necessary to review and update this framework to regulate this service in an effective manner and to apply the 'best practice' licensing principles. Interested stakeholders were invited to submit their opinion by 2 February 2018.

As a result of the aforementioned public consultation process, the MCA has submitted proposals to the Maltese government to adopt revisions to the Amateur Radio licensing regime. The MCA's proposals are still being considered by the government.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The key laws in Malta's regulatory framework for the media sector focus around the Broadcasting Act (Chapter 350, Laws of Malta), the Electronic Communications (Regulation) Act and the most recent addition, the Media and Defamation Act (Chapter 579, Laws of Malta), formerly known as the Press Act. These key pieces of legislation are enforced through the Broadcasting Authority (BA).

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

According to article 10(5) of the Broadcasting Act, a licence for any broadcasting service may only be awarded to a company regularly incorporated in Malta in accordance with the Companies Act. With regard to cross-ownership of media, there are currently no rules in place to the extent that 'it is possible for one company to own broadcasting stations to the amount and type allowed by law together with any amount of press media, of whatever type or nature, varying from newspapers, magazines, pamphlets, posters, billboards, not to mention telephony companies as well' (credit: Professor Kevin Aquilina in his contribution to the Kluwer International Encyclopaedia for Media). Nevertheless, the Broadcasting Act imposes some restrictions on the private industry with regard to media concentrations. Indeed, Professor Aquilina, formerly the chief executive of the BA, states that 'Media concentration rules exist, nevertheless, only for radio and television services and not for other media such as the press and the new media'.

It is pertinent to note that both of the largest cable TV providers in Malta are owned and controlled by foreign interests.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The BA is in charge of regulating all broadcasting content on radio and TV that originates from the Maltese islands and it has also been designated as the authority in charge of broadcasting licensing in accordance with article 3 of the Broadcasting Act. Furthermore, the same Act provides that a broadcasting licence may be granted to an applicant under such terms, conditions and limitations as the BA may deem fit. Indeed, every licence granted by the BA shall include all such provisions that the BA may deem necessary or expedient. In light of this, the First Schedule to the Broadcasting Act shall apply to such licences.

Currently, the BA is authorised to issue the following types of licences.

A licence for nationwide radio and TV broadcasting services

With respect to this type of licence, all frequencies have been assigned. Nevertheless, television channels on the Cable Network and on the Digital Aerial Network are still available. Therefore, a prospective broadcasting station must first reach out to two service providers, namely, Melita and GO plc. After the latter service providers assign a new channel in their line-up, the applicant may submit an application with the BA. Applications for a nationwide sound broadcasting licence must be accompanied by a non-refundable application fee of €5,823. Moreover, the annual licence fee payable to the BA for a nationwide sound broadcasting licence will be €11,646.

A licence for digital radio broadcasting service

Currently, the licensed digital radio broadcasting service provider is Digi B Network Limited. After the BA issued a public call for applications and auction, Digi B Network acquired the right of use of DAB spectrum for use throughout the Maltese islands. Therefore, a prospective applicant must first be assigned a new channel by the aforementioned service provider, and then he or she may apply for a broadcasting licence from the BA. Simultaneously with the submission of the application, the applicant should also pay a fee of €1,160. An annual licence fee is also applicable. Lastly, unless a licence is lawfully terminated or abridged, the validity period of such a licence shall be up to a maximum of four years and additionally it is renewable every four years. To this end, a fee of €3,000 is due upon each renewal of an application, based on the current fee tariff.

A licence for community radio stations

This particular licence caters for the needs of a particular community or locality, and has a limited range of reception. Before submitting an application for a broadcasting licence with the BA, the prospective licence must first reach out to the MCA to obtain frequency allocation. Applications for a community sound broadcasting licence (including for one-off events) must be accompanied by a non-refundable application fee of €116. Moreover, the annual fee payable to the BA for a community sound broadcasting licence is €349 and for licences payable to the BA for community sound broadcasting services for one-off events it is €116 per event.

A licence for nationwide television teleshopping broadcasting service

Before a prospective applicant submits his or her application with the BA, he or she must first approach both Melita and GO, the two incumbent cable TV distribution networks on the island, to obtain the necessary arrangements for the provision of a new teleshopping channel.

A licence for a satellite television broadcasting service

To obtain approval for this kind of broadcasting service, a prospective applicant must first submit an application for a Satellite Earth Station Licence with the MCA, as it is charged with the authority to license satellite uplink services. The applicable licence fees are as follows:

- for each station, for the transmission of communications, depending on the radio frequency bandwidth:
  - stations using up to 10MHz radio frequency bandwidth, per 1MHz radio frequency bandwidth, per annum fee is €650; and
  - stations using more than 10MHz radio frequency bandwidth, per annum fee is 6,500; and
- each station, for the transmission of communications, used for any event:
  - of 30 days or part thereof, per 1MHz radio frequency bandwidth, the fee is €110; and
  - exceeding 30 days or part thereof, monthly fee, per 1MHz radio frequency bandwidth, the fee is €110.

As soon as the uplink services are duly approved by the MCA, the prospective applicant may then submit to obtain a licence for a satellite television broadcasting service.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

With respect to the broadcasting of foreign-produced programmes, there are no specific regulations in place and there are no rules relating to the minimum amount of local content. Nevertheless, in terms of article 23(1) of the Broadcasting Act, in relation to both television and sound broadcasts other than advertisements, the BA has the power to scrutinise the programme schedules.

Furthermore, article 23(4) of the same Act provides that the BA may give instructions:

- as to the exclusion of any from a programme schedule;
- as to the inclusion in, or in a particular part of, a programme schedule of items of a particular category; or

- as to the inclusion in a particular part of a programme schedule of a particular item.

The BA is only bound to approve a programme schedule once it is satisfied that it conforms to its own instructions. Therefore, in light of the above, the BA holds the ultimate control in relation to both local and foreign produced programmes.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The Broadcasting Act regulates media advertising together with the relevant subsidiary legislation. Article 16K of the aforementioned Act provides the rules applicable to audiovisual commercial communications. The Broadcasting Act requires that all such communication is readily identifiable. Audiovisual commercial communication is also deemed illegal when it:

- causes prejudice to the right for respect for human dignity;
- includes subliminal techniques and when it spreads misleading information;
- includes or promotes any form of discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
- encourages behaviour detrimental to the health or safety of the individual;
- encourages behaviour grossly harmful to the protection of the environment;
- promotes tobacco products and cigarettes;
- promotes alcoholic beverages in such a way as to target minors or to stimulate immoderate consumption of such beverages by adults;
- serves as an advertisement of medicinal products and medical treatment available only on prescription in the member state within whose jurisdiction the media service provider falls;
- causes physical or moral detriment to minors;
- directly encourages minors to buy or hire a product or service by abusing of their inexperience or innocence;
- strongly urges minors to persuade their parents or others to purchase the advertised goods or services; and
- exploits the special trust minors place in parents, teachers or other persons, or when it unreasonably includes the presence of minors in dangerous situations.

With regard to advertising online, Maltese law does not directly regulate advertising that occurs over the internet in general or through social media. Nevertheless, a number of laws apply in more general terms. For instance, advertising of goods and services must be consistent with the relevant European Directives regarding consumer protection and that consequently have been transposed into Maltese law, specifically under the Consumer Affairs Act. Thus, for instance, the advertising of tobacco products is prohibited, and standards of practice are applicable to the advertising of gambling, alcohol and tattoos. Furthermore, reference should also be made to the local provisions on misleading and comparative advertising. Essentially, the legislation that implemented the Directive regarding misleading and comparative advertising is the Consumer Affairs Act, where Act XXVI of 2000 entitled the 'Consumer Affairs (Amendment) Act' saw the introduction of article 48 dealing with misleading advertisements, article 49 dealing with comparative advertising and article 50 dealing with allowable comparative advertising.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Must-carry obligations are regulated by Regulation 49 of the ECNSR, which provides that the MCA may impose 'must carry' obligations for the transmission of specified radio and television broadcast channels and complementary services, principally accessibility services to enable suitable access for disabled end users, on undertakings providing electronic communications networks used for the distribution of radio or television broadcasts channels to the public where a significant number of end users of such networks use them as the principal means to receive radio and television broadcasts. However, such obligations shall only be compulsory where they are required to meet clearly expressed general interest objectives and shall be proportionate and transparent.

With regard to financing, the same regulation goes on to state that the MCA may determine, in a proportionate and transparent manner, the appropriate remuneration, if any, in respect of measures taken in accordance with the above-mentioned provision.

Furthermore, in 2011, the MCA published its Guidelines on 'Must-Carry Obligations', which provide the framework for determining how must-carry obligations should be imposed on a pay TV operator. Specifically, Guideline 4 addresses remuneration matters: 'When determining whether remuneration for the retransmission of the General Interest TV channels should be provided, the MCA will need to satisfy itself that any remuneration provided can be justified.'

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is notably one of the most under-regulated subject matters within the sphere of Maltese media law. As a general rule, Maltese legislators have tended to adopt a technology-neutral approach to regulation of new media, applying or amending existing laws to emerging technologies where possible.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Digital switchover was completed on 31 October 2011 with the switching off of the analogue broadcasts. Consequently, the switchover freed up space for more radio frequencies that could then be utilised for LTE networks in competition with the current LTE network.

After the switchover, the MCA's main goal was to coordinate spectrum to simplify the effective provision of mobile services in the 790–862MHz frequency band, which is often referred to as the 800MHz band, with the ultimate aim of making the most of the digital dividend for Malta.

Individual rights of use of radio spectrum in the 800MHz and 2.5GHz bands were issued in April 2018. Melita Ltd, Vodafone Malta Ltd and GO plc were awarded the right to use additional radio spectrum for wireless broadband services. This additional spectrum enables superfast mobile broadband services and enhanced indoor coverage for the benefit of consumers and businesses in Malta. Through spectrum licence awards, the MCA aims to promote strong competition and creates more value for consumers, leading to faster mobile broadband speeds, lower prices, greater innovation, new investment and better indoor coverage.

Digital formats

25 | Does regulation restrict how broadcasters can use their spectrum?

Regulation 76 of the ECNSR states that the MCA may attach one or more of the following conditions to each individual authorisation it issued, in accordance with Part B of the 7th Schedule of the same regulations:

- obligation to provide a service or to use a type of technology for which the rights of use for the frequency has been granted, including, where appropriate, coverage and quality requirements;
- effective and efficient use of frequencies in conformity with the Framework Directive;
- technical and operational conditions necessary for the avoidance of harmful interference and for the limitation of exposure of the general public to electromagnetic fields, where such conditions are different from those included in the general authorisation;
- maximum duration in conformity with article 5 of the Authorisation Directive, subject to any changes in the national frequency plan;
- transfer of rights at the initiative of the right holder and conditions for such transfer in conformity with the Framework Directive;
- usage fees in accordance with the provisions of article 18(4) and (5) of the Act;
- any commitments which the undertaking, obtaining the usage right, has made in the course of a competitive or comparative selection procedure;
- obligations under relevant international agreements relating to the use of frequencies; and
- obligations specific to an experimental use of radio frequencies.

Media plurality

26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

With respect to media plurality, article 11 of the Broadcasting Act provides that when issuing broadcasting licences, the BA shall be guided by the principles of freedom of expression and pluralism; these shall be the basic principles that regulate the provision of broadcasting services in Malta. Therefore, the BA does not have a particular process to assess media plurality, but it simply conforms to its own principles of pluralism.

Nevertheless, after a thorough analysis of article 15 of the same Act, one may deduce that the Act empowers the BA to give any person providing, or responsible for the provision of, any sound or television broadcasting service in Malta such directions as the BA may deem necessary or expedient. Therefore, although the law only briefly considers the principle of media plurality, the Broadcasting Act is still given leeway to give directions on this principle as it deems fit.

The most recent Media Pluralism Monitor country report on Malta (2017) categorised Malta's risk for media pluralism as medium. The report notes that the area presenting the highest risk is Political Independence, noting that no significant improvement has been made since 2016 in public service media governance – the fact that both the Board of Directors and the Editorial Board are direct government appointees means there is no guarantee of independence in this sector. The report recommends introducing specific laws to regulate public service media operations and appointment procedures containing safeguards against political interference so as to improve the situation.

Key trends and expected changes

27 | Provide a summary of key emerging trends and hot topics in media regulation in your country.

The year 2018 saw the enactment of a much-needed update to Maltese press laws through the new Media and Defamation Act (Chapter 579, Laws of Malta). Notable changes include the abolition of criminal libel, an obligation for mediation to take place before libel proceedings go to court, and the introduction of the concept of 'serious harm', which compels the court to establish whether the harm caused or likely to be caused by a libellous statement is of a serious nature or not.

The recent approval of the EU Copyright Directive has caused some controversy locally because of the potential implications on freedom of expression and the press; however, the repercussions of this much-debated law will only come to light after it has been transposed into national legislation within the next two years.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 | Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The BA is in charge of all broadcasting stations and ensures their compliance with legal and licence obligations, including matters relating to public or political controversy (ie, the media sector). The communications sector is ruled by the MCA, which is responsible for the regulation of communication services in Malta.

The communications regulator (ie, the MCA) is a separate and distinct body from both the BA and the Malta Competition and Consumer Affairs Authority (MCCAA), the latter being the one responsible for antitrust regulations and ensuring 'the consistent application of competition and sectoral regulation'.

Appeal procedure

29 | How can decisions of the regulators be challenged and on what bases?

With regard to the MCA, an aggrieved individual or undertaking may file an application with the Administrative Review Tribunal (which replaced the former Communications Appeals Board). This tribunal is competent to review administrative acts of the public administration on points of law and points of fact. Moreover, unless any provision of the law does not provide for any time limit for the filing of an action for review by the tribunal, an action to review administrative acts is to be filed within a period of six months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier.

On the other hand, if a broadcasting licence is refused or suspended by the BA, an appeal may be filed before the Court of Appeal within 15 days from the date that the decision of the BA is served.

With respect to the competition and consumer affairs, appeals from the decision of the Director General (Competition) and Director General (Consumer Affairs) may be heard before the Competition and Consumer Appeals Tribunal.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

With respect to competition law developments within the communications and media sectors, it is interesting to note that on 24 May 2017, Apax Partners Midmarket SAS, Fortino Capital and Vodafone Group Plc announced an agreement to merge Melita Ltd and Vodafone Malta Ltd. Essentially, the aim was to merge the island's leading mobile operator (Vodafone Malta) with Malta's principal cable, broadband and tv provider (Melita Limited). However, in December 2017 it was announced by the parties to the proposed transaction that they were not able to entertain the MCCAA's requirements and therefore a decision was reached to terminate the transaction and consequently withdraw the notification.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

On 14 July 2014, the new Federal Telecommunications and Broadcasting Law and the new Law for the Public Broadcasting System of the Mexican State were published in the Official Mexican Gazette.

The Federal Telecommunications and Broadcasting Law and the Law for the Public Broadcasting System of the Mexican State supersede the previously enacted Federal Telecommunications Law and the Federal Radio and Television Law. Also, any provisions in the Law on General Communications that conflict with those in the Federal Telecommunications and Broadcasting Law will no longer be in effect.

The issuance of the new telecommunications and broadcasting legal framework derives from the constitutional reform published in the Official Mexican Gazette on 11 June 2013. This reform created the Federal Telecommunications Institute as an autonomous public agency, independent in its decisions and function, with its own legal status and resources, for the purpose of regulating and promoting competition and efficient development of the telecommunications and broadcasting sectors.

The Institute is responsible for the regulation, promotion and supervision of the use, enjoyment and exploitation of the radio spectrum, orbital resources, satellite services, public telecommunication networks, and broadcasting and telecommunications services, and has the authority to regulate access to active and passive infrastructure, as well as to other essential resources related to such industries.

The Federal Telecommunications Institute, which supersedes the previous Federal Telecommunications Commission, is the authority in terms of antitrust matters in broadcasting and telecommunications sectors, for which it shall exercise the powers, set forth in the Mexican Constitution, the Federal Telecommunications and Broadcasting Law and the Federal Competition Law.

According to the Federal Telecommunications and Broadcasting Law, the Institute may issue, among others, administrative regulations, licences and authorisations on telecommunications and broadcasting matters and decide on their renewal, modification or revocation, as well as authorising assignments or change of control, title holding or operation of the business entities related to such licences and authorisations. The Ministry of Communications and Transportation shall issue non-binding technical opinions on the matters mentioned above.

The Mexican Constitution and the Foreign Investment Law set forth that direct foreign investment is allowed up to 100 per cent for telecommunications and satellite services, and up to 49 per cent for broadcasting services, subject to a standard of reciprocity.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The Federal Telecommunications and Broadcasting Law sets forth the current licensing and authorisation regime, which consists of sole licence, licence to use, enjoy or exploit frequency bands of the radio spectrum, licence for the occupation and exploitation of orbital resources, and authorisations.

A sole licence shall be required to provide all kinds of telecommunications and broadcasting public services including public Wi-Fi services. The sole licence may be granted for commercial, public, private or social use, for a term of up to 30 years and may be extended for up to equal terms. Statutorily, the Federal Telecommunications Institute shall analyse and assess the documents submitted for this application within a term of 60 calendar days, and the Institute may request additional information when necessary. Once such term has expired and all requirements have been met, according to the Institute, the sole licence shall be granted.

On 25 November 2013, the Mexican government published an action plan called Estrategia Digital Nacional with the purpose of providing public broadband internet access through certain programmes, including the Mexico Conectado programme. Generally, the licence to provide such public Wi-Fi services shall be granted through a public bidding process.

The licence to use, enjoy or exploit frequency bands of the radio spectrum for a determined use and for the occupation and exploitation of orbital resources, shall be granted for a term of up to 20 years and may be extended for up to equal terms. When the exploitation of the services subject to such licence requires a sole licence, it may be granted in the same administrative act.

The licence for the use, enjoyment or exploitation of the radio spectrum for commercial, and in some cases for private, use shall only be granted through a public auction.

The radio spectrum licences for public or social use shall be granted through direct allocation for a term of up to 15 years and may be extended for up to equal terms. This licence shall not be for profit purposes, and licensees shall not share the radio spectrum with third parties. Upon meeting the requirements of this application, the Institute shall resolve accordingly within a term of 120 business days after submitting the application.

Authorisation from the Federal Telecommunications Institute is required to:

- incorporate and operate or exploit a telecommunications service provider without licensee status;
- install, operate or exploit terrestrial stations to transmit satellite signals;
- install telecommunications and broadcasting equipment that crosses the national borders;
- exploit landing rights; and

- temporarily use spectrum bands for diplomatic visits. The installation and operation of transmitting earth stations do not require any type of authorisation.

These authorisations shall be valid for a term of up to 10 years and may be extended for up to equal terms; the process to obtain such authorisation shall be resolved no later than 30 business days after submitting the application. Once this period expires with no resolution from the Institute, the authorisation shall be considered as granted.

According to the Federal Telecommunications and Broadcasting Law, current licensees may obtain authorisation from the Institute to provide additional services to those indicated in the original licence or to migrate to a sole licence.

The applicable payable fees regarding the licensing and authorisation regime are the following:

- sole licence to provide all kinds of telecommunications and broadcasting public services, 18,627.27 Mexican pesos, and for its renewal, 8,241.22 pesos;
- licence to use, enjoy or exploit the radio spectrum for a determined use or for the occupation and exploitation of orbital resources, 32,584.40 pesos, and for its renewal, 13,791.53 pesos;
- authorisation to exploit landing rights, 9,996.72 pesos, and for its renewal, 5,666.63 pesos;
- authorisation to incorporate and operate or exploit a telecommunications service provider without licensee status, 6,444 pesos, and for its renewal, 3,541.63 pesos;
- authorisation to install, operate or exploit earth stations to transmit satellite signals, 3,850.17 pesos, and for its renewal, 2,950.60 pesos;
- migrating to a sole licence, 12,395.69 pesos; and
- authorisation to provide an additional service to those indicated in the original licence that use the radio spectrum, 20,582.74 pesos, and that do not use the radio spectrum, 7,525.63 pesos.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Spectrum licences granted for commercial or private use shall contain, among other things, the permitted frequency band subject to the licence, usage terms and geographic coverage zone where they shall be used, enjoyed or exploited. Only the spectrum licences granted for commercial or, in some cases, for private use, may be assigned to third parties with prior authorisation from the Federal Telecommunications Institute. Licensed spectrum is generally not tradable.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The public telecommunications network licensees shall, among others:

- interconnect, directly or indirectly, their networks at the request of other licensees, and shall refrain from performing acts to delay, obstruct or cause service inefficiency;
- offer and allow effective number portability;
- refrain from charging long-distance communications to national destinations;
- provide non-discriminatory service to the public; and
- refrain from establishing contractual or any other type of barriers to prevent other licensees from installing or accessing telecommunications infrastructure in shared real estate properties.

Licensees of public telecommunications networks providing mobile services may freely sign agreements regarding visiting user services; the execution of such agreements shall be mandatory to preponderant economic agents in the telecommunications sector or agents with substantial power (as those terms are defined hereinafter).

Also, the Federal Telecommunications and Broadcasting Law sets forth that public telecommunications network licensees shall adopt a transparent approach to guarantee interconnection and interoperability of their networks with other licensees, in a non-discriminatory basis.

The Federal Telecommunications Institute is vested with the authority to determine the existence of preponderant economic agents in broadcasting and telecommunications sectors, and to impose the measures deemed necessary to allow competition and free market participation. These measures may include, among others, service offer and quality, exclusive agreements, usage limitations on telecommunications terminal equipment, asymmetric regulation on tariffs and network infrastructure, including unbundling of essential resources and accounting, functional or structural separation of such agents.

The Institute shall define economic agents who have, directly or indirectly, a national market participation of more than 50 per cent in telecommunications and broadcasting services, as preponderant. Market participation shall be measured by number of users, audience, network traffic or capacity used.

Furthermore, the Institute shall declare whether an economic agent has substantial power in telecommunications and broadcasting relevant markets, pursuant to the procedure established in the Federal Competition Law.

Also, the Federal Telecommunications Institute is empowered to declare, at any time, preponderant economic agents, as well as economic agents with substantial power in any of the relevant markets of the telecommunications and broadcasting sectors.

Preponderant economic agents in the telecommunication sector or agents with substantial power shall be subject, among other things, to the following obligations: to register with the Institute a list of unbundled interconnection services, to submit before the Institute at least once a year, to separate accounting and cost-accounting of interconnection services, and not to carry out practices that prevent or limit the efficient use of infrastructure devoted to interconnection.

For the purposes of promoting competition, the Institute has the authority to impose specific obligations and limitations on agents with substantial power on matters regarding information, quality, rates, commercial offers and billing.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

As mentioned in question 4, structural and functional separation has been introduced in the Federal Telecommunications and Broadcasting Law, thus the Institute may impose measures to promote competition in such sectors, including asymmetric regulation, such as unbundling of essential resources and functional or structural separation of preponderant economic agents.

The Law defines 'unbundling' as the separation of physical elements, including fibre optic, technical and logical, functions or services of the local networks of the preponderant economic agent in the telecommunications sector, or of the agent with national substantial power in the relevant market of access services to end users.

The Institute also has the authority to establish measures and impose specific obligations to allow the effective unbundling of the local networks of the preponderant economic agent in the telecommunications

sector or the agent with national substantial power in the relevant market of access services to end users.

Breaching or violating the Institute's resolutions regarding local network unbundling, divestiture of assets, rights or other necessary resources or breach of asymmetric regulation, may result in the revocation of the corresponding licences and authorisations.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The Mexican Constitution and the Federal Telecommunications and Broadcasting Law impose upon the state certain responsibilities regarding public telecommunications services. The state shall guarantee that telecommunication services, including broadband and internet, are provided under conditions of competition, quality, plurality, universal coverage, interconnection, convergence, continuity and free access.

The Mexican Constitution defines 'universal coverage' as general public access to telecommunications services that shall be subject to availability, affordability and accessibility conditions. Consequently, the Ministry of Communications and Transportation shall prepare annually a social coverage programme and a public connectivity programme. The purpose of these social programmes is to increase network coverage and penetration of telecommunications services in such priority areas as determined by the Ministry.

The sole licence and spectrum licence for commercial and private use shall consider, among others, the programmes and commitments regarding investments, quality, geographic, demographic or social coverage zones, public connectivity and contribution to universal coverage determined by the Institute in considering the annual programmes prepared by the Ministry.

In 2002, pursuant to the provisions set forth in the previous Federal Telecommunications Law, a telecommunications social coverage fund was created to ensure the provision of telecommunications services in Mexican territory and to offer funding to public telecommunications network licensees aimed at rural communities. To this end, the Mexican Congress approved funding for the Telecommunications Social Coverage Fund, which is governed by a technical committee composed of six federal government representatives.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The Federal Telecommunications and Broadcasting Law grants the Federal Telecommunications Institute the authority to create, update and manage the technical plan for number allocation. Such plan sets forth that licensees and authorised telecommunication service providers shall obtain number allocation by submitting an application before the Federal Telecommunications Institute. In general, such request shall be submitted at least three or four months (depending on the type of number allocation requested) before the date on which such number allocation is intended to be used. The process of obtaining number allocation shall be resolved no later than 60 business days after submitting the application. To determine whether the requested number allocation proceeds, the Federal Telecommunications Institute shall take into account the following: use given to previous number allocations, and number availability.

The Federal Telecommunications and Broadcasting Law sets forth that users have the right to keep the same telephone number when changing service provider. Effective portability shall be completed within a period not exceeding 24 hours upon submitting the corresponding application to the service provider. This provision entered into force on 10 February 2015.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Customers are entitled to the rights provided for in the Federal Telecommunications and Broadcasting Law, the Federal Consumer Protection Law and the Data Protection Law.

In general, customers have the right, among others, to execute and have knowledge of the commercial conditions set forth in the standard form contract registered before the Consumer Protection Agency. Such standard form contract shall be registered with the agency and shall comply with the provisions of the Federal Telecommunications and Broadcasting Law, the Federal Consumer Protection Law and other applicable provisions. Also, pursuant to the Data Protection Law, agreements shall comply with provisions thereof and customers shall be afforded the rights thereunder.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Licensed and authorised internet service providers shall comply with, among others, the following guidelines regarding network neutrality:

- free choice: users may access any content, application or service offered by the licensee or authorised service provider, within the legal applicable framework, without access being limited, deteriorated, restricted or discriminated against;
- non-discrimination: providers shall refrain from obstructing, interfering with, inspecting, filtering or discriminating among content, applications or services;
- privacy: providers shall maintain user privacy and network security; and
- transparency and information: providers shall publish on their web page the information regarding the features of the service offered, including traffic management policies and network administration authorised by the Institute, as well as the speed, quality, nature and guaranteed service.

Although 'zero rating' of data transmission could affect the guidelines and regulations on net neutrality mentioned above, and provided for in the Federal Telecommunications and Broadcasting Law, leading mobile telephone companies in Mexico have expanded their offerings of free navigation for social networks, messaging applications and other online services. The foregoing derives from the fact that the Federal Telecommunications Institute has not determined whether these offers affect or contravene the provision of the law. Bandwidth throttling is not permitted. On 28 June 2018, the Advisory Council of the Federal Telecommunications Institute issued a non-binding recommendation by means of which it urged all participants in the telecommunications sector to avoid practices such as 'zero rating' and 'bandwidth throttling'. The Federal Telecommunications Institute has announced that over the course of 2019, it will issue Guidelines for Networks Operations considering the neutrality principles provided under article 145 of the Federal Telecommunications and Broadcasting Law, which may include provisions in connection with the 'zero rating' practice.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

In Mexico, there are no laws or regulations that currently regulate digital platforms specifically. The Mexican FinTech Law was published in the Official Mexican Gazette on 9 March 2018 (effective as of the following day), with the purpose of regulating financial services provided by financial technology companies or institutions, their organisation and operation. Also, there are initiatives under discussion on this matter regarding regulating digital platforms that provide transportation services.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There is no specific regulation regarding NGA networks, nor are there government financial schemes to promote broadband penetration in Mexican territory; however, the Mexican Constitution and the Federal Telecommunications and Broadcasting Law set forth that the executive branch shall publish the broadcasting and telecommunications policies and perform actions to ensure broadband internet access in buildings and facilities of the federal government; each state shall do the same in their own jurisdiction. The project for the expansion and modernisation of the public network known as 'Red Troncal', which is expected to provide connectivity within all Mexican territory, will be awarded by the Mexican government to a private enterprise through a public bidding process (see question 27).

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

Public telecommunications network licensees and authorised entities shall keep a record and control of all communications made, in any form, to identify accurately the following information:

- name and address of user;
- type of communication (voice, voicemail, conference and data), additional services and messaging or multimedia services used;
- necessary information to trace and identify the origin and destination of mobile communications;
- necessary information to determine date, time and duration of the communication, as well as messaging or multimedia services;
- record of date and time of the first activation of the service and location tag from the activation of the service; and
- digital location of the geographic positioning of the corresponding telephone lines.

For these purposes, the licensee shall keep the information referred to in the paragraph above, during the first 12 months, in systems that allow real-time analysis and delivery to competent authorities through electronic media. Upon completion of said period, the licensee shall keep the information for an additional 12 months in electronic storage systems, in which case, delivery of such information to the competent authorities shall take place within 48 hours upon request notification.

In general, the protection, processing and control of personal data are governed by the Data Protection Law, which sets forth that processing of personal information is subject to the consent of the owner. Such consent may be implied, which is sufficient to process general personal data, whereas express consent is required to process financial information, and written consent is required to process sensitive information.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

In Mexico, there are no laws or regulations that currently regulate cybersecurity specifically. On 13 November 2017, the Mexican government published the Cybersecurity National Strategy. This strategy defines objectives and cross-cutting themes and reflects the guiding principles regarding the articulation of efforts from individuals, civil society, and private and public organisations in the field of cybersecurity. Additionally, in October 2017, the Mexican government created the Cybersecurity Sub-Commission, chaired by the Ministry of the Interior.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

In Mexico, there are no laws or regulations that currently regulate big data specifically; also, there have not been any relevant initiatives on this matter. Companies seeking to participate in big data operations shall ensure that their proposed activities comply with the Data Protection Law that is applicable to the data involved in their operations.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

In Mexico, there are no laws or regulations that currently regulate data localisation specifically. The Data Protection Law allows cross-border transfers of personal information, provided that the data subject gives informed prior consent.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

In Mexico, communications and media sectors fall under the same legal framework; therefore, issues regarding emerging trends and hot topics will be addressed in question 27.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

As mentioned in question 1, the key regulatory framework for the media sector in Mexico is comprised in the following statutes: the Federal Telecommunications and Broadcasting Law; the Law for the Public Broadcasting System of the Mexican State; and the Law on General Communications.

According to said regulatory framework, the Institute is vested with the authority to regulate, promote and oversee the use, enjoyment and exploitation of the radio spectrum, orbital resources, satellite services, public telecommunications networks, and broadcasting and telecommunications provisions.

As mentioned in the answer to question 2, the Institute is empowered to grant, revoke, renew or modify licences and authorisations on broadcasting and telecommunications sectors, as well as to authorise

assignments or changes of control of licensed and authorised individuals or business entities. The Institute also has the authority to regulate matters related to antitrust and fair trading in such sectors.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

According to the Foreign Investment Law, direct foreign investment is allowed up to 49 per cent for both broadcasting services, subject to a standard of reciprocity, and printing and publishing newspapers for distribution in Mexican territory.

There is no specific regulation regarding cross-ownership of newspaper companies and telecommunications and broadcasting companies. However, the Federal Telecommunications and Broadcasting Law sets limits regarding broadcasting and telecommunications licensees that prevent or restrict access to plural information in the same market or in the same geographic coverage zone.

For that purpose, the Institute shall order pay-television licensees to include in their service those channels that carry news or information programmes of public interest, to guarantee access to plural information in a timely manner. Also, pay-television licensees shall include at least three channels, in which the content is predominantly produced by national independent programmers, whose funding is mostly Mexican in origin.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

As mentioned in questions 1 and 2, pursuant to the Federal Telecommunications and Broadcasting Law, the Institute is empowered to grant the sole licence. The sole licence grants the right to provide, in a convergent manner, all kinds of public telecommunications and broadcasting services. The licensee requiring the use of frequency bands of the radio spectrum for broadcasting purposes shall obtain the appropriate licence separately.

The sole licence shall be granted for commercial, public, private or social use for a term of up to 30 years and may be extended for up to equal terms. The interested party in obtaining a sole licence shall submit a request containing, at least, the following information: name and address of the applicant, general characteristics of the project, and documents and information attesting their technical, legal and administrative conditions.

To obtain the sole licence from the Institute shall take a minimum of 60 calendar days upon submitting the application; however, the Institute may request additional information where necessary. Once the agency has concluded the analysis and assessment of the documents submitted for this application within such period, and all requirements have been met, the sole licence shall be granted.

The services provided by the licensees shall not grant the privilege or distinction to create any kind of discrimination, and in the case of individuals, all discrimination motivated by ethnic or national origin, gender, age, disability, social background, health condition, religion, sexual orientation, marital status or anything else that undermines human dignity or with the purpose of nullifying or impairing the rights and freedoms of individuals shall be prohibited.

The spectrum licence for broadcasting purposes shall be granted for a term of up to 20 years and may be extended for up to equal terms. This licence for commercial and, in some cases, for private use, shall be granted only through public auctions with prior payment of the corresponding fee.

When requesting a spectrum licence to provide broadcasting services that involves the participation of foreign investment, a prior and favourable opinion shall be required from the Foreign Investment Commission, and this agency shall verify the limits of foreign investment set forth in the Mexican Constitution and the Foreign Investment Law.

When granting a broadcasting licence, the Institute may consider the following factors, among others:

- economic proposal;
- coverage, quality and innovation;
- prevention of market concentration that conflicts with the public interest;
- possible entry of new competition into the market; and
- consistency with the licence programme.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

There is no specific regulation that restricts or limits the amount of local or foreign content broadcasted. However, the Federal Telecommunications and Broadcasting Law sets forth certain rules and incentives regarding content requirements that shall be followed by licensees.

Broadcasted programming shall promote, among other things: family integration; sound child development; artistic, historical and cultural principles; and equality between men and women.

For the purpose of promoting free and harmonious child and adolescent development, broadcasting aimed at this sector shall, among other criteria:

- broadcast programmes and information to support cultural, ethical and social principles;
- avoid content that stimulates or justifies violence; and
- foster interest in knowledge, particularly with regard to scientific, artistic and social matters.

Broadcasting licensees shall use the Spanish language in their transmissions; if transmissions are in a foreign language, subtitles or translation into Spanish shall be used. The use of foreign languages without subtitles and translation into Spanish may be authorised by the Ministry of Interior.

Pay television and audio licensees shall retransmit broadcasting signals of federal institutions free of charge, and shall reserve channels for the transmission of television signals from federal institutions, as indicated by the executive branch, pursuant to the following: one channel, when the service contains between 31 and 37 channels; two channels, when the service contains between 38 and 45 channels; and three channels, when the service contains between 46 and 64 channels. If there are more than 64 channels, the reserve shall increase by one channel for every 32 channels.

When the service contains up to 30 channels, the Ministry of Communications and Transportation may require that a specific channel devote up to six hours daily to transmit programming indicated by the Ministry of the Interior.

The incentives for licensees regarding local content programming are that those covering at least 20 per cent of their programming with national production may increase advertising time up to two percentage points, and those covering at least 20 per cent of their programming with national independent production may increase advertising time up to five percentage points.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The Federal Telecommunications and Broadcasting Law sets forth that broadcasting, pay television, programmers and signal operator licensees shall maintain a prudent balance between advertising and programming transmitted daily.

Broadcasting licensees shall apply, among others, the following rules: that in television stations, commercial advertising time shall not exceed 18 per cent of the total transmission time per channel, and in radio stations, commercial advertising time shall not exceed 40 per cent of the total transmission time per channel.

Pay television licensees shall transmit, daily and per channel, up to six minutes of publicity in every hour of transmission. For this purpose, publicity contained in retransmitted broadcast signals and own channel advertising shall not be deemed as publicity.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Broadcast television service licensees shall enable pay television service licensees to retransmit their signal, free of charge and in a non-discriminatory manner, within the same geographic coverage zone, in full, simultaneously and without any changes, including advertising, and with the same quality of the broadcast signal.

Pay television service licensees shall also retransmit the broadcast television signal, free of charge and in a non-discriminatory manner, within the same geographic coverage zone, in full, simultaneously and without changes, including advertising and with the same quality of the broadcasted signal, and shall include such retransmission in their services, with no additional cost.

Satellite pay television service licensees shall only retransmit broadcast signals with coverage of 50 per cent or more of the Mexican territory. All pay-television licensees shall retransmit broadcast signals by federal institutions.

Public telecommunications networks or broadcasting television licensees, declared by the Institute as agents with substantial power in either market or as a preponderant economic agent, shall not be entitled to the gratuitous rule of retransmitting signals and under no circumstance shall this be reflected as an additional cost of the services provided to users.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

There is no specific regulation regarding new media content; however, the right to information, expression and to receive content through public broadcasting services and pay television services is free, and shall not be subject to any judicial or administrative prosecution or investigation, nor any limitation or prior censorship, and shall be exercised in accordance with the provisions of the Mexican Constitution, international treaties and applicable laws.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The transition to digital broadcasting went into effect on 31 December 2015. Original licensees to use the 700MHz frequency band freed up by the switchover shall return them to the Mexican government.

At least 90MHz of spectrum freed up by the digital switchover shall be reallocated to the shared public telecommunications network known as Red Compartida.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The policy for the transition to Digital Terrestrial Television (DTT) sets forth the following rules, among others, regarding digital formats:

- A/53 ATSC is the transmission standard that shall be used by television licensees;
- television licensees transmitting DTT shall transmit at least one channel with A/53 ATSC; and
- fixed DTT services shall be transmitted in standard definition quality.

On 17 February 2015, the General Guidelines for Multi-Channelling Access were published in the Official Mexican Gazette for the purpose of regulating the authorisation and operating conditions for multi-channelling access. Such authorisation shall be granted by the Federal Telecommunications Institute.

Broadcasting licensees with access to television multi-channelling shall transmit at least one channel in high-definition quality, in accordance with the terms provided for in the policy for the transition to DTT.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

No specific media plurality rules are in place. The Mexican Constitution sets forth that the state shall guarantee that telecommunications and broadcasting services are provided, subject to, among other conditions, competition, quality and plurality.

Also, the Federal Telecommunications and Broadcasting Law sets forth provisions regarding cross-ownership and rights of the audience, in which plurality is contemplated. Such rights include providing the users with the benefits of culture, plurality and authenticity of the information.

As mentioned in question 18, this law requires certain conduct from licensees regarding cross-ownership, which shall not refrain or limit access to plural information.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

On 21 March 2018, the shared public telecommunications network known as Red Compartida started operations with more than 30 per cent coverage in the country. Coverage of 85 per cent of the country is expected by the end of 2021 and the project should be completed before January 2024 with 92.2 per cent of coverage. In addition, the guidelines of the public bidding for the expansion and modernisation of the public network known as Red Troncal were originally issued in June 2018. The expansion process's purpose is to transform the Red Troncal into a wider

network that provides national coverage. The execution date of the APP Agreement was scheduled to occur in November 2018, in accordance with the original calendar. Nevertheless, because of the recent change of administration in Mexico, the bid process and the calendar were amended so that the execution of the APP Agreement is now planned to occur in July 2019.

On 30 November 2018, US President Donald Trump, Canadian Prime Minister Justin Trudeau and former Mexican President Enrique Peña Nieto signed the US–Mexico–Canada Agreement (the USMCA) which will replace the North American Free Trade Agreement, subject to ratification by the respective Congresses. Chapter 18 of the USMCA includes several provisions for purposes of promoting the offer of telecommunications services in the market of the United States, Mexico and Canada, the latter by means of accomplishing better conditions through an enhanced and effective competition. For instance, article 18.4 of the USMCA specifies that each of the parties shall ensure that a supplier of public telecommunications services in its territory provides, directly or indirectly within its territory, interconnection with a supplier of public telecommunications services of another party, under no discriminatory terms, conditions and rates. Furthermore, the USMCA also provides that the telecommunications regulatory body of each of the parties (in case of Mexico, the Federal Telecommunications Institute) shall be vested with the authority to require interconnection at reasonable rates. Once ratified by the respective Congresses, the USMCA will become effective in Mexico and may result in the amendment of several provisions of the Federal Telecommunications and Broadcasting Law.

In February 2019, the Supreme Court declared as unconstitutional section IV of article 298 B of the Federal Telecommunications and Broadcasting Law. This section states that if a licensee breaches any of the provisions of the referred law, secondary regulations, administrative provisions, fundamental technical plans or any other general provisions issued by the Federal Telecommunications Institute, it will be subject to a fine for a minimum amount equivalent to 1 per cent of the licensee's revenues. The unconstitutional declaration was issued on the grounds that the referred fine results significantly excessive. As a result, in case any licensee incurs in such conduct, it may be subject to a fine that might be less to an amount equivalent to 1 per cent of its total revenues, depending on the type of breach.

Currently, no tax amendments or regulations for this specific sector are expected.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The Federal Telecommunications Institute is vested with the authority, as an autonomous body, independent in its decisions and functions, to regulate the communications and media sectors in Mexico. The Institute also has the authority in antitrust matters related to telecommunications and broadcasting sectors, in accordance with the Federal Competition Law.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

General rules and actions from the Institute may be challenged as a matter of law or procedure only through an indirect *amparo* trial and shall not be subject to injunction. This trial shall be heard by specialised judges and courts in matters regarding antitrust, telecommunications and broadcasting.

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Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

In August 2017, the Supreme Court ruled that the Federal Telecommunications Institute is the sole regulator in matters pertaining to telecoms and media. Such ruling resulted in the elimination of the zero interconnection rate exclusively for the benefit of one of the players in the industry, which was an asymmetric resolution imposed by the Congress (not by the Federal Telecommunications Institute) on the preponderant economic agent in the telecommunications industry. Subsequently, the Institute imposed a new interconnection rate for the benefit of such player as preponderant economic agent in the telecommunications industry. Such interconnection rate was applicable during 2018 and resulted in more than a 50 per cent decrease of the asymmetric regulation previously imposed on such preponderant economic agent. Competitors of the telecommunications preponderant economic agent have expressed their disappointment and dissatisfaction with such new interconnection rate. Additionally, in April 2018, the Supreme Court issued a second ruling that also resulted in the elimination of the zero interconnection rate, but this time also for the benefit of other entities.

Also, several telecommunications network operators complained to the Federal Telecommunications Institute about various defaults of the obligations imposed on the telecommunications preponderant economic agent, without any sanctions. On 27 February 2018, the Federal Telecommunications Institute approved the unbundling plan for the preponderant economic agent in the telecommunications industry, known as the Functional Unbundling Plan. According to this plan, the new company shall exclusively provide wholesale services.

Nigeria

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Nigeria's communications sector is primarily regulated by the Nigerian Communications Act (NCA) and the Wireless Telegraphy Act (WTA). The NCA established the Nigerian Communications Commission (NCC), which is charged with the responsibility of regulating the communications sector. The Minister of Communications Technology (the Minister) under the NCA is vested with the responsibilities of the formulation, determination and monitoring of the general policy for the communications sector in Nigeria with a view to ensuring, among other things, the utilisation of the sector as a platform for the economic and social development of Nigeria, the negotiation and execution of international communications treaties and agreements, on behalf of Nigeria, between sovereign countries and international organisations and bodies, and the representation of Nigeria, in conjunction with the NCC, at proceedings of international organisations and on matters relating to communications.

Under the NCA, the NCC is authorised to make and publish regulations and guidelines insofar as it is necessary to give effect to the full provisions of the NCA among other reasons.

The WTA sets out the framework for regulating the use of wireless telegraphy in Nigeria.

Foreign ownership restriction does not apply to the provision of communications services in Nigeria as a company with foreign ownership, as long as it is incorporated in Nigeria, can apply for a licence to provide communications services. Under the Nigerian Investment Promotion Commission Act, a foreign national can own up to 100 per cent of a business or can invest in any business except those on the negative list. Communications services are not on the negative list.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Under the NCA, there are two broad licensing frameworks:

- an individual licence, which is a type of authorisation in which the terms, conditions and obligations, scope and limitations are specific to the service being provided. Some of the activities authorised by an individual licence are: internet services, fixed wireless access, unified access services, electronic directory services, internet exchange, international gateway, international cable infrastructure and landing station services, collocation services and commercial basic radio communications network services; and
- a class licence, which is a type of general authorisation in which the terms and conditions or obligations are common to all licence holders. It requires only registration with the NCC for applicants to commence operation. Some of the services subject to a class licence are sales and installation of terminal equipment (including mobile cellular phones and HF, VHF/UHF radio, etc), repairs and maintenance of telecoms facilities, cabling services, telecentres, cybercafes and the operation of public payphones.

An entity intending to carry out a service subject to an individual licence shall apply to the NCC in the prescribed form upon the payment of the processing or administrative fee (usually 5 per cent of the licence fee) and the licence fee, while a person intending to operate under a class licence is to submit a registration notice in the prescribed form and a registration fee of 10,000 naira to the NCC.

In accordance with the NCA, a licence applicant must receive a response to the application within 90 days of submitting it. However, an offer letter is normally issued to applicants for a class licence if the application is complete. For individual licences, depending on the service and completeness of the required information, the conclusion of the process can take between four and 12 weeks.

The duration of a licence depends on the type of service authorised or spectrum licensed. The national carrier licence and international gateway licence are valid for 20 years. The unified access service licence is valid for a term of 15 years, while a digital mobile licence (DML) authorising the use of a specified mobile spectrum is valid for a term of 15 years. On the other hand, an internet service, paging, prepaid calling card and special numbering services licence are all valid for a term of five years. The licence fees payable depend on the type of service. Fees payable are fixed by the NCC and published on its website. In addition to licence fees, a prospective licensee is required to pay an administrative charge and, upon grant of the licence, a licensee shall pay an annual operating levy calculated on the basis of net revenue for network operators and gross revenue for non-network operators.

Fixed, mobile and satellite services are regulated and licensed under the NCA and to operate any of these services a licence must be obtained from the NCC. As these services are operator-specific, they fall under the individual licence category. In Nigeria, mobile telecommunications services are differentiated on the basis of whether the operator is authorised by a DML, fixed wireless access licence (FWAL) or unified access service licence. A DML authorises an operator to use appropriate equipment in a designated part of the electromagnetic spectrum and permits it to operate a network for the provision of public telecommunications services. In 2001, the NCC licensed four spectrum packages in the 900MHz and 1,800MHz bands to Mobile Telecommunications Limited (now ntel), Econet Wireless Nigeria Limited (now Airtel) and MTN Nigeria Communications Limited for use in the provision of digital mobile services. These were later joined by Etisalat and Globacom.

A FWAL authorises an operator to use appropriate equipment in a designated part of the electromagnetic spectrum for a term of five years (with renewal for a further five years) and permits it to operate a network for the provision of public telecommunications service. FWALs

are granted on a regional basis to reflect the 36 Nigerian states and the federal capital territory, with operators wishing to achieve national coverage required to obtain licences in each of the licensing regions. In 2002, the NCC in authorising FWAL services also offered 42MHz paired in the 3.5GHz band, and a total of 28MHz paired in the 3.5GHz band across the 37 licensing regions of Nigeria to 22 new licensees.

In 2007, the NCC introduced the unified access service licence (UASL) scheme and allocated 40MHz of paired spectrum in the 2GHz band in four equal blocks of 10MHz paired spectrum. On successful allocation of the spectrum, the allottees were issued with a spectrum licence and where necessary, a UASL. The UASL authorises the holder to provide both fixed and mobile services including voice and data, and imposes special conditions requiring its holders to build and operate a telecommunications network to provide voice telephony, video services, multimedia services, web browsing, real-time video streaming, video surveillance, network gaming, email, SMS, file transfer, broadband data and location-based services, and other services that may be authorised, and that the 3G network be built and operated according to certain defined technical standards.

In the broadband ecosystem, a wholesale wireless access service licence (WWASL) authorises the holder to construct, maintain, operate and use a network consisting of a mobile communication system, a fixed wireless access telecommunications system, or a combination of any of these systems comprising radio or satellite or their combination, within Nigeria, deployed for providing point-to-point or switched/unswitched point-to-multipoint communications for the conveyance of voice, data, video or any kind of message. The WWASL also authorises the holder to construct, own, operate and maintain an international gateway, while an infrastructure company licence authorises the holder to provide and operate on a wholesale basis an open access metropolitan fibre network within a designated geographical area in Nigeria, in particular among other things, to construct, maintain and operate fibre optic network facilities.

Satellite services in Nigeria are normally authorised by a global mobile personal communications by satellite (GMPCS) licence. In addition to the general conditions applicable to fixed, mobile and satellite services, a GMPCS licence imposes special conditions requiring the holder to, among other things, construct, operate, implement and maintain a GMPCS land earth station for the purposes of establishing, maintaining, validating and controlling command functions and communication with the space segment of a GMPCS system; deploy a GMPCS network for the purpose of providing one-way or two point-to-point or point-to-multipoint communications for the conveyance of voice data or video; sell telecommunications components and accessories used or intended for use in the installation of GMPCS terminals; install GMPCS terminals; and provide activation, billing, maintenance and related management services for subscribers to GMPCS services. Licensing of satellite services continues to be by way of a separate licence.

Public Wi-Fi services are authorised under the Regulatory Guidelines for the Use of 2GHz ISM Band for Commercial Telecoms Services. Under these Guidelines, Wi-Fi hotspots shall, inter alia, be deployed in the 2GHz ISM band and must be registered and authorised by the NCC. In addition, commercial Wi-Fi hotspot operators must hold a licence for the provision of internet services.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Yes, in line with the Frequency Management Policy, an applicant for a commercial frequency licence from the NCC must also hold a commercial operating licence from the NCC (or must have submitted an application for an operating licence to the NCC). The commercial operating licence authorises the provision of a specific service for which the spectrum is intended to be used. An applicant for a frequency licence may also be given a frequency reservation pending the outcome of the processing of his or her commercial operating licence. However, the frequency licence will be subject to successful approval of the commercial licence.

Pursuant to the provision of Spectrum Trading Guidelines issued by the NCC, radio frequency spectrum is tradable, provided such transactions comply with the eligibility criteria set out in the Guidelines

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The NCA imposes on the NCC the obligation to promote fair competition in the communications industry and to protect communications services and facilities providers from misuse of market power or anticompetitive and unfair practices by other service or facilities providers or equipment suppliers. The NCA also authorises the NCC to determine whether a licensee is in a dominant position in any aspect of the Nigerian communications market. In April 2013, the NCC undertook a detailed study of the level of competition in the Nigerian communications market and identified the following broad-based markets subject to ex-ante competition regulation:

Market segment	Sub-segment
Voice	• Mobile telephony (including messaging); and • fixed-line telephony.
Data	• Fixed data, retail data transmission services and leased lines; and • mobile data (eg, dongles, data cards, tablets, internet through mobile phone connections, for example, 3G, GPRS, Edge).
Upstream segments	• Spectrum; • tower sites; • network equipment; • wholesale broadband or internet access; and • wholesale leased lines and transmission capacity.
Downstream segments	• Handsets/devices (includes the device operating system); and • applications/content (includes m-commerce).

The identified markets were further divided into wholesale and retail sub-segment as follows:

	Upstream segment	Voice segment	Data segment	Downstream segment
Services provided as wholesale by an operator to other operators	Wholesale broadband access	Wholesale voice termination on voice network		
Services provided as wholesale by an operator to other operators	Wholesale leased lines and transmission capacity	Wholesale voice termination on fixed network		
Service provided as retail by each individual operator to its consumers		Retail voice access on mobile networks	Retail broadband or internet access on mobile devices	Supply of applications, content and devices

	Upstream segment	Voice segment	Data segment	Downstream segment
Service provided as retail by each individual operator to its consumers		Retail access on fixed networks	Retail broadband or internet access on mobile devices at fixed location	
Service provided as retail by each individual operator to its consumers			Retail leased lines	

This study also determined that MTN held and Globacom and MTN collectively held significant market power for the mobile voice and upstream segment respectively. As a result of this conclusion, the NCC (in exercising its power to remedy anticompetitive practices under the Competition Practice Regulations) imposed on MTN as the operator with significant market power in the mobile voice market the following obligations:

- accounting separation;
- collapse of on-net and off-net retail tariff;
- submission of required details to the NCC; and
- a determination of the pricing principle to address the rates charged for on-net and off-net calls for all operators in the mobile voice market.

In respect of the joint dominance collectively held by Globacom and MTN in the market for upstream segment, the NCC imposed the following obligations on both operators: a price cap for wholesale services and a price floor for retail services as to be determined by the NCC on a periodic basis; accounting separation; and submission of required details to the NCC.

In October 2014, the NCC reviewed its direction requiring MTN to collapse its on-net and off-net retail tariff, by approving a stipulated differential for MTN's on-net and off-net call charges.

In October 2015, the NCC, in a bid to ensure sustainability, growth and development of the data service market, approved the withdrawal of floor price for data services. The NCC stated that it would restore the floor price if any distortion is observed within the Nigerian Communication market.

Regulations 10 to 12 of the Telecommunications Networks Interconnection Regulations 2007 (the Interconnection Regulations) made by the NCC under its rule-making powers, impose certain obligations on a licensee declared by the NCC to be dominant in one or more communications market relating to interconnection. A dominant licensee is required to:

- meet all reasonable requests for access to its telecommunications network, in particular access at any technically feasible points;
- adhere to the principle of non-discrimination with regard to interconnection offered to other licensed telecommunications operators, applying similar conditions in similar circumstances to all interconnected licensed operators providing similar services and providing the same interconnection facilities and information to other operators under the same conditions and quality as it provides for itself and affiliates and partners;
- make available on request to other licensed telecommunication operators considering interconnection with its network, information and specifications necessary to facilitate conclusion of an agreement for interconnection including changes planned for implementation within the next six months, unless agreed otherwise by the NCC;
- submit to the NCC for approval and publish a reference interconnection offer, describing interconnection offerings, broken down according to market need and associated terms and conditions including tariffs; and
- provide access to the technical standards and specifications of its telecommunications network with which another operator shall be interconnected.

In addition, the dominant licensee shall, except where the NCC has determined interconnection rates, set charges for interconnection on objective criteria and observe the principles of transparency and cost orientation. The burden of proof that charges are derived from actual costs lies with the licensed telecommunications operator providing the interconnection service to its facilities. The dominant licensee may set different tariffs, terms and conditions for interconnection of different categories of telecommunications services where such differences can be objectively justified on the basis of the type of interconnection provided.

A dominant licensee shall also:

- give written notice of any proposal to change any charges for interconnection services in accordance with the procedure set out in the guidelines on interconnection adopted by the NCC and the provisions of the operating licence;
- offer sufficiently unbundled charges for interconnection, so that the licensed telecommunications operator requesting the interconnection is not required to pay for any item not strictly related to the service requested;
- maintain a cost accounting system which, in the opinion of the NCC, is suitable to demonstrate that its charges for interconnection have been fairly and properly calculated, and provides any information requested by the NCC;
- make available to any person with a legitimate interest on request, a description of its cost accounting system showing the main categories under which costs are grouped and the rules for the allocation of costs to interconnection. The NCC, or any other competent body independent of the dominant telecommunications operator and approved by the NCC, shall verify compliance of the dominant telecommunications operator with the cost accounting system and the statement concerning compliance shall be published by the NCC annually.

Lastly, if interconnection services are not provided through a structurally separated subsidiary, the dominant licensee shall:

- keep separate accounts as if the telecommunications activities in question were in fact carried out by legally independent companies, so as to identify all elements of cost and revenue with the basis of their calculation and the detailed attribution methods used;
- maintain separate accounts in respect of interconnection services and its core telecommunications services and the accounts shall be submitted for independent audit and thereafter published; and
- supply financial information to the NCC promptly on request and to the level of detail required by the NCC.

As at the time of writing, the NCC has engaged a consultant to undertake a study of the level of competition in the telecoms industry (2010–2015) and where necessary propose regulatory obligations to be imposed on dominant operators in each of the identified telecommunications markets. The outcome of the study is still awaited as at this time.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Under the Competition Practice Regulations, the NCC in issuing a direction to remedy an abuse of a dominant position or an anticompetitive practice may direct a licensee to make changes in actions or activities including structural separation of services or businesses, as a means of eliminating or reducing the abusive or anticompetitive practice. Pursuant to the provisions of the recently enacted Federal Competition and Consumer Protection Act 2018 (the Competition Act), the Competition Tribunal is empowered upon receipt of a monopoly report from the Competition Commission to order the division of any undertaking by the sale of any part of its shares, assets or otherwise.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The Universal Service Provision (USP) Fund established by the NCA is geared towards promoting the widespread availability of network services and applications services by encouraging the installation of network facilities and the provision of network services, application services and broadband penetration in unserved, underserved areas or for underserved groups within the community.

The USP Fund is financed from monies appropriated to the USP Fund by the National Assembly; contributions from the NCC based on a portion of the annual levies paid by licensees; and gifts, loans, aids and such other assets that may, from time to time, specifically accrue to the USP Fund. In practice, the USP secretariat created by the NCC is responsible for implementing and executing USP programmes and USP projects. The USP board supervises and provides broad policy directions for the management of the USP Fund.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The Numbering Regulations 2008 (the Numbering Regulations) regulates the allocation (or assignment) of numbers. In this regard, the Numbering Regulations provides a regulatory framework for the control, planning, administration, management and assignment of numbers, pursuant to section 128(1) of the NCA. Under the Numbering Regulations, the holder of a communications licence may apply in the prescribed form to the NCC to be assigned numbers (in a set of blocks) by stating:

- the name and contact details of the applicant;
- the licence under which the application is made;
- the services intended to use the assignment;
- the geographic areas for completing calls or transmitting messages to the numbers to be included in the assignment;
- the quantity of numbers requested for inclusion in the assignment;
- any particular blocks requested for inclusion in the assignment;
- the utilisation of the assignment predicted for 12 months after the grant of the assignment;
- the current utilisations of existing assignments to the applicant for the intended services;
- an indication of which, if any, portions of the application are confidential to the NCC;
- any other information that the applicant considers necessary or appropriate to justify the application; and
- any other information that the NCC may, from time to time, require to assess the application.

In making a decision on an application for an assignment, the NCC shall take into account factors including but not limited to:

- any earlier decisions about assignments to the applicant or other licensees for service similar to the intended services;
- any statements in the licence of the applicant about eligibility for providing services or being assigned numbers;
- the usage conditions;
- the digit analysis capabilities of communications networks that are operated in Nigeria;
- the utilisation of the assignment predicted for 12 months after the grant of the assignment over the next three years;
- the current utilisations of existing assignments to the applicant for the intended services; and
- the quantity and fragmentation of blocks that have not been assigned; and whether or not the licensee has failed to fulfil an obligation in the Numbering Regulations or the National Numbering Plan, or any other numbering related obligation under the Act, has committed a contravention of its regulatory obligation.

The Nigerian Mobile Number Portability Business Rules and Port Order Processes (the MNP Business Rules) sets out the regulatory, legal and technical framework for implementing MNP in Nigeria. The NCC has also issued the Mobile Number Portability Regulations 2014 to provide a regulatory framework for the operation of MNP in Nigeria. Under the terms of the MNP Business Rules, MNP is obligatory for all mobile network operator and is currently available across only Global Systems for Mobile networks (although number portability is intended to be implemented in phases that will cover Code Division Multiple Access, fixed networks and location).

Under the MNP Business Rules, MNP is 'recipient led'. To initiate a porting request, the recipient operator would receive a porting request from a subscriber to port their number. The recipient operator, number portability clearing house and donor operator then exchange messages to validate the porting request. Porting is free and is normally completed within 48 hours.

A port request, however, can be rejected for a number of reasons including where the number is not included in the Nigerian numbering plan, where the number was ported within the last 90 days, where the number is not registered in the subscriber information database, and where the number is already subject to a pending port request.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Yes, the NCA requires each licensee to prepare a consumer code for their respective customers and such consumer code shall be subject to prior approval and ratification by the NCC. The individual consumer code governs the provision of services and related consumer practices applicable to the licensee. Where the NCC designates an industry body to be a consumer forum, any consumer code prepared by such industry body shall be subject to prior approval and ratification by the NCC. A consumer code prepared by a consumer forum, the NCC or licensees shall as a minimum contain model procedures for:

- reasonably meeting consumer requirements;
- the handling of customer complaints and disputes including an inexpensive arbitration process other than a court;
- procedures for the compensation of customers in case of a breach of a consumer code; and
- the protection of consumer information.

The Consumer Code of Practice Regulation (the Consumer Code Regulations) also requires that the individual consumer code after its approval by the NCC be published in at least two national newspapers (or as the NCC may direct), and the approved individual consumer code shall become applicable from the date of its publication. The Consumer Code Regulations is under review by the NCC, and may be amended by the Draft Consumer Code of Practice Regulations 2018 if eventually approved.

The competition provisions of the NCA and the provisions of the Competition Practice Regulations may limit the application of certain customer terms and conditions deemed to be anticompetitive in the communications sector. Also, the Regulations on Enforcement Processes require every licensee to submit the contents and representations contained in any promotions of products or services to the NCC for its prior approval. Failure to obtain the required approval shall constitute a contravention under these Regulations.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Under the extant regulatory framework, there are no express restrictions or limitations regarding an internet service provider's (ISP) freedom to control or prioritise the type or source of data that it delivers. The guidelines for the provision of internet service, the licence for the provision of internet service, the UASL and the WWASL do, however, impose some obligations on the ISP and the holders of these licences. An ISP and the respective licensees are required not to show (whether in respect of charges or other terms or conditions applied or otherwise) undue preference to or to exercise undue discrimination against any particular person in respect of the provision of a service or the connection of any equipment approved by the NCC.

The NCC has developed a Draft Internet Industry Code of Practice (the Draft Code). With respect to net neutrality, the Draft Code inter alia:

- prescribes measures that seek to guarantee the rights of internet users to an open internet;
- imposes specific transparency obligation on Internet Access Service Providers (IASPs) with respect to performance, technical and commercial terms of its internet access service in a manner that is sufficient for consumers and third parties to make informed choices regarding their uses of such services;
- imposes a positive obligation on IASPs when providing internet access service, to treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment;
- bars IASPs from blocking lawful content on the internet, unless under condition of reasonable network management;
- bars IASPs from degrading or impairing lawful internet traffic unless under condition of reasonable network management;
- bars IASPs from engaging in paid-prioritisation; and
- sets out circumstances that warrant the use of reasonable network management practices.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Except for the Framework and Guidelines to the Use of Social Media Platforms in Public Institutions issued by the National Information Technology Development Agency (NITDA) in January 2019, which provides guidance on the use of social media within a public institution's communications environment, there is no specific legislation or regulation in respect of digital platforms.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

Yes, in addition to the application of regulatory obligations ordinarily applicable to other category of communications licensees, the holder of the WWASL will be required by the licence to, among other obligations, roll out services at least as follows: three state capitals in year one, four additional state capitals in year two, six additional state capitals in year three, 12 additional state capitals in year four, 12 additional state capitals in year five and two-thirds of all local government headquarters in the remaining licence period. Also, a WWASL requires the holder to supply customer premises equipment adapted in such a way as to reasonably accommodate the needs of hearing-impaired individuals.

Notwithstanding the application of the USP fund for the facilitation of broadband penetration in Nigeria, there are other NCC-initiated projects such as the Wire Nigeria project aimed at facilitating the rollout of fibre optic cable infrastructure in which subsidies based on per kilometre of fibre and incentives to encourage rapid deployment of non-commercially viable routes are provided. The State Accelerated Broadband Initiative is aimed at stimulating the demand for internet services and to drive affordable home broadband prices where subsidies on terminal equipment based on broadband infrastructure deployed in state capitals and urban and semi-urban centres are provided to operators. Also, under the ongoing Open Access Model for Next Generation Fibre Optic Broadband Network (Open Access Model), there shall be a one-off government financial support to facilitate the rollout of the infrastructure companies. This financial support will be based on meeting pre-identified targets at certain points in time during the rollout of the broadband infrastructure phase.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

Part VI of the General Code (in appendix I of the Consumer Code Regulations) sets out the responsibilities of a licensee in the protection of individual consumer information. These responsibilities stipulate that a licensee may collect and maintain information on individual consumers reasonably required for its business purposes and that the collection and maintenance of such information on individual consumers shall be:

- fairly and lawfully collected and processed;
- processed for limited and identified purposes;
- relevant and not excessive;
- accurate;
- not kept longer than necessary;
- processed in accordance with the consumer's other rights;
- protected against improper or accidental disclosure; and
- not transferred to any party except as permitted by any terms and conditions agreed with the consumer, as permitted by any permission or approval of the NCC, or as otherwise permitted or required by other applicable laws or regulations.

Licensees are required by the Consumer Code Regulations to adopt similar provisions guaranteeing the same level of protection (or higher) in the production of their own individual consumer codes.

In addition, licensees are required by these responsibilities to meet generally accepted fair information principles including:

- providing notice as to what individual consumer information they collect, and its use or disclosure;
- the choices consumers have with regard to the collection, use and disclosure of that information;
- the access consumers have to that information, including to ensure its accuracy;
- the security measures taken to protect the information; and
- the enforcement and redress mechanisms that are in place to remedy any failure to observe these measures.

Lastly, it is also pertinent to state that recently there have been indications that the NCC intends to enact through administrative rulemaking, a data protection regulation for the telecoms sector because of the inadequacy of the Consumer Code Regulations (and the General Code) to offer an adequate level of privacy protection to telecoms subscribers. If this regulation is eventually enacted, it will prevail over the privacy protection provisions in the General Code, and may indeed offer a stricter level of protection for the data subject.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Yes. The Cybercrime Act 2015 provides a unified and comprehensive legal framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria. The Cybercrime Act 2015 also ensures the protection of critical national information infrastructure and promotes cybersecurity and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights.

Additionally, the Cybercrime Act 2015 and General Code (applicable in the telecommunications sector) make provision for the application of cybersecurity techniques as it relates to the protection of personal or customer information or when acting as a data controller. In this regard, section 38(5) of the Cybercrime Act requires telecommunication service providers to take appropriate (cybersecurity) measures to safeguard the confidentiality of the data retained, processed or retrieved for the purpose of law enforcement. The General Code in paragraph 35(2)(d), in turn, requires licensees to include in their fair information principles the (cyber)security measures taken to protect customer information, and the enforcement and redress mechanisms that are in place to remedy any failure to observe these measures.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no specific legislation on big data. However, the Cybercrime Act 2015 has as one of its objectives the promotion of cybersecurity and the protection of computer systems and networks, electronic communications, data and computer programs, intellectual property and privacy rights. The Cybercrime Act does not use the term 'big data' but uses the term 'data', which it defines as 'representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer'. The Cybercrime Act imposes a number of obligations relating to the retention and confidentiality of data on any public or private entity that provides to users of its services the ability to communicate by means of a computer system, electronic communication devices, mobile networks and entities that process or store computer data on behalf of such communication service or users of such service. We are unaware of any enforcement initiatives that have occurred since the enactment of the Cybercrime Act.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Yes. The Guidelines on Nigerian Content in ICT issued by NITDA requires ICT companies and data and information management firms in Nigeria to host, respectively, all subscriber and consumer data and government data locally within the country and further provides that they shall not for any reason host any government data outside the country without an express approval from NITDA and the Secretary to the government of the Federation.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Draft Code

As stated earlier, the NCC has developed a Draft Internet Industry Code of Practice. The Draft Code has the following objectives:

- protect the right of internet users to an open internet;
- provide clear guidelines to IASPs on the use of traffic management practices;
- outline the obligations of IASPs in relation to the protection of consumers' personal data;
- outline the obligations of IASPs in the handling of offensive and potentially harmful content, and the protection of minors online;
- ensure adequate safeguards are put in place by IASPs against unsolicited internet communications; and
- establish best practices for internet governance in Nigeria, in line with emerging issues and global trends.

The Draft Code applies to all IASPs operating in Nigeria. The NCC has conducted a public inquiry in respect of the Draft Code, and as at the time of writing the outcome of this inquiry is still expected.

Framework for determining cost-based pricing for retail broadband, data services and mobile termination rates in Nigeria

In 2017, the NCC engaged KMPG and Pricewaterhouse Cooper to respectively develop a framework for determining cost-based pricing for retail broadband, data services and mobile termination rates in Nigeria. With respect to mobile termination rates, the report was released in 2018 wherein the NCC determined:

- the termination rates for voice services provided by one operator in Nigeria to another operator in Nigeria for terminating a call in their network are as follows:
  - generic 2G/3G/4G operators – 3.90 naira per minute;
  - new entrant (LTE) operators – 4.70 naira per minute; and
  - clearing houses – payment and volume discounts as negotiated.
- the international termination rate of 24.40 naira determined in 2016 will continue to apply until a new Determination is made.

This Determination became effective from 1 July 2018 and remains valid and binding on licensees until further reviewed by the NCC. As at the time of writing, the report on pricing for retail broadband data services is still being awaited.

Expiration of the Broadband Plan

The National Broadband Plan expired in 2018. We expect that the incoming Minister and the NCC will draft a new national broadband plan in the coming months.

Enactment of Competition Act

The Competition Act was signed into law on 30 January 2019 and provides that its provisions shall override the provisions of any other law including the Investment and Securities Act that relates to matters of competition and consumer protection. Insofar as the Competition Act applies to an industry or sector of an industry that is subject to the jurisdiction of another regulator under any law, in matters or conducts relating to competition and consumer protection, the provisions of the Competition Act shall be construed as establishing a concurrent jurisdiction between the Competition Commission and the relevant government agency, and the Competition Commission shall have precedence over and above the relevant government agency. In addition, the Competition Act requires that all appeals or request for review of the exercise of the power of any sector-specific authority shall first be heard and determined by the Competition Commission before such appeals can lie before or be determined by the Competition Tribunal.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The National Broadcasting Commission Act (the NBC Act) regulates the broadcasting sector in Nigeria. The NBC Act also established the National Broadcasting Commission (NBC), which is responsible for regulating the broadcasting industry. There is also the Broadcasting Code (BC), which was made by the NBC under the NBC Act. The BC represents the minimum standard for broadcasting in Nigeria.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Yes, the ownership of broadcasting networks is restricted. The NBC Act requires the NBC to satisfy itself when granting a broadcasting licence that the applicant can demonstrate to the satisfaction of the NBC that he or she is not applying on behalf of any foreign interest. The NBC is also prohibited from granting a licence to either a religious organisation or a political party. Foreign investors can therefore participate in broadcasting activities, provided that the majority of shares in a broadcasting company are held by Nigerians.

In terms of cross-ownership in the broadcasting industry, the NBC Act provides that a person is prohibited from having 'controlling shares in more than two of each of the broadcast sectors of transmission'. Apart from the provisions in the NBC Act, there are no regulations regarding cross-ownership of media companies.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

To operate a radio, sound, television, cable or satellite station in Nigeria, an application in the prescribed form is addressed to the Director-General (DG) of the NBC requesting approval to purchase a set of application forms indicating the licence category and proposed location. If granted, the applicant would be required to complete the application form and submit it to the DG. The form is accompanied by a certificate of incorporation, a certified copy of the company's memorandum and articles of association, an engineering design of systems including feasibility study, a letter of undertaking to abide by the terms of the licence and a letter of reference from the company's bankers.

Section 9(1) of the NBC Act sets out the criteria used by the NBC in the grant of a broadcast licence and these require the applicant to be a corporate body registered in Nigeria or a broadcasting station owned, established or operated by the federal, state or local government. The NBC is also required to satisfy itself that the applicant is not applying on behalf of any foreign interest. If the NBC is satisfied with the application, it will make recommendation through the Minister of Information to the President for the grant of a licence.

The licence fee for an initial term of five years is as follows:

Type		Fee (naira)
Category A	Radio	20 million
	Open TV	15 million
	Cable TV	10 million
Category B	Radio	15 million
	Open TV	11.25 million
	Cable TV	7.5 million
Direct broadcast satellite (single channel)		10 million
Direct-to-home (multi-channel)		25 million

There is no specific timescale for the grant of a licence.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The NBC Act and the BC regulate the broadcasting of programmes and the minimum local and foreign programme content. Foreign content is permissible provided it is essential and relevant to the entertainment, education and information of Nigerians. The BC stipulates that a broadcaster relaying foreign content shall ensure the proper acquisition of broadcasting rights to such content. In addition, with the exception of special religious and sports programmes or events of national importance, Nigerian broadcasters shall not link up live to foreign programmes.

A licensee is required to adhere to a minimum of 60 per cent local content for open television and 80 per cent local content for radio. The cable and satellite retransmission stations are mandated to reflect a minimum of 20 per cent local content in their programming. In addition, the NBC issued a regulation on local content in February 2009, which requires all terrestrial television stations operating in the country to air only Nigerian local content during peak family viewing hours, between seven o'clock and ten o'clock in the evening.

There are no specific regulations on broadcast of foreign programmes to mobile devices.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast media advertising is regulated by the NBC Act, the BC, the Advertising Practitioners Council of Nigeria Act (the APCON Act), the Nigerian Code of Advertising Practice and Sales Promotion and the APCON Vetting Guidelines (the Vetting Guidelines). Under the Vetting Guidelines, any broadcast media advertising material must be submitted for approval by the Advertising Standards Panel before it is aired.

By the provisions of the BC, all regulations governing broadcasting including the rules on programmes and advertising shall apply to internet broadcasting.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Yes, under the BC a terrestrial subscription service is required to carry a free-to-air terrestrial public broadcasting station in its area of coverage free of charge. A satellite subscription service is also required by the BC to carry a free-to-air national public broadcasting station free of charge.

At present, there is no mechanism for financing these obligations in Nigeria.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

Internet radio and broadcasting streaming signals from and into Nigeria requires a licence from the NBC. In practice, most of the internet radio stations operating in Nigeria already have a radio (or other broadcast) licence issued by the NBC. The BC also requires the local content for this category of licence to be 80 per cent. The regulations and conditions governing news, programmes, advertising and sponsorship in relation to other forms of broadcasting or broadcast licence are also applicable to internet broadcasting.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

In 2016, the federal government proposed 20 June 2017 as the new date when Nigeria will switch over from analogue to digital broadcasting. As at the time of writing, the digital switchover has been rolled-out in phases in parts of Nigeria, and is ongoing.

The NCC is proposing that the radio frequencies freed up should be reallocated to mobile broadband.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

Yes. Broadcasters are required to use the spectrum assigned to them in accordance with the technical specifications and conditions specified in their licence.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There are no express provisions respecting media plurality under the NBC Act. However, the BC does incorporate some provisions that appear to support media pluralism. For instance, the BC provides that panellists in discussion programmes are expected to reflect various viewpoints, and for political broadcasts equal airtime shall be provided to all political parties or views, with particular regard to the duration and the particular time within which such programmes can be broadcast during political campaign periods.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

As stated earlier, the digital switchover has been rolled-out in phases in parts of Nigeria, and is ongoing as at time of writing. We expect that the process will continue in the coming months.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

As stated earlier (in questions 1 and 17) the NCC and the NBC respectively regulate the communications and broadcast sectors, while the Competition Commission created by the recently enacted Competition Act is the lead antitrust regulator in Nigeria, and is a separate institution from the NCC and NBC. The Competition Commission is charged with the administration and enforcement of the provisions of the Competition Act including the approval of mergers and the protection and promotion of consumer interests.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Decisions of federal regulatory and administrative bodies such as the NCC and the NBC are subject to judicial review by the Federal High Court (FHC) and can be litigated up to the Supreme Court. Decisions can be challenged on the grounds of lack of authority, breach of the rules of natural justice, error of law on the face of the record and that the decision has been obtained by fraud. Under the NCA, a person dissatisfied or whose interest is adversely affected by any decision of the NCC must comply with a two-stage process within the stipulated time frame, before proceeding to the FHC for a review of the decision of the NCC. A person who is dissatisfied with the decision of the NCC will request that the NCC provide a statement giving the reason for the decision. Upon receipt of the NCC statement of reasons, the person may ask the NCC in writing for a review of its decision, specifying the reason and basis for its request. The NCC, upon receipt of the written submission, shall meet to review its decision, taking into consideration the submission of the dissatisfied person. It is only after the person has exhausted this two-stage process that he or she can proceed to court for a review of the NCC's decision.

With respect to the Competition Commission, the Competition Act provides that an appeal against the decision of the Commission shall lie to the Competition Tribunal.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The Competition Act was signed into law on 30 January 2019. The Competition Act in its explanatory memorandum seeks to provide for

the establishment of the Competition Commission and the Competition Tribunal, and for the promotion of competition in the Nigerian markets at all levels by eliminating monopolies, prohibiting abuse of dominant market positions and penalising other restrictive trade and business practices. Accordingly, the Competition Act regulates three business practices, namely: restrictive agreements; abuse of a dominant; and mergers. Secondly, business practices deemed to be anticompetitive are subject to review by the Competition Commission. Lastly, the Competition Act creates a number of enforceable consumer rights.

The Competition Act provides that its provisions shall override the provisions of any other law that relates to matters of competition and consumer protection. Insofar as the Competition Act applies to an industry or sector of an industry that is subject to the jurisdiction of another regulator under any law, in matters or conducts relating to competition and consumer protection, its provisions shall be construed as establishing a concurrent jurisdiction between the Competition Commission and the relevant government agency (including NCC and NBC), and the Competition Commission shall have precedence over and above the relevant government agency. In addition, the Competition Act requires that all appeals or request for review of the exercise of the power of any sector specific authority shall first be heard and determined by the Competition Commission before such appeals can lie before or be determined by the Competition Tribunal. As at the time of writing, both the Competition Commission and Competition Tribunal are yet to be constituted.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The fundamental law for the electronic communications sector is the Electronic Communications Law, approved by Law No. 5/2004, of 10 February (as amended). This law transposes into national legislation Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC, all of the European Parliament and of the Council, of 7 March, and Directive 2002/77/EC of the Council, of 16 September.

The most relevant amendment was approved, with republication of the entire body of the law, by Law No. 51/2011, of 13 September, to transpose the 2009 EU Regulatory Framework for Electronic Communications (the 2009 EU Regulatory Framework). The current version of Law No. 5/2004, as republished by Law No. 51/2011, results from the following amendments: Law No. 10/2013, of 28 January; Law No. 42/2013, of 3 July; Decree-Law No. 35/2014, of 7 March; Law No. 82-B/2014, of 31 December; Law No. 127/2015, of 3 September; Law No. 15/2016, of 17 June; and Decree-Law No. 92/2017, of 31 July, which implemented Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks.

However, the Electronic Communications Law is not the only key law in this sector. Several aspects are regulated in separate legal instruments:

- Decree-Law No. 123/2009, of 21 May (as amended by Decree-Law No. 258/2009, of 25 September, Law No. 47/2013, of 10 July, Law No. 82-B/2014, of 31 December and Decree-Law No. 92/2017, of 31 July) governs the construction of infrastructure suitable for the accommodation of electronic communications networks, the deployment of electronic communications networks and the construction of infrastructure for telecommunications in housing developments, urban settlements and concentrations of buildings;
- the regime applicable to radio communications networks and stations is established in Decree-Law No. 151-A/2000, of 20 July (as amended);
- the regime for essential public services and the means of user protection is regulated under Law No. 23/96, of 26 July (as amended);
- the regimes governing the placing on the market, setting into service and use of radio equipment were approved by Decree-Law No. 57/2017, of 9 June; and
- Law No. 99/2009, of 4 November (as amended by Law No. 46/2011, of 24 April) determines the legal framework applicable to administrative offences committed within the communications sector, including infringement of legal and regulatory provisions.

The Electronic Communications Law further assigned ANACOM as the national regulatory authority.

Nowadays, there are no restrictions on foreign ownership or investment in the electronic communications sector in Portugal, with the exception of the limits to cross-ownership (which are not exclusive to foreign investors) that apply to television and radio activities.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The provision of electronic communications networks and services, whether publicly available or not, is only subject to a general authorisation. This regime determines that the execution of activities in the electronic communications sector does not depend on any prior decision or authorisation by ANACOM but is subject to a mere declaration of commencement of activity signed by the provider, after which the network or service provider may commence its activities.

Nevertheless, the use of spectrum frequencies and number allocation depends on the award of individual rights of use, which shall be conducted by ANACOM.

The award of spectrum frequencies depends on the type of frequency and can be performed through procedures of direct acquisition, public tender and auction. All frequencies and their respective types are listed in the National Frequency Allocation Board (QNAF).

The right to use the frequency is granted for a 15-year period, renewable for an equal period of time. The rights of use of frequencies should be awarded within 30 days or, when a competitive or comparative procedure is required (tender or auction), within the deadline set for that procedure, not exceeding eight months. The payable fees depend on the form of the award.

Regarding mobile networks, 2G (GSM) and 3G (UMTS) were granted by means of tender offer and 4G (LTE) was granted by auction in 2011.

In accordance with QNAF, public Wi-Fi services are exempt from licensing.

The individual right of use of numbers is granted on a direct basis and shall be awarded within 15 days. The payable fees are determined by ANACOM. The allocation to operators is executed upon request or public tender or auction (applicable only if the relevant number is of exceptional economic value) and shall take up to 30 days.

Regarding the applicable fees for the authorisation and licensing process, Administrative Rule No. 1473-B/2008, of 17 December (amended and republished by Administrative Rule No. 296-A/2013, of 2 October and Administrative Rule No. 378-D/2013, of 31 December) approves the value of each payable fee. Fees are due in respect of:

- the issuance by ANACOM of statements supporting rights (issued after the receipt of the declaration of commencement of activity);
- the exercise of the activity by a supplier of electronic communications networks and services (the regulatory fee);

- the allocation of rights of use of frequencies and numbers; and
- the use of frequencies and numbers.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Over the past nine years, ANACOM has been adopting a more flexible approach with regard to spectrum use, in accordance with the technological neutrality principle underlined in the 2009 EU Regulatory Framework, without neglecting acquired rights.

The spectrum licences generally specify the permitted use. All three licence types – 2G, 3G and 4G – specify the permitted use along with the allocated frequencies.

The licensed spectrum is both tradable and assignable. It is therefore possible to trade or assign licensed spectrum between companies, according to the rights granted in the licence, as long as ANACOM has not prohibited such transfer in respect of specific rights.

In case of transfer, the holders of rights of use shall give ANACOM prior notification of their intention to transfer such rights, as well as the conditions under which they intend to conduct the relevant transfer. ANACOM is, within 45 working days, entitled to prohibit the transfer or assignment if the following conditions are not met:

- the transfer or lease does not distort competition, namely owing to the accumulation of rights of use;
- frequencies are efficiently and effectively used;
- the intended frequency use complies with what has been harmonised through the application of Decision No. 676/2002/EC of the European Parliament and of the Council of 7 March (the Radio Spectrum Decision) or other EU measures; or
- the restrictions set forth in the law in respect of radio and television broadcasting are safeguarded.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

The communications markets subject to ex-ante regulation are those mentioned in the European Commission Recommendation 2007/879/EC, of 17 December 2007 on relevant product and service markets, and also in the European Commission Recommendation 2014/710/EU, of 9 October 2014 (replacing the 2007 Recommendation).

The remedies ANACOM may impose are the following:

- transparency in relation to the publication of information;
- non-discrimination in relation to the provision of access and interconnection and the respective provision of information;
- accounting separation in respect of specific activities related to access and interconnection;
- price control; and
- cost accounting.

ANACOM shall impose the appropriate and justified obligations according to the nature of the identified problem.

The table opposite lists the applicable ex-ante regulatory obligations for each of the currently regulated markets. (References to the PT Group refer to the Portuguese historical operator, Portugal Telecom, currently named MEO.)

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Yes. Under the 2009 EU Regulatory Framework, the Electronic Communications Law foresees functional separation as an exceptional remedy, in the event that the imposition of all general ex-ante obligations has proven to be insufficient to ensure effective competition. ANACOM shall notify the European Commission, with proper justification, to impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity. On the other hand, the same undertakings may decide voluntarily to promote functional separation: the split of the wholesale unit shall be subject to prior notification to ANACOM so it can assess the effect of the intended transaction on existing regulatory obligations, by means of a coordinated analysis of the different markets related to the access network.

The Electronic Communications Law also determines, under the EU Regulatory Framework of 2002 and Directive No. 1999/64/EC, of the Commission, of 23 June 1999, that undertakings providing public electronic communications networks shall operate their cable television network through legally independent bodies if:

- they are controlled by a member state or enjoy special rights;
- they have a dominant position in a substantial part of the market in respect of the provision of public electronic communications networks and of publicly available telephone services; or
- they operate a cable television network created through the enjoyment of special or exclusive rights in the same geographic area.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The universal service obligations in Portugal currently include the following services:

- connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location (including dial-up access to internet);
- provision of a comprehensive directory and telephone directory enquiry service; and
- adequate provision of public pay telephones.

In April 2019, ANACOM approved a Recommendation to the Portuguese Government regarding the designation process for new universal service providers, considering the forthcoming expiry of the current contracts and the fact that a legislative amendment to the rules on universal service provision is still pending. According to ANACOM's Recommendation, universal service providers are to be designated on a national basis (covering the entire Portuguese territory) for each of the services comprised in the universal service obligations, but these should cease to include provision of a comprehensive directory and telephone directory enquiry services. In addition, ANACOM has recommended that the following round of contracts should have a limited duration of one year, with a possible extension for one additional year, and that the reference amounts for the price of each of the specific services should be significantly reduced.

Related to the connection service, there is an additional obligation to provide a special price package for pensioners and retired users.

There are no universal service obligations associated with the provision of broadband.

Markets	Operators concerned	Key remedies
Wholesale call termination on individual public telephone networks provided at a fixed location (Market 1 under the 2014 Recommendation).	MEO and all operators providing call termination on individual public telephone networks at a fixed location	• To meet reasonable requests for access; to enable network access in fair and reasonable conditions; 10 days to justify the denial of access; (applies to MEO only) present a proposal for IP interconnection architecture; • non-discriminate in quality of service, delivery time and tariff; • transparency in the publication of information, including reference proposals; publish information about network configuration, interconnection points and prices; six months' pre-warning regarding interconnection changes; two months' pre-warning regarding other changes with impact to operators; (applies to MEO only) publish an interconnection reference offer; (applies to MEO only) publish prices, terms and conditions, technical information and information on quality of service; and • price control obligation; to set cost-oriented prices; set the same maximum termination price at local and single transit interconnection.
Wholesale for voice call termination on individual mobile networks (Market 2 under the 2014 Recommendation).	MEO Vodafone NOS	• To meet reasonable requests for access; • non-discrimination in the access and interconnection offer and in the respective information provision; • transparency in the publication of information; and • price control.
Wholesale local access provided at a fixed location (Market 3a under the 2014 Recommendation).	MEO	• To meet reasonable requests for access to network and use of specific network resources; • non-discrimination; • transparency; • accounting separation; • price control; and • availability of accounting records.
Wholesale central access provided at a fixed location for mass-market products (Market 3b under the 2014 Recommendation).	MEO	• Applicable only to non-competitive areas: • to meet reasonable requests for access to network and use of specific network resources; • non-discrimination; • transparency; • accounting separation; • price control; and • availability of accounting records.
Wholesale high-quality access provided at a fixed location (Market 4 under the 2014 Recommendation).	MEO	• To meet reasonable requests for access; (applies to MEO only) must include in the new reference offer any viable proposal form the operators; ensure capacity expansion in CAM (Mainland, Azores and Madeira) and inter-island circuits, including capacity up to 10Gbps; to negotiate in good faith with undertakings requesting access and not to withdraw access to facilities already granted; provide for the possibility of co-installation in MEO's sites; ensure the interconnection between co-installed operators in the MEO sites; • provide alternative operators with the information, resources and services on time, on a basis and with a quality not inferior to that offered to MEO's retail and corporate departments; practice at wholesale level deadlines for delivery and repair of contractual damages shorter than equivalent deadlines in retail markets; not to make fidelity, quantity or capacity discounts without grounds; ensure specific quality of service objectives for CAM and inter-islands circuits; not to convey to the retail department or to the Group's own companies information about the leased lines service to other operators; and publish performance levels as set in the determination of 11 March 2009; • publish and maintain on the website the (new) Ethernet and digital leased lines reference offer; clearly identify the changes made to the offer at each change; 30-day pre-warning regarding changes to the offer; 60-day pre-warning regarding structural changes in the support network or relevant technologies or services in the offer; change the offer within 90 calendar days after notification of the final decision on this market analysis; • costing system and accounting separation; • to set prices on the basis of cost orientation; reduce by at least 66 per cent the price of traditional CAM circuits up to 2Mbps; provide annual data on the total costs and capacity contracted by operators and that used and reserved by MEO itself; and • availability of accounting records (Customs Accounting System), including data regarding revenue from third parties.
Wholesale for call origination on the public telephone network provided at a fixed location (Market 2 under the 2007 Recommendation).	Companies of the PT Group that operate in this market	• To meet reasonable requests for access; • •non-discrimination in the offer of access and interconnection and respective provision of information; • transparency in the publication of information, including reference proposals; • price control obligation and cost accounting; and • accounting separation and costing accounting system regarding specific activities related to access or interconnection (applies to PT Group only).

The Electronic Communications Law determines that if ANACOM verifies that the universal service has net costs and finds such costs to be an excessive burden, it is incumbent upon the government, following the request of the respective provider, to arrange for appropriate compensation taken either from public funds or by sharing the net cost with other undertakings providing publicly available electronic communications networks and services on national territory.

Law No. 35/2012, of 23 August (amended and republished by Law No. 149/2015, of 10 September) establishes that the net costs of universal service are financed by the Fund for the Universal Service, and determines that the financing of the universal service's net costs shall be based on its sharing among undertakings providing public communications networks or publicly available electronic communications services on national territory that, in the calendar year to which the net costs relate, registered an eligible turnover in the electronic communications sector, which gives them a weight equal to or higher than 1 per cent of the sector's overall eligible turnover. The Fund shall be deemed to constitute autonomous property, without legal personality, and is managed and legally represented by ANACOM.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The Electronic Communications Law states that the rights to use numbers are awarded to companies that offer or use electronic telecommunication networks or services. Those rights are allocated by open, objective, transparent, non-discriminatory and proportionate procedures. As a general rule, the rights to use numbers are awarded by ANACOM within 15 days after the submission of the request by the operators. In the case of rights of use for numbers of exceptional economic value, ANACOM can grant them through competitive or comparative selection procedures, including by tender or auction.

All providers of publicly available telephony services (ie, both fixed and mobile) must offer number portability and are obliged to cooperate to enable such portability and ensure minimum quality standards. With the new rules implemented by the revised 2009 EU Regulatory Framework, the right to portability was reinforced by reducing the porting deadline to one working day.

Number portability is managed by an independent entity (the Reference Entity).

The Electronic Communications Law determines that number portability must be required by the subscriber of the new service provider, accompanied by the note of termination of the former subscription agreement. The new service provider engages the former provider by electronic request, indicating three portability windows in which the portability can be executed. The former provider can deny portability only in very restricted cases, acceptance of the request being the general rule.

There is a special concern in the regime in preventing any unwanted portability, which is why both service providers involved have a particular responsibility to ensure that the person requesting portability is the legal subscriber of the contract associated with relevant number.

Portability is also governed by ANACOM Regulation No. 58/2005, of 18 August, amended and republished by Regulation No. 114/2012, of 13 March, and, more recently, by Regulation No. 257/2018, of 8 May, and by Regulation No. 85/2019, of 21 January.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Yes. The Electronic Communications Law establishes a number of mandatory rules applicable to the contracts concluded with consumers and end users.

The contract must specify, among other conditions, the following:

- services provided;
- the minimum service quality levels offered;
- information as to whether or not access to emergency services is provided;
- details of prices;
- payment methods offered and any charges or penalties due because of the choice of each payment method;
- the duration of the contract and the conditions whereby the contract or services may be renewed, suspended or terminated;
- explicit indication of the subscriber's willingness in respect of the inclusion or not of their respective personal information in a public directory; and
- the type of action that might be taken by the provider in reaction to network security or integrity incidents.

Regarding the duration of the contract, the Electronic Communications Law (as amended by Law No. 15/2016, of 17 June) determines that companies that provide electronic communication services must offer contracts without a binding period, as well as contracts with six and 12-month binding periods. The binding period in contracts for the provision of electronic communications services concluded with consumers may not exceed 24 months, unless in specific cases, such as customer consent and equipment upgrade.

In parallel with the telecom regulation, customer terms and conditions are also subject to the regime on standard contractual clauses, approved by Decree-Law No. 446/85, of 25 October, and general consumer protection regulations.

Providers are obliged to communicate their standard contracts to ANACOM, which is entitled to determine that operators cease or adapt immediately the use of standard contracts where it verifies the failure to comply with legal rules.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights. This regulation imposes the obligation on internet services providers to treat all traffic equally, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used. More recently, the Body of European Regulators for Electronic Communications sought to clarify the rules of Regulation (EU) 2015/2120, by publishing in August 2016 some guidelines on the implementation by national regulators, including ANACOM, of European Net Neutrality Rules.

In accordance with this regulation and guidelines, zero-rating is not prohibited. However, a zero-rating offer where all applications are blocked once the data cap is reached except for zero-rated applications would infringe the regulation. In addition, bandwidth 'throttling' is permitted only as an extraordinary measure imposed by law, by a court

decision or by a public authority. It is also permitted in other cases, such as, to preserve the integrity and security of the network and to prevent impending network congestion.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no specific Portuguese legislation or regulation relating to digital platforms (besides the law applicable to information society services and e-commerce – Law No. 7/2004, of 7 January, as amended). However, in the context of the EU, in 2015 the European Commission conducted a public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. More recently, in June 2016, the European Commission at a Communication entitled 'A European agenda for the collaborative economy' encouraged member states to regulate the activities provided through digital platforms.

Accordingly, digital platforms relating to gambling and crowdfunding are regulated by the legislation applicable to the activities provided through these platforms. Portugal is also discussing the approval of a regulation for digital platforms used for transportation activities.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are no specific regulatory obligations.

However, in the context of the deployment of NGA networks, the regime governing the construction of infrastructure suitable for the accommodation of electronic communications networks and the access to such infrastructure by telecommunications operators has been approved by Decree-Law No. 123/2009, of 21 May, as amended and republished by Law No. 47/2013, of 1 July and by Decree-Law No. 92/2017, of 31 July, which transposes Directive 2014/61/EU, of the European Parliament and of the Council, of 15 May 2014.

There is no government financial scheme to promote basic broadband. However, in 2008, following a public tender, four contracts were executed between the Portuguese state and two private companies, regarding NGA broadband penetration in rural areas. In all cases, the public investment is less than 50 per cent of the total amount necessary, and such public investment was funded with EU funds. The contracts were executed after the corresponding European Commission decision regarding state aid rules.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

Yes. In the electronic communications sector, the processing of personal data is regulated by Law No. 41/2004, of 18 August (which transposes into national legislation Directive 2002/58/EC of the European Parliament and the Council, of 12 July, concerning the processing of personal data and the protection of privacy in the electronic communications sector). This law was amended by Law No. 46/2012, of 29 August (which transposes the part of Directive 2009/136/EC amending Directive 2002/58/EC of the European Parliament and of the Council, of 12 July). This regime specifies and complements the provisions of Law No. 67/98, of 26 October (the Law on Protection of Personal Data). The retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks is ruled by Law No. 32/2008, of 17 July (which transposes into national legislation Directive 2006/24/EC of the European Parliament and of the Council, of 15 March 2006), and by Administrative Rule No. 469/2009, of 6 May, amended and republished by Administrative Rule No. 694/2010, of 16 August.

Law No. 41/2004 determines that undertakings providing electronic communications networks or services shall ensure the inviolability of communications and the related traffic data by means of a public communications network and publicly available electronic communications services. Listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by anyone other than users is prohibited without the prior and explicit consent of the users concerned, except for cases provided in the law.

To this effect, providers of publicly available electronic communications services shall take appropriate technical and organisational measures to ensure the security of their services, in cooperation with the provider of the public communications network.

There is an obligation of the providers of publicly available electronic communications services to notify the National Data Protection Commission (CNPD) of any personal data breach. Where the personal data breach is likely to adversely affect the personal data of the subscriber or user, providers of publicly available electronic communications services shall also notify the latter of said breach.

In the scope of this law, the CNPD and ANACOM are entitled to:

- draw up regulations on practices to be adopted to comply with this law;
- give orders and make recommendations;
- publish on the respective websites any codes of conduct they are aware of; and
- publish on the respective websites any other information deemed to be relevant.

The Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive No. 95/46/EC (General Data Protection Regulation) was approved and is currently in force. The same changes to the national regulation are also expected to insure conformity with the General Data Protection Regulation.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Article 54-A to 54-G of the Electronic Communications Law (as amended by Law No. 51/2011) enshrines obligations applicable to operators providing public communications networks or publicly available electronic communications services, including to take appropriate technical and organisational measures to appropriately prevent, manage and reduce the risks posed to security of networks and services, aiming in particular to prevent or minimise the impact of security incidents on interconnected networks, at national and international level, and users, and to notify ANACOM of a breach of security or loss of integrity with a significant impact on the operation of networks or services. ANACOM is entitled to approve and impose technical implementing measures on operators that provide public communications networks or publicly available electronic communications services.

It is incumbent on ANACOM to:

- inform the national regulatory authorities of other member states and the European Network and Information Security Agency (ENISA) where this is deemed to be justified on account of the scale or seriousness of the breach of security or loss of integrity notified by the operators;

- inform the public, by the most appropriate means, of any breach of security or loss of integrity or to require operators to do so, where it determines that disclosure of the breach is in the public interest; and
- submit once a year a summary report to the European Commission and ENISA on the notifications received on breach of security or loss of integrity, by the operators, and the action taken thereon.

Recently, in March 2019, ANACOM enacted a specific regulation governing in greater detail technical and implementation aspects of the above legal provisions regarding the security and integrity of electronic communications networks and services.

Additionally, Law No. 109/2009, of 15 September (which transposes into national legislation the Framework Decision No. 2005/222/JHA of the Council of the European Union, of 24 February 2005), establishes substantive and procedural criminal provisions, as well as provisions on international cooperation in criminal matters related to the field of cybercrime.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no specific legislation or regulation relating to or addressing the issues arising from big data.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no laws or regulations that require data to be stored locally.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The preparation of the procedures applicable to 5G services, including spectrum issues, is expected to be addressed by ANACOM in the next two years.

On the other side, regulation of over-the-top services remains a hot topic, as well as the implementation of Regulation (EU) No. 2015/2120 of the European Parliament and of the Council of 25 November 2015, including 'zero rating' and bandwidth 'throttling'.

ANACOM has been monitoring zero-rating and similar offers made available by mobile internet access providers and has recently concluded that some of these commercial offers were in breach of the Telecom Single Market Regulation and the Roaming Regulation, as regards the rules governing net neutrality and roaming. Accordingly, during the course of 2018, several operators were required by ANACOM to amend commercial service offers.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The media sector in Portugal is regulated by the Regulatory Authority for Media (ERC), a public entity created by Law No. 53/2005, of 8 November.

There are three key legal frameworks, one for each of the different areas:

- the Television Law No. 27/2007, of 30 July, as amended by Law No. 8/2011, of 11 April and Law No. 40/2014, of 9 July;
- the Radio Law No. 54/2010, of 24 December, as amended by Law No. 38/2014, of 9 July; and
- the Press Law No. 2/99, of 13 of January, as amended by Law No. 18/2003, of 3 February and Law No. 19/2012, of 8 May.

On the subject of changes, Law No. 78/2015, of 29 July, introduced several amendments regarding the promotion of transparency in the ownership, management and financial resources of undertakings pursuing social communication activities, addressing the concerns of information and conflict of interests in these areas and amending the Press Law, the Television Law and the Radio Law.

Law No. 33/2016, of 24 August, supports the expansion of the provision of digital terrestrial television (DTT) programme services, ensuring proper technical conditions and price control.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

With regard to television and radio, although no foreign ownership restrictions apply, there are some restrictions on investment.

In television, no company can directly or indirectly own more than 50 per cent of the licences issued for free-to-air television. Political parties or associations, local authorities or their associations, trade unions, or employers or professional associations are not allowed to perform or finance, either directly or indirectly, television activity.

In radio broadcasting, ownership is restricted to 10 per cent of the local radio licences issued in Portuguese territory, or a number of radio licences equal to 50 per cent or more of the radio stations with the same territorial coverage and using the same frequency band. Therefore, companies cannot directly or indirectly hold more than the above-mentioned percentages.

The Press Law does not specifically regulate ownership or control, so general competition law rules apply.

The ownership or control of media companies, including radio, television and newspapers, can also be restricted within the context of concentrations between undertakings: general rules of competition law apply, and the decision of the Competition Authority (ADC) is subject to a prior opinion of the ERC, which shall be mandatory if the ERC considers that the concentration harms media plurality.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Under both the Television and Radio Law, television and radio broadcasting shall only be performed by companies that pursue such activities as their main corporate object.

The right to broadcast television and radio is subject to the award of a licence by the ERC by means of a public tender launched by a decision of the government. It is incumbent upon the ERC to grant, renew, alter or repeal licences or authorisations to pursue media broadcasting activity. The fees and timescale associated with such activity depend on the terms provided in the public tender.

The spectrum allocation for the performance of television and radio broadcasting is one of ANACOM's statutory goals, which ANACOM must execute having considered the ERC's opinion. The use of the spectrum intended for broadcasting unrestricted free-to-air television programme services and radio is made under the QNAF.

The conditioned access television programme services that require a subscription (pay-TV) do not use spectrum and therefore such broadcasting is only subject to obtaining a licence granted by the ERC.

Concessions for public media broadcasting services, both radio and television, shall be granted for a 15-year period, subsequently renewable for equal periods of time, under the terms of the concession contract to be executed between the state and the concessionaire.

In general, fees payable to the ERC in respect of the exercise of the media activity were approved by Decree-Law No. 103/2006, of 7 June (amended by Decree-Law No. 70/2009, of 31 March, and rectified by the Statement of Rectification No. 36/2009, of 28 May). The amounts of the fees due in relation to the issuance of a licence by the ERC are defined in Administrative Rule No. 136/2007, of 29 January (as amended by Decree-Law No. 70/2009, of 31 March) and Administrative Rule No. 785/2009, of 27 July.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The Television Law mandates that operators who provide television programme services with national coverage shall reserve a majority proportion of their transmission time for European works, excluding the time appointed to news services, sports events, games, advertising, teleshopping and teletext services.

With respect to local requirements, the Radio Law also determines that the music programming of radio programme services must include Portuguese music with a minimum quota ranging from 25 to 40 per cent. Aside from these specific obligations, there is also a general rule for the media sector to extend television programming to regional or local contents, broadcast information with a specific interest for the audience's geographic scope, and promote typical values of regional or local cultures.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Broadcast media advertising is regulated by the Advertising Code (approved by Decree-Law No. 333/90, of 23 October, as amended), more specifically, by the Television and Radio Law, with regard to advertising in television and radio, respectively.

The Advertising Code regulates sensitive areas such as advertising of alcoholic beverages and tobacco, and false advertising. The Code states that advertising must respect human dignity and must not promote discrimination or any harmful behaviour.

With regard to television, the amount of spot advertisement and teleshopping in every two-hour period shall not exceed 10 per cent or 20 per cent of the airtime, depending on the type of programme service: 'pay-TV' services or free-to-air television programme services, unrestricted or subject to a subscription. This limit excludes announcements made by television operators in connection with their own programmes and ancillary products directly linked to those programmes, and also public service or public interest announcements and humanitarian appeals broadcast free of charge, as well as the identification of sponsorships. Windows devoted to teleshopping shall be of a minimum uninterrupted duration of 15 minutes. Currently, a proposal exists for a Directive (amending Directive No. 2010/13/EU, of 10 March), which stipulates that the daily proportion of television advertising spots and teleshopping spots within the period between 7 am and 11 pm shall not exceed 20 per cent.

The Radio Law also predicts similar restrictions. The inclusion of advertising in the broadcast programmes must not affect the integrity of the programmes and shall take into account programmes' breaks, their duration and nature. The broadcasting of advertising material shall not exceed 20 per cent of the total licensed programme services airtime and sponsored programme slots must make explicit reference to the sponsorship at the beginning of the programme.

The Press Law does not specifically regulate advertising in the sector, so general rules apply.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

ANACOM shall impose must-carry obligations upon undertakings providing electronic communications networks used for the distribution of radio or television broadcasts where such networks are used by a significant number of end users as the principal means of receiving radio and television broadcasts. Those obligations shall be to transmit radio and television broadcast channels and services as specified by ANACOM, under the law. Must-carry obligations shall be imposed only where they are necessary to meet clearly set purposes of general interest and shall be reasonable, proportionate, transparent and subject to periodical review.

Under the Television Law, the provider of the digital terrestrial broadcasting network is obliged to reserve transmission capacity for television programme services broadcast by terrestrial means in analogue mode provided by operators holding licences or concessions in force at the date of entry into force of said law (which are the three free-to-air Portuguese TV operators with national coverage); under Law No. 33/2016, of 24 August, the same provider is also obliged to reserve capacity for two thematic programme services produced by the public service provider.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

In general, new media content and its delivery are not regulated differently from traditional broadcast media, with few exceptions.

The Television Law excludes from its subject the concept of television communication services operating on individual demand.

Content provided through non-linear broadcasting services (such as video-on-demand from the linear broadcasting service) would normally be regulated in the same manner as other broadcasting services, but is, in fact, subject to a lighter regulatory regime. This regime includes basic rules on protection of minors, the prevention of racial hatred and the prohibition of certain types of publicity.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The provision of the digital broadcasting service was awarded to MEO by tender offer in 2008. The switchover from analogue to digital was concluded in 2012, as scheduled, with all remaining transmitters and relays still broadcasting analogue signals being switched off on 26 April that year. As of 12.30 pm on that day, all digital television signals being broadcast in Portugal became digital.

The radio frequencies freed up by the switchover were primarily allocated to the 4G (LTE) mobile network.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

ANACOM and the ERC are in charge of the regulation of the spectrum used in media services and they authorise the use of the frequencies and supervise broadcasters' fulfilment of their obligations. These obligations can include almost every aspect of the spectrum use, from technical requirements to general obligations related to the broadcasting activities.

ANACOM also has powers to modify, revise and even impose new conditions grounded on public interest reasons. Currently there are no specific regulations restricting spectrum use concerning multichannelling, high-definition and data services, other than the restrictions established in the licences or arising from legal must-carry obligations.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There is no specific process for ex-ante assessment or regulation regarding media plurality, besides the intervention of ERC in the context of concentrations between undertakings.

Both ANACOM and the ERC may contribute, within the scope of their remit, to ensure the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as pluralism. Specifically in the television, radio and press sectors, the ERC is incumbent to guarantee information that observes pluralism, accurateness and independence, and to ensure diverse and plural programming, including during peak viewing periods: these powers are used within the supervision of the sector, including in the scope of administrative infringements and the licensing administrative procedures.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

Following the Decision (EU) No. 2017/899 of the European Parliament and of the Council on the use of the 470–790MHz frequency band in the EU, ANACOM is still currently preparing its proposal to the Portuguese government. In this context the harmonised technical conditions and a common deadline for effective use of the 700MHz band and long-term use of the sub-700MHz frequency band for audiovisual distribution, including its availability for DTT, is being considered.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

ANACOM is the regulator in the electronic communications and postal sector and the media sector is regulated by the ERC. The antitrust regulator is a different body, the ADC, responsible for the implementation of the general framework for competition's protection.

The general framework for protection of competition, approved by Law No. 19/2012, of 8 May, determines that when a market subject to sectoral regulation is concerned, the ADC shall request the prior opinion of the respective regulatory authority before applying any measure. The sectoral regulator shall then have a maximum period of five working days to issue its opinion.

In general, the relevant legislation for each sector defines mechanisms to avoid conflicting jurisdiction. Both ANACOM and the ERC organic statues determine that ANACOM and the ERC shall cooperate and collaborate with the ADC, while respecting the corresponding assignments in matters relating to the implementation of the legal framework for competition in the communications and media sectors.

For the purpose of cooperation between sectoral regulators and the ADC in the application of competition law, the relevant entities have entered into bilateral cooperation agreements, such as the Protocol for Cooperation executed on 26 of September 2003 between ANACOM and the ADC and the Protocol signed on the 27 of June 2007 between ANACOM and the ERC.

To ensure the consistent enforcement of competition and sectoral regulation, the applicable legislation sets out that the violation of sectoral regulation as an administrative offence is subject to the application of fines, which can be up to €5 million pursuant to the Electronic Communications Law, €375,000 under the Television Law and €100,000 under the Radio Law.

In addition, ANACOM and the ERC can suspend and even revoke licences in case of severe offences.

The administrative offences in the media sector are also weighted by the ERC in the process of licence renewal, which can cause an adverse effect resulting in the denial of the request for renewal.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Administrative decisions of the sectorial regulators (such as regulatory acts, ex-ante obligations, licences) can be challenged before the administrative courts.

The application of fines as a result of an administrative offence can be contested at the Court of Competition, Regulation and Supervision.

In the appeal proceedings, only grounds related to law and procedure may be used. The merits of the administrative decisions regarding the use of discretionary powers, cannot be discussed before the courts, unless on the basis of an infringement of general principles of law, such as equality, proportionality and impartiality, or an ostensive error of judgement.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

2018 and early 2019 have been witness to some interesting merger and antitrust decisions in the communications and media sectors in Portugal.

Regarding merger control, the intended acquisition of the Media Capital Group (owned by Prisa) by the Altice group (that controls MEO) was ultimately unsuccessful and the merger filing was withdrawn in June 2018, following an 11-month investigation that included two negative opinions on the merger's foreseeable effects on competition by the sector regulators (ANACOM and the ERC) and a phase II in-depth investigation. The transaction was dropped when it became apparent that the Portuguese Competition Authority was not convinced that any of the possible merger remedies floated by the purchaser would be adequate, or sufficient, to mitigate the significant input and customer foreclosure concerns resulting from the evidence. As a reminder, this transaction would have involved the acquisition of control over the

largest Portuguese free-to-air television company (TVI) by a leading pay-tv operator, with a very significant market share in other electronic communications markets.

In 2019, the Portuguese Competition Authority has also decided to close several ongoing investigations into the acquisition of sports broadcasting rights and a rights sharing agreement between electronic communications (pay-tv) operators given the lack of evidence that the practices in question might result in any restrictive effects on competition in the affected markets. Closure of these investigations follows a trying two-year period during which the operators in question were routinely required to provide very extensive information and documentation in response to several requests for information put forward by the competition authority.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Regulatory framework

The key statute for the communications sector is Federal Law No. 126-FZ On Communications of 7 July 2003 (the Communications Law). It provides a regulatory framework for communications services in Russia, outlines communications operators' and users' rights and obligations, the powers of regulators and other matters. A significant amount of regulation is implemented through subordinate legislation adopted by the Russian government and other authorities. The key licensing and communication services rules include:

- Russian Government Decree No. 87 On Approval of the List of Names of Communications Services Included in Licences, and of the List of Licensing Requirements of 18 February 2005 (Decree No. 87);
- Russian Government Decree No. 575 On Approval of Rules on Providing Telematics Communications Services of 10 September 2007; and
- Russian Government Decree No. 785 On Approval of Rules on Providing Communications Services for Television and (or) Radio Broadcasting of 22 December 2006.

Regulatory bodies

The Russian Government (http://government.ru) is the main Russian executive body. The Government issues key regulations in the communications sector and supervises the activities of subordinate bodies.

The Russian Ministry of Digital Development, Communications and Mass Media (Minkomsvyaz) (https://digital.gov.ru/ru/) is the principal regulatory body for the communications sector. It develops and implements state policy in the telecommunications sector, including in relation to the use of the radio-frequency spectrum, and adopts various regulations in these spheres.

The Russian Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor) (https://rkn.gov.ru) is responsible for state control and supervision in the sphere of communications. Among other things, it issues communications licences and holds tenders for granting such licences (where required), registers radio-electronic and high-frequency devices, participates in import control of such devices, issues permits for the use of communications networks and telecom-designated constructions and maintains relevant state registers. It is authorised to conduct inspections and to impose sanctions (eg, fines, suspension of licences) for discovered violations.

The Federal Communications Agency (Rossvyaz) (www.rossvyaz.ru/) manages state property and renders certain public services in the sphere of communications, including those related to creation, development and use of communication networks and satellite communication systems. Rossvyaz allocates numbering resources, registers declarations of compliance of communications means and maintains the register of such declarations.

The State Radio Frequencies Commission (Radio Frequencies Commission) (https://digital.gov.ru/ru/activity/advisories/7/) regulates the radio frequency spectrum. The commission decides which part of the radio frequency spectrum would be available for the provision of which communications services and determines plans and programmes for the allocation of radio frequency bands. In certain cases, it can also suspend or terminate frequency allocation.

The Russian Federal Antimonopoly Service (the FAS) (http://fas.gov.ru/) is a federal executive body in the field of competition, state procurement and advertising in all industry sectors including telecommunications. It also regulates prices for communications services offered by the natural monopolies (eg, the Russian Post) and 'significant operators' and participates in price-related disputes. It is entitled to adopt regulations, enforce laws and impose fines and other sanctions in areas of concern.

Foreign ownership restrictions

Russian law does not have a general rule restricting foreign ownership in the communications sector. However, as a matter of practice, only Russian-registered entities can apply for and obtain licences to provide communications services. These entities may have foreign ownership or other control. At the same time, certain restrictions apply in related areas such as the mass media sector (see question 18).

Further, certain Russian companies carrying out communications activities may be deemed as 'having strategic importance for ensuring the country's defence and state security' ('strategic companies') and are subject to Federal Law No. 57-FZ On the Procedure for Making Foreign Investments in Business Companies Having Strategic Importance to the National Defence and State Security of 29 April 2008 (the Foreign Strategic Investments Law). These include companies acting as communications operators and having a dominant market position (generally, over 35 per cent share) with respect to the national communications market, fixed telephone services to no fewer than five Russian regions, fixed telephone services in Moscow, St Petersburg or Sevastopol, or in certain Russian ports.

To acquire direct or indirect control of such entities (or to acquire fixed assets of such companies exceeding 25 per cent of the aggregate book value), foreign investors may need to obtain the consent of the government's foreign investment control commission (the government commission) headed by the Russian Prime Minister, subject to certain thresholds, exemptions, specific regimes for state-owned and offshore foreign investments and other requirements provided in the law. In addition, under Federal Law No. 160-FZ On Foreign Investments in the Russian Federation of 9 July 1997 and the Foreign Strategic Investments Law, the head of the government commission has the authority and

discretion to order that any foreign investment with respect to any Russian company (ie, not necessarily a strategic company) should be cleared by the government commission.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Communications licences

Government Decree No. 87 contains an exhaustive list of communication services requiring a communication licence. It includes, among others, communication services for the purposes of cable, terrestrial broadcasting, telematics and data communications services. Licences are granted by Roskomnadzor. Roskomnadzor maintains a publicly available register of licences (https://rkn.gov.ru/communication/register/license/). The licensing process includes submission of application with attachments, which will vary depending on the type of services applied for. On average, it takes about 75 days to obtain a communications licence. The duration of a licence can be from 3 to 25 years.

For certain telecommunications services, such as TV or radio broadcasting, a communication licence is not sufficient, and a separate broadcasting licence is required. Broadcasting licences are issued by Roskomnadzor under separate regulations, but also on the basis of applications. See question 17 for the information on obtaining broadcasting licences.

In certain cases, the communications licence may be granted only via a public tender, for instance if it involves the use of the radio frequencies spectrum.

Radio frequencies (RFs)

The Radio Frequencies Commission allocates RFs among relevant radio services (for civil use, military use and other purposes) based on the Table of Distribution of RFs approved by the Russian government from time to time (generally, once in every four years).

Further, Roskomnadzor allocates particular RFs and RF channels. The allocation procedure varies depending on the type of the communications services involving RFs. But, in general, to obtain an RF permit, the applicant has to undergo a series of expert reviews performed by the Service for Radio Frequencies and various state security agencies. Also, if a company applies for a licence to provide communication services in a territory with limited resources of the public communication network or in a territory where the number of communication operators is limited by the possibility of using the available RFs, permits are allocated via tenders. There is a separate procedure for allocation of RFs for terrestrial and satellite broadcasting (see question 17 for more detail).

The allocation procedure may take up to 120 days. RFs are usually allocated for 10 years, but this term cannot exceed the term of the relevant communications licence. The term may be extended an unlimited number of times. RF permits are subject to a one-time fee and annual payments, both depending on various factors (the availability of RFs in the region, type of RF usage, number of services provided, type and quantity of installed equipment, etc).

The above licensing and authorisation regime equally applies to fixed, mobile and satellite networks and services, and to 2G, 3G and 4G networks. The first tender with respect to LTE frequencies was held in October 2015. RF bands in the ranges of 1,710–1,785MHz and 1,805–1,880MHz have been allocated among major telecom operators for developing LTE standard networks.

In March 2018, the first test zone for 5G networks was launched. RF bands in the range 3,400–3,800MHz have been selected for the testing.

Providing access to Wi-Fi in public spots is considered as a communication (telematic) service and is subject to relevant licensing and authorisation regimes. Operators of public Wi-Fi must ensure identification of users of public Wi-Fi spots (various means can be used ranging from user IDs, bank card details to login information from the government's service portal and codes texted to users' mobile phones).

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Spectrum permits in Russia specify permitted use by reference to the type of radio electronic device that the spectrum permit holder can use in the permitted range of frequencies. Spectrum permits also specify territory, purposes and other conditions of the spectrum use. Changes to the permitted parameters of use require re-issuance of the spectrum permit.

In certain cases, it is possible to use the spectrum on the basis of a non-personalised general licence that applies to all radio electronic devices of a particular type, for example, to certain short-range devices.

Spectrum permits are issued by Roskomnadzor on the basis of the decisions of the State Radio Frequencies Commission. The spectrum permit is not tradable or assignable, but can be transferred to another user based on the decision of the State Radio Frequencies Commission.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Russian telecommunication laws impose certain restrictions and obligations on telecommunication operators that alone or together with their affiliates control at least 25 per cent of the installed capacity or have the ability to put through at least 25 per cent of traffic in a certain geographical (numbering) zone or in Russia generally (significant operators). Roskomnadzor maintains the register of significant operators.

Significant operators must ensure equal access to their networks and equal treatment for traffic of telecom operators providing similar services. Significant operators are required to publish the rules on access to their networks and submit them for the review of the regulator. The regulator has the right to issue a directive requiring the operator to amend its rules if the regulator believes that the rules are not in line with the telecommunications laws and regulations.

Access service fees charged by significant operators are subject to tariff regulation. Service fees for certain public electronic communication services and public post services are also subject to state tariffs. The list of public electronic communication services and public post services subject to state tariffs is approved by the government.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Significant operators must keep separate records of their revenues and expenses in respect of different lines of business, different services and parts of networks used to render such services. The same rules apply to telecom operators that are natural monopolies and universal services operators. Minkomsvyaz approves the rules on the separation of accounts. Current rules have been approved in 2006.

Russian competition laws also provide for forced separation as a last resort measure that may be implemented by a court at the request of antitrust authorities in respect of a dominant market player that systematically abuses its dominant position.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

In Russia, phone connection services via payphones, multifunctional devices, information kiosk terminals and similar devices and internet connection services via access points and collective access points are viewed as universal communications services. Laws contain certain requirements applicable to universal communication services. For example, devices for phone connection must be evenly distributed to allow a user to reach the nearest device within an hour without the use of a vehicle; at least one internet connection collective access point must be installed in every community with population exceeding 500 people; and at least one internet access point for users with their own devices must be installed in every community with a population of between 250 and 500 people.

The government nominates the provider of universal communications services from the operators controlling significant market share of the universal public telecommunications network in at least two-thirds of the constituent territories of the Russian Federation. In 2014, the government nominated Rostelecom as such a provider. Rostelecom renders universal telecommunication services based on a 10-year contract with the Federal Communications Agency.

Service fees for universal communication services set by an operator of universal communications service may not exceed maximum rates prescribed by the FAS. Additional costs incurred by the operator of universal communications service are covered from the Universal Services Reserve, which is funded by mandatory payments of public telecommunications network operators, penalties for delays in their payments and other statutory sources. The current payment rate is 1.2 per cent of the revenues of public telecommunications network operators.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

From 1 December 2013, mobile number portability across mobile networks of different operators within the one constituent territory of the Russian Federation became available for subscribers for a flat fee not exceeding 100 roubles.

To change a mobile service operator, a subscriber has to submit an application to the new operator to request the unilateral cancellation of the contract with the current operator and the subsequent transfer of the mobile phone number to the new operator.

Following receipt of the subscriber's application, the new operator and the subscriber enter into a service contract and the new operator files a request to a special database of transferred numbers to inform the current operator about the transfer. The mobile phone number is transferred to the new operator subject to the subscriber having paid all service fees due to the current operator.

In its application, the subscriber is entitled to designate specific time and date from which the new operator should commence the provision of services. The services may not commence earlier than eight days from the date of execution of the service contract with the new operator for individuals and not earlier than 29 days for legal entities, or later than six months from the execution of the service contract.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

The general rules of the Russian Civil Code and Russian consumer protection laws apply to communications services. Communications service contracts with individuals are considered to be public contracts, meaning that service providers may not refuse to sign a contract with any willing individual and must ensure equal treatment of all subscribers of the same category.

In addition, Russian communications laws require that the terms and conditions of contracts with subscribers must comply with the rules of provision of communications services adopted by the government. The government adopted rules of provision of communication services that contain detailed regulations governing the rights and obligations of service providers and subscribers of communications services. There are separate regulations for different types of telephone and radio communications services, broadcasting, telegraphy communications services, telematics services, postage and other services.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The 'net neutrality' principle is not formally recognised in Russian communications laws. However, the FAS has provided certain guidance relevant to this issue. In February 2015, the FAS prepared a report on the implementation of net neutrality principles that describes the measures for traffic management in Russia. The report introduced the following tools, which, the FAS believes, can help maintain net neutrality:

- unified traffic control instruments;
- intolerance to any kind of technical or technological discrimination of services and applications;
- variety of tariffs and similar means of traffic management and telecom services quality control measures; and
- equal opportunities for traffic operators.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

Russian law does not have any special rules for digital platforms. General laws governing the internet apply (the key law is Federal Law No. 149-FZ 'On Information, Informational Technologies and Protection of Information' of 27 July 2006, the Information Law). These laws contain specific rules on social networks, messenger services, VPNs and film-streaming businesses (online cinemas) and other relevant matters.

Other laws may apply as well. For example, in 2018 Russia introduced specific rules for ecommerce aggregators (ie, platforms aggregating information on goods or services) by amendments to Law No. 2300-1 On Protection of Consumers' Rights that became effective on 1 January 2019. The amendments impose certain obligations and liability on owners of ecommerce aggregators in connection with consumers buying goods or services via ecommerce platforms.

Further, the FAS currently considers amending Federal Law No. 135 On Protection of Competition (the Competition Law) to introduce criteria for determination of digital platforms owners as dominant players (see question 30).

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The concept of 'universal services' was introduced to the Communications Law in 2005 and provided for the state support of measures aimed at the establishment of 'equal access for any person to telecom services'. These included installation of more than 100,000 public phone booths (info mats, multi-function devices), public access points and hotspots.

In 2014, the Communications Law introduced further measures in this regard. It provided for the state support of the maintenance of the existing public phone booths and public access points and construction of more than 200,000km of fibre-optic communication lines. The amended law also provided for establishment of hotspots in settlements of 250–500 people and access to the internet at a speed of at least 10Mbit/s without traffic limitations.

Further, in 2018 the government adopted the Digital Economy Development Program, which includes plans to create 5G networks in the near future (see question 16).

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

Federal Law No. 152-FZ of 27 July 2006 On Personal Data (the PD Law) provides for the general rules on personal data processing, including the rules applicable to data processing in the communications sector. As a general rule, personal data should be processed upon receipt of individuals' explicit consents, unless one of the statutory exemptions applies. The PD Law sets out general principles for the use of personal data including in the promotion of goods and services directly to potential consumers, and an obligatory opt-in confirmation. These rules equally apply to the telecommunications sector.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The key statute for regulation of cybersecurity of information systems in Russia is Federal Law No. 187-FZ On Security of Critical Information Infrastructure of the Russian Federation of 26 July 2017 (the CII Law). The CII Law has been in effect since 1 January 2018.

The CII Law provides the framework for ensuring security of the Russian critical information infrastructure (CII), including the functioning of the state system for detecting, preventing and liquidating consequences of cyberattacks against information resources in Russia. The CII comprises IT systems and telecommunication networks operating in spheres of healthcare, defence, transport, fuel, space rocket, metallurgy, nuclear, financial sector and science that are owned or maintained by the Russian state authorities and legal entities, and the relevant electric communication networks. The CII Law imposes certain duties on the owners or maintainers of the CII facilities (eg, to notify competent state authorities on computer incidents, to assist state authorities in detecting, preventing and eliminating the consequences of computer attack, and to comply with established requirements for operation of technical facilities used to detect computer attacks).

There are a number of subordinated legislations including:

- Government Decree No. 162 On Approval of Rules on Implementation of State Control for Ensuring Security of Significant Objects of Critical Information Infrastructure of the Russian Federation of 17 February 2018; and
- Government Decree No. 127 On Approval of Rules on Categorisation of Critical Information Infrastructure of the Russian Federation, and List of Criteria of Significance of Critical Information Infrastructure Facilities of the Russian Federation of 8 February 2018.

In March 2019, the State Duma approved in the first hearing a draft law proposing to amend the Communications Law and the Information Law, to ensure autonomous operation of the Russian segment of the internet if it will be disconnected from the global web (this draft law is commonly referred to as the law on sovereign 'runet' (a conflation of Russia and net)). The draft proposes to introduce certain duties on communications operators and owners of technological networks to counter network threats such as to reroute the data through domestic lines and install specific hardware allowing Roskomnadzor to reroute or block the traffic directly. It also proposes that IP addresses in the '.ru' zone must be located on Russian servers. Despite the law on sovereign runet not yet being adopted, the government has already decided to create the Centre for Monitoring and Control of Public Communication Networks (the Centre), by Decree No. 126 of 13 February 2019. The Centre must be established by Minkomsvyaz and Roskomnadzor by 1 July 2019. The Centre is to collect information about network infrastructure and IP addresses; maintain the register of traffic exchange points; and, in case of emergency, order the rerouting of traffic.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Russian law does not specifically regulate the collection and processing of big data. Data analytics is currently subject to the PD Law and other data protection regulations.

The State Duma currently considers draft law No. 571124-7 to introduce yet another set of amendments to the Information Law. The draft proposes to impose certain obligations on a big data operator, including to disclose on its website that it collects data, to obtain informed consent from individuals if it wants to use their IP addresses for identification purposes and to notify Roskomnadzor if it processes information from at least 100,000 IP addresses. The draft law exempts certain bid data operators from these obligations: for example, television audience research as required by the Mass Media Law is exempt.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Certain data must be stored locally in Russia. For example, under the PD Law, personal data of Russian citizens must be primarily recorded, systematised, stored, updated and retrieved with the use of databases physically located in Russia. There are certain narrow exceptions allowing the processing of data abroad:

- pursuant to international agreements or treaties to which Russia is a party;
- to render justice;
- to perform functions of the Russian federal government or a Russian municipal government; or
- to pursue professional journalism, lawful mass media activity, lawful scientific activity, lawful literary activity or other lawful creative activity, unless doing so infringes on the rights and lawful interests of a personal data subject.

The Communications Law requires that communication operators must keep in Russia:

- up to three years: information about the facts of receipt, transmission, delivery and processing of voice information, text messages, images, sounds, video and other messages by telecommunications services users; and
- up to six months: text messages, voice information, images, sounds, video and other messages of telecommunication services users.

In addition, the Information Law imposes similar data localisation obligations on information dissemination organisers and messengers.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

In 2017, Minkomsvyaz developed a programme called 'Electronic Economy' in furtherance of orders of the President and the government of 5 December 2016. The programme is aimed at the 'electronic transformation' of the Russian communications sector by 2024. It covers different aspects: legislative and regulatory spheres, staff and education, research and development, information infrastructure, information security, state governance, smart city and electronic healthcare. For example, as part of the programme, the government aims to implement 5G networks and develop a plan for the allocation of 5G RFs.

In December 2018, the State Duma introduced landmark changes to the Communications Law. Starting on 1 June 2019, telecommunication operators are no longer allowed to charge increased fees for calls between Russian regions (the 'national roaming') or charge users for domestic incoming calls.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The key law regulating the media sector in Russia is the Law of the Russian Federation No. 2124-1 On Mass Media of 27 December 1991 (the Mass Media Law).

Specific content requirements for mass media can also be found in other laws including:

- Federal Law No. 436-FZ On Protection of Children from Information Harmful to Their Health and Development of 29 December 2010 (the Child Protection Law);
- Federal Law No. 15-FZ On Protection of Health Against Tobacco Smoke and Consequences of Tobacco Consumption of 23 February 2013 (the Anti-Tobacco Law); and
- Federal Law No. 38-FZ On Advertising of 13 March 2006 (the Advertising Law).

The principal state authority responsible for developing and implementing national policy and regulation for telecommunications, mass media, IT and postal services is Minkomsvyaz with three subordinate government agencies:

- Roskomnadzor, responsible for the state control and supervision of compliance with Russian laws on mass media, telecommunications and personal data processing;
- the Federal Agency for Press and Mass Communications, responsible for the management of state property in the press and other media sectors; and
- Rossvyaz, responsible for the management of state property and law enforcement functions in the field of communication and information, including construction, development and utilisation of communication networks, satellite systems, TV and radio broadcasting systems.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Effective from 1 January 2016, more stringent foreign ownership restrictions have been introduced to the Mass Media Law including by article 19.1, as follows:

- a foreign legal entity, foreign citizen or Russian company with foreign participation is banned (along with certain other persons and entities) from serving individually or jointly as the founder or 'participant' of any mass media organisation, or acting as the editor-in-chief of such an organisation or as a broadcaster;
- a foreign legal entity, foreign citizen or Russian company with more than 20 per cent foreign participation (along with certain other persons and entities) may not own, manage or control, directly or indirectly more than 20 per cent of a shareholder or participant of a founder, editor or broadcaster; and
- 'any other forms of control' of foreign entities and individuals over mass media organisation are also prohibited.

These restrictions are vaguely drafted and subject to conflicting interpretations. For example, in January 2019 the Russian Federation Constitutional Court ruled that certain parts of article 19.1 are not constitutional and directed to amend the Mass Media Law to remove the ambiguity. The subject matter of the amendments is to provide clarity on certain terms used in article 19.1 and to address how investors can enjoy certain corporate rights within the permitted 20 per cent limit. It is likely that the Mass Media Law will be amended to address this ruling.

Additional restrictions apply to certain 'strategic' media companies. Pursuant to the Foreign Strategic Investments Law, the following activities are considered strategic:

- TV and radio broadcasting on the territories that cover 50 per cent and more of the population of the Russian Federation subject;
- acting as an editor, publisher or founder of printed mass media if the aggregate circulation per year is not less than 15 million copies for editions published two and more times a week, 2.5 million copies for editions published once a week, once in two or three weeks, 700,000 copies for editions published once or twice a month, and 300,000 copies for editions published once a quarter and less frequently; and
- foreign investments in companies exercising the above strategic activities that lead to establishing control over such companies are subject to certain restrictions, including the requirement to obtain an approval of the government commission.

Separate foreign ownership restrictions have recently been adopted for certain specific media services – for example, for an audiovisual service owner (see question 21).

In addition, under Federal Law No. 160-FZ On Foreign Investments in the Russian Federation of 9 July 1997 and the Foreign Strategic Investments Law, the head of the government commission has the authority and discretion to order that any foreign investment with respect to any Russian company (ie, not necessarily a strategic company) should be cleared by the government commission.

Further, in November 2017, the Information Law was amended to extend to media organisations certain restrictive regulation on the 'foreign agents' that were initially designed to apply to non-profits who receive financing from foreign sources and engage in political activity in Russia. In particular, foreign agent mass media must include a special disclaimer in every publication or post identifying their status as foreign

agents. In addition, they must keep separate accounts for funds and property received from foreign sources, submit quarterly reports on the sources of financing to the Russian Ministry of Justice, and publish activity reports in Russia semi-annually. The Russian Ministry of Justice keeps the register of foreign agent mass media, and the register is available at http://minjust.ru/ru/deyatelnost-v-sfere-nekommercheskih-organizaciy/reestr-inostrannyh-sredstv-massovoy-informacii.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

In general, broadcasting using traditional technologies (free-to-air, cable, satellite) usually involves obtaining the following permissions from state authorities:

- a mass media registration;
- a broadcasting licence; and
- a communication services licence (not required if the broadcaster has an agreement with a licensed communication services provider).

Mass media registration is granted by Roskomnadzor to a mass media founder within a month of filing the application.

Broadcasting licences are granted by Roskomnadzor as well. Broadcasting licences are divided into two major types: a universal licence that can be granted to the editor of a TV or radio channel, and allows broadcasting in all media in the whole territory of Russia; and a broadcasting licence that is granted to entities that are not editors of TV or radio channels, for broadcasting in specific media (eg, cable, terrestrial or satellite). In case of free-to-air or satellite broadcasting, the applicant must also obtain the right to use specific broadcasting frequency. As a general rule, frequencies are allocated through a public tender by the Federal Tender Commission for TV and Radio Broadcasting.

Broadcasting licences are granted for 10 years.

See question 2 on the obtaining of communications licences.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Generally, the Mass Media Law guarantees unrestricted access to the information and materials of foreign mass media to Russian citizens. However, distribution of foreign TV and radio channels (as well as other mass media) and content is permitted only upon registration of mass media in Russia (see question 18 for a description of the current foreign ownership restrictions). Distribution of foreign printed media not registered in Russia requires a permit from Roskomnadzor. The Russian advertising laws also have an exemption from the general advertising ban for pay-TV channels; such exemption is available to cable channels with primarily local content.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The principal law regulating broadcast media advertising is the Advertising Law. The Advertising Law contains certain restrictions and limitations for broadcast media advertising.

Restrictions for paid channels

Effective from 1 January 2015, advertising on TV programmes or in broadcasts on TV channels that are accessed exclusively on a paid basis or with the use of technical decoding devices is not permitted. The following channels are exempt from this restriction: Russian national 'must-carry' free television channels; TV channels broadcast in Russia by terrestrial transmission using limited frequency resources; or TV channels transmitting not less than 75 per cent of local content.

Time limitations

The general time limitations for advertising air time are as follows:

- air time devoted to advertising should not exceed 15 per cent of the overall air time per hour;
- the interruption of children's and educational programming by advertising is limited to one to three minutes at the beginning and at the end of the programme depending on the duration of the programme;
- for any other programming, including movies, interruption for advertising should not exceed four minutes per occurrence; and
- advertising may not be aired during religious programmes or programmes of less than 15 minutes.

Each interruption of a programme or broadcasting by advertising should be made with advance notice.

Restrictions on advertising for certain types of goods

The Advertising Law generally prohibits advertising of drugs, weapons, tobacco, tobacco goods and smoking-related equipment, and certain other goods. The advertising of alcohol products is specifically prohibited for printed media, internet and broadcasting on TV channels, save for certain exceptions, including advertising of beer and related beverages during sport live broadcasts or records, and of Russian wine.

There are also rules and restrictions applicable to advertising of certain other goods. For instance, advertising of medicines and medical services, including methods of treatment, should contain warnings regarding contra-indications, as well as the need to read instructions and seek advice from specialists. These notices should be broadcast for at least five seconds and should cover at least 7 per cent of the picture area.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Under the Communications Law, each TV communication services operator must broadcast must-carry channels to its subscribers for free. The list of must-carry channels includes:

- all-Russian TV and radio must-carry channels listed in Presidential Decree No. 715 dated 24 June 2009. Currently the list includes 10 TV channels: Channel 1, Russia-1, Match TV, NTV, Peterburg-5 Channel, Russia-Kultura, Russia-24, Karusel, OTR and TV Center-Moscow; and three radio channels: Vesti FM, Mayak and Radio Rossii;
- must-carry channels of the constituent territories of the Russian Federation; and
- TV channels that have obtained the right to carry out terrestrial broadcasting using positions in multiplexes.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

Russian law currently does not provide for a specific regulation applicable to new media content or online (internet) TV broadcasting. Arguably, the existing Mass Media Law definitions of a 'TV channel' and a 'TV programme' are broad enough to apply to TV content broadcast online. However, as a matter of practice, in general, online broadcast is currently permitted without licence.

The rules on content applicable to traditional broadcast media would apply to online broadcast in most instances. There are recent new laws related to different aspects of new media content. For example, effective from 1 July 2017, the Information Law has been amended to include a concept of an 'audiovisual service owner' (AS owner). In essence, an audiovisual service is a website, webpage, IT system and or software that is used to form or organise internet distribution of a 'collection of audiovisual works' (eg, video on demand service providers). An AS owner must, among other things, comply with the Mass Media Law requirements and restrictions on dissemination of information. The new regulation also provides for foreign ownership restrictions with respect to AS owners: foreign states, international organisations, foreign entities, Russian entities with more than 20 per cent foreign shareholding, foreign citizens, Russian citizens with double citizenship and their affiliates that operate international audiovisual services (ie, with more than 50 per cent users located outside of Russia) are not allowed to directly or indirectly control more than 20 per cent of an AS owner.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The Russian switchover from analogue to digital broadcasting started in 2009. It is expected that analogue broadcasting of must-carry channels will cease and the switchover to digital broadcasting will be completed by mid-June 2019.

There is no specific plan of reallocation of the radio frequencies freed up by the switchover. Under the existing regulation, the particular radio frequencies capacities for terrestrial and satellite broadcasting can be allocated via tenders pursuant to Government Decree No. 25 of 26 January 2012. Pursuant to Government Decree No. 336 of 2 July 2004, radio frequencies bands may be reallocated by a decision of the Radio Frequencies Commission. If a band reallocation involves changing the band purpose from terrestrial broadcasting to another type of broadcasting, it will require the prior consent of the broadcasters of must-carry channels as well as of the broadcasters that have air terrestrial broadcasting licences for this band.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

Currently there is no specific regulation restricting spectrum use by broadcasters (such as multi-channelling, high definition and data services), other than restrictions provided in the broadcasting and communication licences, licensing requirements and decisions on allocation of RFs (as the case may be), or arising from the must-carry obligations.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There is no specific regulation or promotion of media plurality in Russia. But the Mass Media Law provides that mass media organisations must not be restricted in Russia other than in cases provided by the Russian mass media legislation. Generally speaking, subject to foreign ownership restrictions described in question 18 and other restrictions in the Mass Media Law and other laws and, in many instances, registration requirements, Russia allows mass media in any form. The Mass Media Law also provides that the search, production and distribution of information cannot be restricted other than in cases provided by law (such cases include terrorist and extremist materials, propagation of violence, pornography, etc).

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The three key trends are as follows. Firstly, the emerging of new types of media and internet services (online and electronic newspapers, blogs, social media, messaging apps, aggregators and services) that fall outside of traditional regulation attract attention from the government. This results in new regulation affecting these new types of media and services. For example, following the adoption of special regulation on VPNs, messengers and online cinemas in 2017, in 2018 Russia introduced special rules for ecommerce platforms that aggregate information from online shops and service providers. In March 2019, Russia changed its Civil Code to include 'digital rights', and further laws regulating activities in this field are pending.

Secondly, Russia continues to strengthen the governmental control in the cyberspace to combat cybercrime. This resulted in adoption of Federal Law No. 187-FZ of 26 July 2017 On the Security of Critical Information Infrastructure of the Russian Federation in effect from 1 January 2018. Further, there is a draft of the 'law on sovereign runet' (see question 13). Starting 1 January 2018, messenger operators must run mandatory identification of users that could be done using subscribers' phone numbers. Government Decree No. 1279 of 27 October 2018 defines the procedure for such identification that comes into force in May 2019.

Thirdly, Russia continues to strengthen control over information posted online to prevent dissemination of information it deems harmful or illegal. For example, under Federal Law No. 31 of 18 March 2019, online media and communications services providers are required to prevent distribution of 'fake news'. Fake news is broadly defined as any unverified information that threatens someone's life or health or property, public peace or security , or threatens to interfere or disrupt critical infrastructure, transport or public services, banks, communication lines and facilities, power and industrial facilities. Also, Federal Law No. 30-FZ dated 18 March 2019 enabled Roskomnadzor to require deleting information that shows disrespect to Russian governmental authorities, state symbols, or Russian society, and to block non-compliant resources.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The key state bodies regulating the communications and media sectors are Minkomsvyaz and Roskomnadzor. Roskomnadzor has controlling and supervisory powers both in communications and broadcasting spheres. The antitrust regulator in Russia is the FAS. The FAS also regulates advertising of any kind (see also questions 1 and 21). Specific powers of these state bodies are outlined in the relevant regulations; this helps to avoid conflicting jurisdiction.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Generally speaking, a decision of the regulator may be challenged by complaining to a supervisory authority if such exists ('administrative proceedings') or to a court.

For example, if a person believes that a decision or an action of the regulator (eg, imposition of fines, or cancellation of a licence) is illegal, groundless or violates its rights and legal interests, the claimant may appeal to the relevant supervising authority of the regulator that took such action or rendered such decision. For instance, the relevant supervising authorities are as follows: for Roskomnadzor officials, the head of the Roskomnadzor department where such official works; for the head of a Roskomnadzor department, the head of Roskomnadzor; and for the head of Roskomnadzor, Minkomsvyaz.

Typically, the steps, timing and other details for the appeal process are described in the particular regulations of the relevant authority. Terms and time limits in administrative proceedings vary depending upon the circumstances. A typical appeal through administrative proceedings takes between 15 days and a month and can be further appealed in court.

Alternatively, the claimant may appeal to a court. The appeal process is governed by procedural legislation, for example, by the Russian Arbitrazh Procedural Code (if the decision relates to any entrepreneurial activities), or the Russian Code of Administrative Judicial Proceedings (if the decision concerns rights of individuals or non-profit organisations). To appeal, a claim should be brought to court within three months of the claimant becoming aware of violation of its rights. The appeal process might be a multi-staged process, and each stage has its own rules on timing. In total, the appeal process could take 10 months (or even more). In general, appeal in court has a rather stringent procedure and protections (ie, there will be a formal hearing, the person will be able to present evidence). The court appeal is a public process and relevant information will be posted in public databases of the Russian court system.

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Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The FAS announced that it is working on a draft law that would require the need to pre-install on user-devices certain domestically developed applications and services, and to have a function enabling a user to delete any unwanted application or software other than those ensuring the functioning of a device itself.

In 2019, the FAS presented a new draft law to amend the Competition Law, the 'fifth antimonopoly package', as a response to digitalisation of the economy. Most likely, the draft will be changed significantly. The current draft proposes the need to impose specific criteria to determine whether an owner of a 'digital platform' (ie, a resource that is used to organise and provide interaction between sellers and buyers) has a dominant market position. Among other things, it suggests application of the 'network effects' test, and the digital platform owner may be viewed as dominant if the network effect of its platform allows for a certain influence over the market. The 'network effect' is defined as dependence of the consumer value of goods on the number of consumers of one and the same group (direct networks effect) or change in the consumer value of goods for one group of consumers when the number of consumers in another group decreases or increases (indirect networks effect). An exception is made for digital platforms with revenue of less than 400 million roubles in the past calendar year.

Serbia

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Regulatory framework
The key piece of legislation that regulates the communications sector in Serbia is the Electronic Communications Act (2010, as amended) (ECA) modelled after the EU regulatory framework of 2002.

Institutional structure
The competencies for regulation of electronic communications are divided between the government, the Ministry in charge of telecommunications and information society and the Regulatory Agency for Electronic Communications and Postal Services (RATEL).

The government defines the electronic communications policy, adopts strategic documents and action plans for their implementation, and establishes the principles, goals and priorities for the development of electronic communications in Serbia.

The Ministry supervises the implementation of the ECA and related regulations, represents the Republic of Serbia in international organisations and institutions connected with electronic communications and promotes investment, research and development in the sector. In addition, the Ministry contributes to the harmonisation of the national legislation with the EU regulations.

The RATEL is an organisation functionally and financially independent, which exercises public authorities aimed at effectively implementing the electronic communications policies, promoting competition and protecting consumers' rights. Its main competencies include the adoption of by-laws regulating certain aspects contained in the ECA (eg, provision of universal services, payable fees, radio-frequency usage, etc) and the power to decide on the rights and obligations of the operators and the users of electronic communications.

Foreign ownership restrictions
No restrictions exist in Serbia regarding the foreign ownership of operators of electronic communications.

However, a restriction does exist for the provision of electronic communications services from abroad. Although it is not expressly stated in the ECA, the RATEL interprets that the ECA requires electronic communications operators to have a presence in Serbia and to be registered with the Serbian Agency for Commercial Registers. This means that a foreign entity is not entitled to provide electronic communications services in Serbia from abroad, but needs to do it through an entity incorporated in Serbia.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

General authorisation regime
Activities in the electronic communications sector in Serbia are subject to the regime of general authorisation. Under this regime, the conditions for the performance of activities related to electronic communications networks (construction, installation, maintenance, use and rent) and services (provision of telecommunications services and distribution or broadcasting of media content services consisting entirely or mainly of the transmission of signals) are simple. Any entity may commence activities within the electronic communications sector subject to 15-day prior notice to the RATEL. The RATEL enters such notifications into the publicly available registry of electronic communications network and service operators and issues a confirmation of registration upon request. Registration itself does not have a constitutive effect – notification alone is sufficient for the right to perform the notified activity.

As for the content of the notification, it must include:

- the entity's identification details (ie, name, personal ID and tax identification numbers, address of the company and contact details of the company representatives);
- a short description of the networks or services to which the notification refers; and
- the envisaged date of commencement of the electronic communications activities.

Such a regime applies indistinctly, without the ECA distinguishing or establishing different requirements among fixed, mobile and satellite networks and services or between 2/3/4G technologies.

Scarce resources (ie, numbers and radio-frequencies spectrum)
The right to use numbers is subject to a licensing regime. Licences are granted by the RATEL upon request from the operator. The RATEL may reject granting the request if the request is contrary to the numbering plan adopted by the RATEL or if the requested numbering resources are not available. Licences for the use of numbers are issued for maximum periods of 10 years (renewable).

The rights to use radio frequencies are generally granted through individual licences issued by the RATEL, either upon request or following a public bidding procedure. The decisions on granting individual licences for the use of radio frequencies upon request are to be made within 40 days from the day of the receipt of the request. The RATEL may reject a request if the request is not compatible with the relevant allocation and allotment plans, the required radio frequencies are not available, or the use of the particular radio frequencies may have harmful effects on the environment or cause harmful interferences with other radio communications systems. Bidding procedures are used where there is limited availability of radio frequencies within a specified radio-frequency band.

Licences for the use of radio frequencies are issued for a maximum periods of 10 years (renewable).

As an exception to the above, licences are not required for the use of:

- radio frequencies that create minimal danger from interference, or radio-frequency bands the use of which is coordinated in accordance with the relevant international agreements and recommendations – an operator can use these radio frequencies on the basis of a general authorisation; and
- radio frequencies reserved for the exclusive use of the authorities of the Republic of Serbia in charge of defence and security affairs, as well as emergency services.

Payable fees

Performance of electronic communications activities are subject to an annual fee, the amount of which the RATEL determines every year. In any case, the amount of the payable fee cannot exceed 0.5 per cent of the revenues made by the operator during the relevant year.

Separate fees are payable for the use of numbering and radio-frequency spectrum. The payable fees include a one-off fee for the granting of the licence and recurring annual fees that depend on several factors, such as the type of service provided by using the relevant number or spectrum.

Mobile spectrum

The three mobile operators that are currently active in Serbia (ie, mts – Telekom Srbija, Telenor and VIP mobile) have been assigned radio frequencies spectrum by means of bidding procedures. As a way of example, pursuant to two bidding procedures initiated in 2015, these mobile operators were awarded spectrum in the 1710–1785/1805–1880MHz and the 791–821/832–862MHz frequency bands, respectively.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Permitted use

The permitted use of the radio frequencies assigned through individual licences is not unrestricted. The licences specify several aspects that restrict such use, including:

- the purpose for which the right of use of radio frequencies has been granted;
- locations or coverage areas;
- the manner ensuring the efficient and reasonable use of radio frequencies;
- technical and operational measures to be applied to avoid harmful interferences, ensure electromagnetic compatibility and limit the exposure of citizens to electromagnetic fields;
- obligations related to the use of assigned radio frequencies resulting from the relevant international agreements; and
- terms and conditions for the experimental use of assigned radio frequencies.

Transferability of the licence

The right of use of radio frequencies granted in the form of an individual licence cannot be renounced, leased or transferred to a third party.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Markets susceptible to ex-ante regulation are those with structural, regulatory and other lasting barriers that prevent the market entry of new competitors, where it is impossible to develop effective competition (without such ex-ante regulation) and where provisions for protecting competition are not sufficient to remove the observed market failures. The RATEL has to carry out the identification of these markets at least once every three years, taking into account the EU recommendations pertinent to the analysis of markets and identification of significant market power (SMP).

When the RATEL concludes that there is absence of effective competition on a relevant market, it must designate the operator who, individually or jointly with others, has SMP on that particular market. The RATEL will then impose on the operator at least one of the following obligations:

- public availability of relevant data relating to the interconnection or access services;
- non-discrimination in the provision of interconnection or access services;
- accounting separation;
- provision of access and use by other operators of parts of the network infrastructure and associated facilities;
- price control and cost-based accounting;
- provision of minimum set of leased lines;
- provision of operator selection and operator pre-selection services; and
- offering retail services under certain conditions.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

The ECA does not contain any provisions that can be used as legal basis for requiring functional separation between an operator's network and service activities.

It only foresees the obligation of persons carrying out several economic activities, to perform those related to electronic communications through a separate legal entity; and the possibility to request that operators with SMP keep separate accounting records with respect to their business activities relating to the provision of interconnection or access services.

The remedy of functional separation was introduced in the EU Access Directive in 2009. Serbian authorities are currently working on an update of the ECA, which seeks to harmonise it with the EU regulatory framework of 2009. Therefore, it might be that a functional separation obligation is introduced in Serbia when the new law comes into force.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Universal service obligations

Universal services are defined as a basic set of electronic communications services of specified quality and scope, available to all citizens of the Republic of Serbia, at affordable prices. These services must include:

- access to public telephone network and to publicly available telephone services at a fixed location, including the service of data transmission that enables functional internet access;
- access to directory enquiry service and access to public telephone directories;
- use of public pay telephones;
- free calls to emergency services; and
- special measures aimed at giving persons with disabilities and socially vulnerable users equal possibilities of access to publicly

available telephone services, including calls to emergency services, directory enquiry service and access to public telephone directories.

The RATEL has to designate, in an objective, transparent and non-discriminatory manner, and seeking to ensure effective and efficient universal service provision, an operator or operators with the obligation to provide all or some of the universal services on the entire or a portion of the Republic of Serbia.

Financing of universal service

Operators with universal service obligations are entitled to reimbursement of the excessive costs (ie, costs that entail an excessive burden) derived from the universal service provision. The excessive costs approved by the RATEL are paid through contributions made by all the operators, in proportion to their respective share in the market.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

Number allocation

To ensure a reasonable, equal and effective use of numbers as a scarce resource, the RATEL adopts numbering plans in which it specifies their purpose and ensures the equal availability of numbering resources for all publicly available electronic communications services and operators providing such services.

The right to use numbering resources is given to operators upon request, in the form of licences that include data on:

- the holder of the licence;
- the assigned numbers;
- the duration of the licence, which may not exceed 10 years (renewable);
- the deadline for commencing use of the numbers;
- the purpose for which the right of use has been given;
- the manner in which the efficient and reasonable use of numbers shall be provided; and
- the obligations concerning the use of assigned numbers resulting from relevant international agreements.

The holders of the licences may transfer the right to the assigned numbers to third parties intending to use the assigned numbers for commercial purposes, by means of a written contract approved by the RATEL.

Number portability

(Donor) operators must enable their subscribers, upon request, to keep their assigned numbers when switching to the services of other operators (receiving operators). When such a number porting service is requested, the subscriber must provide data on his or her identity, the number for which the service of number porting is requested and a statement certifying that there are no outstanding debts with the donor operator. The receiving operator is under the obligation to remunerate the costs of the donor operator for the provision of number porting services.

Operators must cooperate with the RATEL and with each other to ensure that the loss of service, during the process of porting, does not exceed one working day, and must refrain from actions aimed at obstructing or preventing the number transfer.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Yes. Operators in Serbia must provide services in a manner that clearly and unambiguously informs users about the terms and conditions of the contract. This entails an obligation to include the following information in the written agreements with the users:

- specification of services, including aspects such as conditions for access and use of services, minimum quality of service provision, measures taken for the prevention of excessive network load, use limitations of terminal equipment, etc;
- provisions on the treatment of personal, traffic and location data;
- information on prices and tariffs;
- validity period of the contract, terms and conditions of renewal, contract cancellation, number portability service fees, etc;
- manner of submitting and resolving complaints; and
- measures that operators must apply for the purpose of maintaining the security and integrity of networks and services, and the control of unlawful content transfer.

In addition, the price lists of services offered by the operators need to include:

- the amount of the one-off connection fee;
- the amount of the monthly fee for access to electronic communications network or service;
- the accounting unit and tariff interval;
- a description of special conditions for access to confidential content or value-added services;
- information on maintenance costs and available service packages;
- information on discounts; and
- other provisions of relevance to a certain service.

The operators have to make publicly available the terms and conditions and the prices of the services offered. Changes to the terms and conditions must be furnished to the RATEL on the day they come into force at the latest.

Operators are obliged to notify the subscribers of any unilateral changes to the contract, at least one month in advance. When the amendments essentially change the terms and conditions of the contract in a manner that is not in favour of the client, he or she might be entitled to cancel the contract without paying any expenses associated with the cancellation.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The Serbian regulatory framework for electronic communications does not explicitly address net neutrality, nor does it refer to practices such as zero-rating or bandwidth 'throttling'.

This lack of specific regulation gives some leeway to operators when it comes to the management of traffic. In fact, zero-rating is a common practice in Serbia, where mobile operators usually offer access to some applications that do not count against the user's contracted package of data.

However, the above does not mean that operators have total freedom to control and prioritise the type or source of data that they deliver, because they are still subject to:

- the general objectives and principles foreseen by the ECA, which include the need to enable end-users of public communications

networks and services to have free access to and distribution of information and to use applications and services of their choice;
- the observance of certain quality parameters set out by the RATEL, which entail the obligation to comply with some minimum standards in the provision of electronic communications services; and
- the competition regulations, which might always be used against those behaviours of the operators deemed as anticompetitive.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is neither specific legislation in place, nor enforcement initiatives, relating to digital platforms.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

No, currently there is no specific regulation of NGA networks. Also, there is no government financial scheme to promote basic broadband or NGA broadband penetration.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The Serbian Personal Data Protection Act (2008) does not contain a specific data protection regime for the communications sector. However, the ECA contains some special provisions that are applicable in the context of electronic communications. In short:
- location data: operators of public communications might process users' location data with the consent of the users. Persons who granted their consent have to be given the possibility to, using simple means and free of charge, temporarily reject the location data processing for each connection or transmission;
- interception of communications: interception of electronic communications that reveals the content of communications is not permitted without the consent of the user, except for a definite period of time and based on the court decision, if necessary for criminal proceedings or for protecting the security of the Republic of Serbia;
- cookies: use of cookies is allowed on condition that the user concerned is provided with clear and comprehensive information about the purpose of data collection and processing, and is also given an opportunity to refuse such processing;
- data retention: operators of electronic communications must retain (for the period of 12 months after the communication has taken place) traffic data on electronic communications produced or processed by them, for the purpose of use in criminal proceedings and protection of national and public security of the Republic of Serbia. Data must be kept in such a manner that they can be accessed and provided upon issuance of a court order, without delay; and
- breach reporting: operators are obliged to inform the RATEL of any violations that caused infringement of the personal data protection or privacy of subscribers or users. The RATEL is then authorised to inform the public about the infringement or to require the operator to do it itself, when it concludes that publication of such information is in the public interest.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The ECA does contain some provisions concerning network security. Operators of electronic communications must take adequate technical and organisational measures to ensure the security and integrity of public communications networks and services, confidentiality of communications, and protection of personal, traffic and location data. This includes measures for the prevention and minimisation of the effects of security incidents on users and interconnected networks, and for ensuring the operative continuity of public communications networks and services.

The ECA also demands that subscribers are informed of particular risks related to violation of security and integrity of public communications networks and services, as well as of possible means of protection and implementation costs.

If a violation does occur, the operator must inform the RATEL if the breach had a significant impact on the operation of the networks and services. Moreover, the RATEL will be authorised to inform the public or to require the operator to do it themselves, when it understands that publication of such information is in the public interest.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

No Serbian legislation or regulation covers big data specifically. Consequently, the general rules under the data protection legislation apply to big data issues.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Operators of electronic communications in Serbia are obliged to retain certain data in such a manner that they can access it and make it available without delay, upon issuance of a court order. These data refer to data necessary for:
- tracing and identifying the source of a communication;
- identifying the destination of a communication;
- determining the beginning, duration and end of a communication;
- identifying the type of communication;
- identifying users' terminal equipment; and
- identifying the location of the users' mobile terminal equipment.

Although the relevant regulation does not expressly require it, compliance with the obligation to access and make the data available without delay might require or, at least, make convenient, the storage of a copy of this information in Serbia.

Apart from the above, no data localisation requirements exist in Serbia. There are, however, rules in the data protection legislation for the transfer of personal data outside of Serbia.

Transfers of personal data can be freely made when the recipient country is a state party to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (eg, EU countries).

For transfers to the territory of a state that is not a party to the above-mentioned Convention, prior authorisation from the Serbian data protection authority must be obtained.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

A new law on electronic communications, aiming to harmonise regulations in Serbia with those of the EU's 2009 regulatory framework, has been in the pipeline for some time. However, no information exists about its current status or expected time of approval.

A new law on data protection will become applicable on 21 August 2019. This new piece of legislation, which was enacted by Serbia's National Assembly on 9 November 2018, mainly replicates the contents of the EU General Data Protection Regulation.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

Regulatory structure

The principal laws applying to the media sector are the Public Information and Media Act (2014, as amended) and the Electronic Media Act (2014, as amended). The latter adopts most of the provisions from the EU Audio-visual Media Services Directive.

Institutional structure

The body exercising competence over print media is the Ministry of Culture. The Ministry prepares and monitors the enforcement of the laws and regulations, and oversees the work of public companies and institutions in the print media sector.

The Regulatory Authority for Electronic Media (REM) is an independent agency with the authority to supervise the work of electronic media and to enact by-laws. The REM issues licences for the provision of TV and radio services and authorisations for provision of on-demand media services.

The REM manages the registries of electronic media service providers, including on-demand media services providers.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

No foreign ownership restrictions apply to media services, including TV and radio broadcasters (broadcasters). There are, however, some other restrictions regarding ownership (including cross-ownership) and control of media, which are aimed to protect media plurality (see question 26).

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The RATEL issues radio broadcasting licences on request. Provided that the relevant frequency is available and the request in line with the allocation and the allotment plans (devised by the government and the Ministry of Telecommunications, respectively), the licence will be granted. As an exception to the above, for the granting of radio frequencies of limited availability, the allocation plan may prescribe the need to follow a public bidding process. The RATEL prescribes the criteria that must be taken into account in the decision-making process. The licence is granted for a maximum period of 10 years.

The REM issues the licences for TV broadcasting pursuant to a process of public bidding. The REM's announcement for the public bidding must contain information about the fee to be paid annually. The applicant must pay a deposit in the amount of three monthly fees.

A licensed broadcaster is obliged to submit to the REM a contract with the operator of at least one electronic communications network, by which it acquires the right to distribute its programmes to the public, within 30 days from the delivery of the licence. The licence owner must begin providing media services within 90 days from the delivery of the licence. Licences are granted for a period of eight years and they can be extended upon request.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

All TV broadcasters with national coverage are obliged to ensure that European audio-visual works (works made in EU and Council of Europe members) make up at least 50 per cent of the programming (including European independent production of at least 10 per cent). If the provider does not fulfil this obligation, the TV broadcaster is obliged to increase the share of European works by each year, starting at 20 per cent as a minimum. News, sports events, advertisement and prize contests are not regarded as European works. The media service provider is obliged to ensure that his or her own production partakes of at least 25 per cent of the annual broadcast programme.

On-demand media service providers must support production and access to European audio-visual works, where feasible. This is to be achieved through the service provider's financial contributions for production and through acquisition of rights to European audio-visual works, as well as by placing a special emphasis of such works in their programme catalogue.

Radio and online (including mobile) media service providers are excluded from the scope of this obligation.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The Advertising Act (2016), which is harmonised with the EU law, includes a section on broadcast media advertising. Pursuant to the relevant provisions, TV and radio advertising must be easily recognisable and clearly and visibly separated by sound, image or space from the other contents. Advertising should not harm the integrity of the programmes. Broadcasting of live action films, television films (excluding live action series and documentary series) and newscasts may be interrupted at any time for the purpose of broadcasting TV advertising, provided that they last 30 minutes or longer.

TV and radio advertising may be broadcasted simultaneously with the ongoing programme, without interrupting its time continuity, with the use of electronic graphics or other technical means (for example, virtual advertising, screen sharing, screen inscriptions, inserters, etc), under the conditions that it does not violate the integrity of the content and that it is separated by sound, image or space from the other contents during their broadcasts. The duration of this TV and radio advertising will be counted in the total advertising time within one hour of the broadcasted programme, as TV and radio advertising cannot take up more than 20 per cent of the broadcast programme. This rule is applied to commercial media service providers only.

Product placement is permitted only during live broadcasts and broadcasts of TV films and series, or sports and entertainment programmes, except if the programmes are intended for children. Programmes that contain product placement must meet all of the following requirements:

- they will not directly encourage the purchase or rental of goods or services;
- their content and their scheduling will in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; and
- they will not improperly present a product, service, or brand, for example by the use of closeups or emphasis placed verbally on the quality.

The Advertising Act defines online advertising as advertising on the internet presentation, social network, mobile applications, or through other forms of internet communication. The Act applies only if from the content of the advertising message it clearly follows that it is directed at the Serbian recipients and that the goods or services that are advertised can be bought in or delivered to Serbia. Presentation on the person's own internet domain is not considered advertising. There is a safe harbour for internet service providers in relation to online advertising by third parties (users), corresponding to the relevant provisions of the e-commerce directive. All other provisions of the Advertising Act apply accordingly to online advertising, as defined in the Act.

Must-carry obligations

22 | Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

In accordance with the ECA, the RATEL establishes on REM's request, at least once in every three years, a list of radio or television channels that the operators are obliged to transmit. Only those operators whose electronic communication network is used by a substantial number of end users as the only or primary means of receiving media content fall within the scope of this rule. The operators are obliged, under the Electronic Media Act, to transmit two public TV channels, without remuneration. In addition, RATEL's decision of 10 October 2017 obliged the operators to transmit four commercial TV channels, also without remuneration. On 25 January 2019, in line with REM's decision rendered three days earlier, RATEL repealed the decision of 10 October 2017. The operators are now obliged to transmit only the two public TV channels. There is no mechanism for financing the costs of the must-carry obligation.

Regulation of new media content

23 | Is new media content and its delivery regulated differently from traditional broadcast media? How?

Yes, to provide certain new media services, the interested party must obtain an authorisation from the REM or be enlisted in the official record. For provision of media-on-demand, both the authorisation and the enlistment are required; for stand-alone internet media outlets the enlistment in the record is sufficient. Providers of the stand-alone internet media service and providers of media-on-demand services must be registered for provision of media services.

The REM may issue a notice or a warning or impose a temporary ban on the broadcasting of the programme content, in response to broadcasting of hate speech or other breach of the content-related obligations, as well as for breach of the conditions contained in the authorisation for the provision of media services.

On-demand media services that can be harmful for the physical or moral development of minors must be provided in a manner where the minors will not see it in usual circumstances (eg, as a protected service with conditional access).

Digital switchover

24 | When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover from analogue to digital TV broadcasting occurred on 7 June 2015.

Radio broadcasting is still performed analogously. Under the government's proposed new law on electronic communications of October 2017, the Ministry of Telecommunications should adopt a rulebook governing:

- the manner and timetable of radio switchover;
- requirements and dynamics related to the establishment of a digital broadcasting network;
- requirements for the formation of a multiplex; and
- the extent of the frequencies' scope of use, necessary for effectuating the switchover to digital broadcasting.

The RATEL proposed in September 2017 a draft rulebook on the plan for allocation of frequencies, locations and areas for terrestrial digital audio broadcasting stations in the VHF Band. The rulebook has not been adopted yet.

In the absence of statutory rules, key questions concerning radio switchover remain open, including:

- Will the analogue signal process continue to exist (simulcast) or will it be completely switched off?
- What is the deadline for the switchover?
- Is there an interest in switching to digital broadcasting among radio broadcasters?
- What are the costs?
- Who will be the operator of multiplexes and distributor of radio signals?
- Will there be a sufficient number of receivers?

On 23 November 2018 an experimental digital radio signal of four radio stations in DAB-plus technology started. The Ministry of Telecommunications has announced that it plans to expand the transmission network during the course of 2019.

Digital formats

25 | Does regulation restrict how broadcasters can use their spectrum?

No, there is no obligation to use the spectrum in a specific way.

Media plurality

26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The Public Information and Media Act regulates and protects media plurality. To protect such plurality, the law forbids the following acts:

- concentration of founders' or managing rights of two or more publishers of daily newspapers whose aggregate circulation exceeds 50 per cent of the total circulation of daily newspapers sold in Serbia in the calendar year prior to the concentration;
- concentration of founders' or managing rights of two or more broadcasters whose joined share in the viewing and listening

figures exceeds 35 per cent of the total in the covered zone in the calendar year prior to the concentration; and
- acquiring of more than 50 per cent of shares across daily newspaper publishers (publishing information addressed to the general public) that have a circulation of more than 50,000 copies annually and across all types of broadcasters.

Concentration can also be forbidden based on the Competition Act (see question 28).

The Ministry of Culture (for print media) and the REM (if at least one undertaking is an electronic media outlet) are the bodies with the authority to address breaches of media plurality. If the relevant undertaking does not eliminate the causes of breach within six months, the print media outlet has to be deleted from the Media Registry and fined for commercial offence. The managing editor will also be fined for commercial offence. In case the entity holding a licence for provision of media services does not eliminate the causes of breach, the REM will revoke the licence.

Licence holders must inform the REM of any intended changes to their ownership structure. If there is a threat of breach of media plurality, the REM will issue a recommendation on how the change of ownership should be performed. If the licence holder does not abide by the recommendation, its licence will be revoked.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

There are no proposed legislative changes in the media sector. The public debate on the strategy on the development of the public information system until 2023 started on 31 January 2019 and ended on 1 March 2019. The working group is preparing the report about the public debate and the final version of the strategy to be adopted by the government.

The REM and the Commission for Protection of Competition have not performed a review of the media market yet. The only market reviews available to date were done by private bodies and show that advertising revenues and consumption of print media are decreasing, that radio and TV revenues and consumption are stable and the revenues and consumption of online advertising are rapidly increasing. According to a study from 2016, which was co-financed by the Ministry of Culture, TV media have the biggest market share of 55 per cent and are most influential by far (online media are second placed with the share of 17 per cent). The advertising market taken as a whole has suffered a decline in recent years. TV viewership is constantly dropping.

Digitalisation of radio broadcasting is one of the pending issues (see question 24).

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

Relevant bodies

Media, antitrust and electronic communications in Serbia are handled by three different bodies:
- the RATEL, for electronic communications;
- the REM for media; and
- the Commission for Protection of Competition, for antitrust matters.

Cooperation between the bodies

No special mechanisms are foreseen to avoid conflicting jurisdiction or to ensure consistent application of competition and sectoral regulation. Such a result is sought through the definition of the competencies of each of these bodies in their statutes and with the inclusion of rules seeking cooperation among the agencies in the performance of their activities. In this sense, the ECA expressly foresees that the RATEL must:
- cooperate with agencies and organisations in charge of broadcasting, protection of competition, consumer protection, personal data protection, and with other agencies and organisations on issues relevant for the electronic communications sector;
- cooperate with the authority for protection of competition when it conducts market analysis aimed at identifying markets susceptible to ex-ante regulation;
- if necessary, request the opinion of the competition protection authority when it designates operators with significant market power;
- monitor the radio-frequency spectrum allocated for distribution and broadcasting of media content in cooperation with the relevant broadcasting regulatory authority; and
- cooperate with the broadcasting authority to determine the conditions and methods of use of radio frequencies for media content distribution and broadcasting.

Moreover, and in line with the above, the RATEL and the Commission for Protection of Competition signed a Memorandum of Cooperation on 17 May 2011, which regulates the relations of these two bodies.

The Electronic Media Act prescribes that the REM must:
- cooperate with agencies and organisations in charge of public information, electronic communications, competition protection, consumer protection, personal data protection, protection of equality, and other agencies and organisations, on issues relevant to the media services sector; and
- perform analysis of the relevant media market, in cooperation with competition protection authority, and in accordance with the REM's methodology.

In line with this, the REM and the Commission for Protection of Competition signed a Memorandum of Cooperation on 8 January 2018. The Memorandum provides for a continuous exchange of data, harmonisation of the positions on issues of common interest, and joint participation in activities that contribute to the affirmation of policies implemented by the Commission and the REM.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

RATEL

The RATEL's decisions on the rights and duties of operators and users are final and subject to appeal through judicial proceedings before the administrative court.

The RATEL's decision may be challenged as unlawful before the administrative court if:
- a law, other regulation or general act was not at all or not properly implemented in the decision;
- the decision was passed by an inadequate authority;
- the decision-making procedure was not performed according to the procedural rules;
- the factual situation was incompletely or incorrectly established, or an incorrect conclusion was inferred from the established facts; or

- in the decision made at its discretion, the RATEL overstepped its authorities, or the decision was not adopted in accordance with the purpose of the exercised authority.

The lawsuit must be filed within 30 days from receipt of the RATEL's decision. The filing of a lawsuit does not suspend the execution of the RATEL's decision.

REM

The REM's decisions are also final and subject to appeal through judicial proceedings before the administrative court. The lawsuit must be filed within 30 days from receipt of the REM's decision, and the reasons for challenging the decision are the same as for the RATEL (see above).

If a lawsuit was filed against a decision on issuance of a licence for the provision of media services, imposition of measures, or revocation of a licence, the administrative court cannot resolve the matter on the merits. Instead, the court will specify the deficiencies of its decision and instruct the RATEL to re-examine the issue, in accordance with the court's conclusions.

Competition law developments

30 | Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The Commission for Protection of Competition has in recent years become a prolific agency, with numerous investigations in its track record and prone to use all available legal remedies, including dawn raids. The Commission has also conducted market reviews and fined both private and public companies. The approach by the Commission to the issue of concentration is generally permissible, usually in the form of conditional approvals. In relation to restrictive agreements, the Commission has been reluctant to issue fines, and preferred measures are aimed at eliminating competition infringements instead.

In the past year, there have been around 20 concentrations in the area of telecommunications and media, which the Commission approved in the summary proceedings. Most of the decisions are related to United Group, which owns a significant portfolio of companies active in the telecommunication and media sector in Serbia and in the region.

On 1 March 2019, the Commission rendered a decision to open the investigation phase of the merger clearance procedure in the proposed concentration between Telekom Serbia, majorly state-owned market leader in the telecommunications industry, and Telemark, a local internet provider, distributor of audio-visual content and provider of public voice services in Central Serbia. The Commission has four months (ie, until 1 July 2019) to conduct the market analysis and assess the effects of the proposed concentration. The current practice of the Commission in concentration proceedings is to propose behavioural or structural measures and to negotiate the acceptable measures with the companies, rather than prohibit the concentration.

In October 2018, the Commission exempted a distribution agreement between the public broadcaster RTS and Telekom Serbia from the restrictive agreement prohibition. In the abuse of dominance area, SBB as the largest cable operator in Serbia, has announced an increase in monthly prices in the amount of 100 dinars (approximately €1), beginning as of 1 January 2018. SBB justified the increase by the increase in the number of TV channels offered. The Commission found this explanation unconvincing and in January 2017 started a pre-investigation for abuse of the dominant position. The proceedings are still pending.

The Commission had already established that SBB was abusing its dominant position on two occasions, in 2008 and 2010.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Regulatory framework

The Info-communications Media Development Authority (IMDA) is the converged regulator for the info-communications and media sectors, and is responsible for the development, promotion and regulation of the info-communications industry, which includes both the telecoms and IT sectors. The IMDA is under the direct authority of the Ministry of Communications and Information (MCI).

At present, the telecoms and media sectors are governed by separate regulatory frameworks.

The telecoms sector is regulated by the IMDA under the Telecommunications Act (the Telecoms Act) and the Info-communications Media Development Authority Act 2016 (the IMDA Act).

'Telecommunications' is defined very broadly under the Telecoms Act as:

> *[A] transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, optical or other electro-magnetic systems whether or not such signs, signals, writing, images, sounds or intelligence have been subjected to a rearrangement, computation or other processes by any means in the course of their transmission, emission or reception.*

The Telecoms Act is the primary legislation governing the telecoms industry in Singapore. It sets out the broad licensing and regulatory framework for the telecoms sector. Specific issues are dealt with through regulations, codes of practice, standards of performance, directions and advisory guidelines issued by the IMDA, pursuant to its powers under the Telecoms Act.

The Telecoms Act itself does not make a distinction between fixed, mobile and satellite services. This is consistent with the technology-neutral approach that the IMDA has taken in regulating the industry. There are, however, licensing and regulatory requirements that are service-specific. For instance, the Telecommunications (Radio-Communications) Regulations (Radio-Communications Regulations) regulate the licensing process for radio frequency (RF) spectrum, the use of RF spectrum and the operation of radio stations and networks. This set of regulations is applicable primarily to mobile services.

Other regulations cover specific issues pertaining to fixed, mobile and satellite services. Examples of such regulations are the Telecommunications (Class Licence) Regulations, the Telecommunications (Dealers) Regulations and the Telecom Competition Code 2012 (TCC). The TCC presently regulates competition, interconnection and market access across the entire telecoms industry. That said, refer to question 30 for further information on the converged competition code governing competition and market-related matters in both the telecoms and media markets that the IMDA is currently developing, which will supersede the TCC when it comes into effect.

At present, the Telecoms Act does not apply to the licensing of any broadcasting service or any broadcasting apparatus that is already subject to regulation under the Broadcasting Act.

Foreign ownership restrictions

Since 1 April 2000, no direct or indirect foreign equity limits have been applicable to telecoms licensees. However, other than in exceptional circumstances, the IMDA's current practice is to issue facilities-based telecoms licences only to companies incorporated in Singapore, which can be wholly owned by a foreign entity. In the case of services-based licences, the IMDA would also issue licences to foreign companies with a local registered branch. Merger and acquisition control regulations exist under the TCC.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Licensing framework

All persons operating and providing telecoms systems and services in Singapore must be licensed under section 5 of the Telecoms Act. The IMDA categorises licences for the operation and provision of telecoms systems and services into licences for either facilities-based operators (FBOs) or services-based operators (SBOs), and where RF spectrum is required for the provision of wireless services, additional licensing is required under the Radio-Communications Regulations.

FBO licence

A person intending to deploy telecoms infrastructure (generally taken to refer to any transmission facility) to provide telecoms services to other telecoms licensees or end users must obtain an FBO licence. The IMDA generally adopts a technology-neutral approach towards the licensing of telecoms infrastructure. The configuration of the systems deployed and the technology platform (wireless or wired) adopted will be left to the choice of the licensee, subject to spectrum and other physical constraints.

An FBO licence is on a higher hierarchical level than an SBO licence. As such, an FBO licensee does not need an SBO licence if it wishes to provide services that on their own would have required an SBO licence. The converse, however, does not apply. An SBO licensee that wishes to deploy telecoms infrastructure in the provision of telecoms services must apply for an FBO licence. The FBO licence will then replace the SBO licence.

Although the general conditions of an FBO licence are standardised across all FBO licensees, additional specific conditions may apply to each individual FBO licensee depending on the services that the licensee may provide.

The following are some telecoms systems and services that may require an FBO licence:

- any terrestrial telecoms infrastructure for the carriage of telecoms or broadcasting traffic (be it cross-border or local traffic; network coverage may be nationwide or limited to selected local geographic broadcast), including but not limited to:
  - submarine cables (including the establishment of frontier stations, backhaul and sale of indefeasible rights of use);
  - satellite international gateways; and
  - domestic telecoms networks (including core backbone and local access networks);
- public switched telephone services;
- public switched message services;
- public switched ISDN services;
- leased circuit services;
- public switched data services;
- public radio communication services;
- public cellular mobile telephone services;
- public trunked radio services;
- public mobile data services;
- public mobile broadband multimedia services (including 3G/4G mobile communication systems);
- public fixed-wireless broadband multimedia services;
- terrestrial telecommunication network for broadcasting purposes only; and
- satellite uplink/downlink for broadcasting purposes.

FBO licences	Annual fees and duration
FBOs	Licence duration: 15 years, renewable for a further period as the IMDA thinks fit. Annual fee: • first S$50 million annual gross turnover (AGTO): S$80,000; • next S$50 million – S$100 million in AGTO: 0.8 per cent of incremental AGTO; • above S$100 million in AGTO: 1 per cent of incremental AGTO.
FBO designated as public telecoms licensee	Licence duration: 20 years, renewable for a further period as the IMDA thinks fit. Annual fee: • first S$50 million AGTO: S$200,000; • next S$50 million – S$100 million in AGTO: 0.8 per cent of incremental AGTO; • above S$100 million in AGTO: 1 per cent of incremental AGTO .
Public mobile data services Public trunked radio services	Licence duration: 10 years, renewable for a further period as the IMDA thinks fit. Annual fee: • first S$50 million AGTO: S$80,000; • next S$50 million – S$100 million in AGTO: 0.8 per cent of incremental AGTO; • above S$100 million in AGTO: 1 per cent of incremental AGTO.
Terrestrial telecoms network for broadcasting purposes only Satellite uplink/downlink for broadcasting purposes	Licence duration: 10 years, renewable every 5 years. Annual fee: S$5,000

SBO licence

SBO licences are granted to operators that do not intend to deploy telecoms infrastructure. Such licensees may instead lease telecoms network elements (such as transmission capacity) from FBO licensees to provide telecoms services, or resell the telecoms services of other telecoms licensees. SBO services can be individually licensed or class-licensed. Class licensing is a licensing scheme where the standard terms and conditions that apply to the category of licences are published in an official gazette for compliance. Operators providing the services within the scope of the class licence will be deemed to have read and agreed to the terms and conditions of the class licence. Generally, operators leasing international transmission capacity to provide telecoms services will be licensed individually.

Telecoms services that require SBO (individual) licensing include, without limitation:

- international simple resale;
- resale of leased circuit services;
- public internet access services;
- internet exchange services;
- virtual private network services;
- managed data network services;
- mobile virtual network operation;
- live audio-text services;
- global mobile personal communications by satellite services;
- internet protocol (IP) telephony services;
- satellite mobile telephone or data services;
- mobile communications on aircraft;
- voice and data services with masking of calling line identity;
- machine-to-machine services;
- white space geolocation database services; and
- prepaid services for other telecoms services, such as:
  - callback and call re-origination services;
  - internet-based voice and data services;
  - international calling card (ICC) services;
  - resale of public switched telecoms services;
  - store-and-retrieve value-added network services; and
  - store-and-forward value-added network services.

Telecoms services that require only an SBO (class) licence include, without limitation:

- post-paid telecoms services, such as:
  - callback and call re-origination services;
  - internet-based voice and data services;
  - ICC services;
  - resale of public switched telecoms services;
  - store-and-retrieve value-added network services; and
  - store-and-forward value-added network services;
- audio-text services; and
- public chain payphone services.

Certain services, such as audio-text and internet access services, are subject to concurrent telecoms and media licensing requirements. In this respect, audio-text and internet access services are also deemed to be class-licensed under the Broadcasting (Class Licence) Notification (see also question 19).

SBO (individual) licence	
SBO (individual)	Annual fee: • first S$50 million AGTO: S$4,000; • next S$50 million to S$100 million in AGTO: 0.5 per cent of incremental AGTO; • above S$100 million AGTO: 0.8 per cent of incremental AGTO.
Live audio-text services only	S$200 every 5 years

SBO (class) licence	
Resale of public switched telecommunication services, public chain payphone services, and store-and-retrieve value-added network services (without the use of leased circuits)	No registration fee
All other categories of SBO (class) licences	S$200 (one-time payment)

Licensing – radio frequency

Pursuant to its exclusive privilege under the Telecoms Act, the IMDA can determine how RF spectrum is allocated. The IMDA can also make decisions on the assignment of unused radio spectrum. Specifically, the Radio-Communications Regulations give the IMDA the right to prepare and publish radio spectrum plans and RF band plans. The Radio Spectrum Master Plan is a document prepared by the IMDA pursuant to such statutory right and it serves to inform the industry and interested parties on the allocation and availability of spectrum, technological trends in the use of spectrum and the IMDA's policy with regard to spectrum allocation and reallocation for public communication networks. At the time of writing, the Radio Spectrum Master Plan is in the process of being updated by the IMDA, and the updated version has yet to be published. The IMDA is also empowered under the Radio-Communications Regulations to vary or revoke any radio spectrum plan or RF band plan, in whole or in part.

RFs required for the provision of 2G, 3G and 4G mobile services, as well as wireless broadband services, have been granted as spectrum rights through an auction process. RFs required for the operation of a satellite are generally allocated administratively or assigned by the IMDA as part of the satellite licence. The Radio-Communications Regulations also regulate the installation and maintenance of radio communications stations or networks in Singapore.

Regarding the permitted use of licensed radio spectrum, the general powers of section 5A(8) of the Telecoms Act and regulation 10(1)(i) of the Radio-Communications Regulations give the IMDA the discretion to direct the grantee concerning its use of the spectrum right. Additionally, the grantee may be restricted in its use of equipment within the allocated RF spectrum. For example, no station fitted in an aircraft shall be operated or used while such aircraft is at rest on land or on water in Singapore, barring certain exceptional circumstances as stated in regulation 36 of the Radio-Communications Regulations.

Provision of publicly available telephone services

Since 1 April 2000, subject to the IMDA's licensing requirements, any person may apply to the IMDA for a licence to provide telecoms services to the public. There are no special conditions imposed by the IMDA for such services. A holder of an FBO licence may, however, depending on the scope and requirements of its operations, apply to the IMDA to be designated as a public telecommunication licensee (PTL) under section 6 of the Telecoms Act. A PTL is accorded certain statutory powers under the Telecoms Act to facilitate the deployment of telecoms infrastructure, including the power to enter state and private property to lay telecoms infrastructure. The IMDA will grant such applications only if the FBO licensee has committed to substantial telecoms infrastructure investment and roll-out so as to offer services to a significant proportion of the population within a reasonable time. At present, four licensees have been designated as PTLs (namely, NetLink NBN Management Pte Ltd (as trustee-manager of NetLink NBN Trust) and NetLink Management Pte Ltd (as trustee of NetLink Trust) as joint licensees, Singtel, StarHub and StarHub Cable Vision). The IMDA also reserves the right to impose basic service obligations on a PTL.

The IMDA may modify the conditions of a telecoms licence granted under section 5 of the Telecoms Act. The procedure to be followed is set out in section 7 of the Telecoms Act, which prescribes that, in the case of a PTL licensee, the IMDA first has to give notice to the PTL licensee of the proposed modifications to the licence, including whether compensation is payable. Before finalising any direction to implement the licence modifications, the IMDA is also required to give PTL licensees at least 28 days to make written representations on the proposed modifications. In the case of a non-PTL licensee, the Telecoms Act does not set out the procedure to be followed in relation to the modification of the licence. Instead, the modification procedure of a non-PTL licence is typically set out in the relevant licence. Under the terms of their licences, telecoms licence holders may not assign, transfer, deal with or otherwise dispose of the whole or any part of the rights, privileges, duties or obligations under the licence without obtaining the prior written approval of the IMDA.

Provision of public Wi-Fi services

Operators providing public Wi-Fi services may require a telecom licence granted by the IMDA, as well as a broadcasting class licence (see question 19). However, commercial establishments that are open to the public and that merely provide Wi-Fi to customers within their own premises for purposes incidental to their primary business may be exempted from telecom licensing requirements.

In 2006, the Singapore government launched the Wireless@SG programme, in partnership with private sector operators, to deploy wireless hotspots in public areas in Singapore to provide high-speed wireless broadband. The Wireless@SG programme aims to promote a wireless broadband lifestyle among citizens. At present, the four licensed Wireless@SG operators are: Singtel, StarHub, M1 and MyRepublic. Businesses, venue owners or tenants that wish to provide free Wi-Fi to their premises may enter into commercial agreements with the Wireless@SG operators for this purpose.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The IMDA manages the allocation and usage of spectrum for various services, including public mobile, private land mobile, terrestrial fixed and broadcasting services. As such, spectrum licences generally specify that licensees can only use the assigned spectrum for the specified purpose. Conditions requiring the network to be operated on a non-interference and unprotected basis, and limiting the operation to specific geographical locations, may also be imposed.

The IMDA may also permit existing assigned spectrum to be used for new purposes if there are grounds to do so. For example, in December 2014, the IMDA decided to allow 3G spectrum rights holders to deploy 4G and international mobile telecommunication (IMT)-advanced services using the 3G bands, subject to the following conditions:

- 3G spectrum rights holders who wish to deploy 4G and IMT-Advanced systems and services using the 3G bands are required to seek the IMDA's prior approval;
- 3G spectrum rights holders must ensure there is no degradation of existing services;
- 3G spectrum rights holders must take measures to prevent interference to any IMDA-authorised networks; and
- the IMDA reserves the right to impose quality of service requirements on the 4G and IMT-Advanced systems and services, as well as other measures to protect consumer interests.

Licensed RF granted under a spectrum right may be traded and shared, subject to the IMDA's prior approval, TCC provisions and any restrictions and conditions specified by the IMDA. At present, the IMDA has not issued any specific regulations on the trading and sharing of RF, aside from general conditions stated in the Radio-Communications

Regulations. Conditions on trading and sharing of RF may also be imposed via the licences or relevant spectrum rights.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Ex-ante regulations are primarily applied to licensees that are classified as 'dominant licensees' under the TCC. Under section 2.2.1 of the TCC, a licensee will be classified as 'dominant' if it is licensed to operate facilities that are sufficiently costly or difficult to replicate such that requiring new entrants to do so would create a significant barrier to rapid and successful entry into the telecommunication market in Singapore by an efficient competitor; or if it has the ability to exercise significant market power in any market in Singapore in which it provides telecommunication services.

In this regard, dominant licensees are subject to a range of ex-ante obligations under the TCC, such as accounting separation requirements; obligations to file tariffs with the IMDA for approval; to provide unbundled services; and to allow resale of end-user services by any licensee. Dominant licensees may also be required to offer certain interconnection and access-related services on terms that are pre-approved by the IMDA, by way of a standardised reference interconnection offer (RIO). These obligations are further explored in greater detail below.

Tariffing

Unless exempted by the IMDA, dominant licensees must file tariffs for any telecommunications service they intend to offer (including any offer on a trial basis) with the IMDA and obtain the IMDA's prior approval before offering the service. The proposed tariff filing must include certain specified information, including a description of the service; the relevant prices, terms and conditions; any discounts or special considerations that will be offered; and the minimum time period for which the service will be available. The IMDA will assess whether the proposed tariff is just and reasonable in accordance with the principles in the TCC.

Interconnection with dominant licensees

If required by the IMDA, dominant licensees must also publish RIOs, under which they have to offer interconnection and access-related services on prices, terms and conditions that are pre-approved by the IMDA. A downstream operator that meets the relevant criteria may then request services from the dominant licensee under the terms of its RIO.

Presently, Singtel (which is the incumbent fixed-line network operator and also operates a number of telecoms facilities such as submarine cable landing stations) and NetLink Trust (whose assets include central offices, ducts and manholes) have been required to offer RIOs pursuant to the TCC.

In the context of the next-generation nationwide broadband network (NGNBN), the IMDA has also imposed similar obligations on the appointed network and operating companies to make available certain mandated services to qualifying persons under the terms of standardised interconnection offers (ICOs) (see question 5 for more details on the appointed network and operating companies).

Accounting separation

Dominant licensees are subject to the IMDA's Accounting Separation Guidelines, which provide for two levels of accounting separation: detailed segment reporting and simplified segment reporting. The accounting separation requirements are intended to provide the IMDA with information to monitor cross-subsidisation by dominant FBO licensees, as well as to ensure that services provided internally by dominant FBO licensees to their downstream operators or affiliates are provided on similar terms to equivalent services provided to other unrelated licensees.

Briefly, detailed segment reporting involves separate reporting of key service segments and certain individual retail services. The requirements include a specified cost allocation process and prescribed allocation methodologies for certain cost and revenue items. Reports include both income statements and mean capital employed statements. In contrast, simplified segment reporting requires less disaggregation of operations and a less rigorous cost allocation process. Only income statement reporting is required.

Next-generation nationwide broadband network

To ensure effective open access of the NGNBN infrastructure for downstream operators, the IMDA has put in place structural separation and operational separation requirements on the network and operating companies (see question 5).

Merger control

Under Part VA of the Telecoms Act, all designated telecommunication licensees (DTLs), designated business trusts (DBTs) and designated trusts (DTs) are required to comply with merger control requirements. Where a transaction meets the specified pre-merger filing thresholds, generally, where the transaction would result in a party and its associates becoming either a 12 per cent controller (ie, holding 12 per cent or more) or a 30 per cent controller (ie, holding 30 per cent or more) of the ownership or voting power in a DTL, DBT or DT, the IMDA's prior approval must be sought for the transaction. In addition, the IMDA must be notified if a transaction would result in a person holding 5 per cent or more but less than 12 per cent of the ownership or voting power in a DTL, DBT or DT.

Infrastructure sharing

Under certain circumstances, the IMDA may require an FBO licensee (which may not be a dominant licensee) to 'share' its infrastructure with other licensees. As provided under section 7 of the TCC, the IMDA may require sharing of any infrastructure that it determines is 'critical support infrastructure', or where the IMDA concludes that sharing would be in the public interest, in accordance with the principles in the TCC.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Generally, the IMDA does not require structural or functional separation between an operator's network and service activities in Singapore. However, in relation to the NGNBN industry, the IMDA has, with a view to ensuring effective open access for downstream operators, instituted a multilayered industry structure consisting of: the network company (NetCo); several operating companies (OpCos) including the appointed OpCo; and numerous retail service providers.

At the first layer, the NetCo appointed by the IMDA is responsible for building and operating the passive infrastructure, which includes the dark fibre network. OpenNet Pte Ltd was the initial NetCo appointed by the IMDA. The assets and operations of OpenNet have since been taken over by NetLink Trust (acting through its trustee, NetLink Management Pte Ltd), following NetLink Trust's acquisition of OpenNet effective 1 October 2014. In July 2017, 100 per cent of the units in NetLink Trust were acquired by NetLink NBN Trust (acting through its trustee-manager, NetLink NBN Management Pte Ltd). Under the conditions of the FBO licence held jointly by NetLink NBN Management Pte Ltd (as trustee-manager of NetLink NBN Trust) and NetLink Management Pte Ltd (as trustee of NetLink Trust), the NetCo is

required to ensure structural separation, which involves, among other things, ensuring that it has no effective control over any other telecoms licensee or broadcasting licensee; it is not under the effective control of any other telecoms licensee or broadcasting licensee; and it is not under the effective control of the same controlling entity as any other telecoms licensee or broadcasting licensee (the 'no effective control' requirements). These requirements are intended to ensure that the NetCo and its downstream operators are separate entities with fully autonomous decision-making considerations, and that they do not have control over each other's management and major operating decisions.

At the second layer, Nucleus Connect Pte Ltd (Nucleus Connect), the appointed OpCo, is responsible for building and operating the active infrastructure, comprising switches and transmission equipment, to provide wholesale network services. While Nucleus Connect may be owned by its downstream operating units, it is nevertheless subject to a range of detailed operational separation requirements under its FBO licence conditions. The operational separation requirements are intended to ensure, among other things, that downstream operators are treated in a non-discriminatory manner; that Nucleus Connect independently formulates and makes its own commercial decisions; and that it operates at arm's length from affiliated operators.

Section 69C of the Telecoms Act also empowers the Minister for Communications and Information (the Minister), if certain conditions are met and in the public interest, to issue a separation order requiring the transfer of a telecom licensee's business or assets to a separate or independent entity.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Generally, universal service obligations (USOs) are applied by the IMDA only to PTLs pursuant to the conditions of their licence. For example, Singtel, the incumbent telecoms operator, is required under its licence to provide basic telephone services to any person in Singapore who requests such service. In respect of the NGNBN, which is intended to deliver high-speed broadband access throughout Singapore, the IMDA has imposed USOs on both the appointed NetCo and OpCo following the creation of the NGNBN. The NetCo's USO took effect from 1 January 2013. The NetCo's USO obliges it to fulfil all requests to provide its fibre services to all locations in Singapore. Correspondingly, the OpCo must meet all reasonable requests by any operating company or downstream retail service providers for access to a basic set of wholesale services offered under its standard ICO.

Compliance with USOs is not financed by a statutorily created fund (such as universal service funds in other jurisdictions) or contributions from industry.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The IMDA administers the number allocation scheme in Singapore in accordance with its National Numbering Plan. Among other things, the National Numbering Plan sets out rules and guidelines for the use and assignment of numbers to telecommunication services delivered over the public switched telephone network (PSTN), the radio network and the internet or other IP-based networks; and describes the assignment of numbers to international services, trunk service, emergency services and special services such as voice mail and intelligent network (IN) services. There is only one numbering area in Singapore and area or trunk codes are not used. The PSTN, radio network and IP telephony share the same numbering plan – a uniform eight-digit numbering plan.

Numbers are allocated to various service categories according to the first digit. Those beginning with the digit '0' are reserved for international services; '1' for special services, including calls for operator assistance, service enquiry, machine-to-machine, internet dial-up, voice information, IN services and access code international direct dial type of services; '3' for IP Telephony services; '6' for PSTN and IP Telephony services; '8' and '9' for eight-digit Radio Network numbers; and '99' for three-digit emergency services.

Number portability across mobile networks and fixed-line services is obligatory. Fixed-line and mobile telephony operators are required to allow consumers to retain full use of their existing phone numbers when switching service providers. In addition, IP telephony operators utilising level '6' numbers (ie, Singapore telephone numbers beginning with '6') are subject to the same number portability requirements as fixed-line operators. Syniverse Technologies is the centralised database administrator appointed to operate the centralised number portability database system, starting with the launch of full mobile number portability in June 2008. The IMDA has published a document entitled the 'Fixed Number Portability Guidelines' to set out the technical approach to fixed number portability by FBO licensees offering a fixed-line voice service.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Retail tariffs filed by dominant licensees for approval with the IMDA must include information relating to the customer terms and conditions (see question 4 for more details).

Section 3 of the TCC also sets out a number of consumer protection-related provisions with which all FBO licensees and SBO licensees must comply. These include provisions relating to minimum quality of service standards (and disclosure to end users of any lower standards agreed to); disclosure of prices, terms and conditions (including for services provided on a free trial basis); restrictions on service termination; and prohibition against charging for unsolicited telecoms services.

Section 3 of the TCC also includes a number of mandatory contractual provisions that must be included in all FBO licensees' and SBO licensees' end-user service agreements (ie, service contracts with business or residential subscribers). These include provisions relating to billing cycles; the prices, terms and conditions upon which service will be provided; procedures for disputing charges; and termination or suspension of service.

The IMDA also has the right under the FBO and SBO licences to require licensees to file their schemes of service, including non-price terms and conditions for the provision of services, with the IMDA before the launch or announcement of such services.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The IMDA's policy framework on net neutrality is set out in a policy paper dated 16 June 2011, which sets out five principles representing its approach towards net neutrality that internet service providers (ISPs) and telecoms network operators are required to adhere to:

- they must not block legitimate internet content or impose discriminatory practices, restrictions, charges or other measures that would effectively render any legitimate internet content inaccessible or unusable;

- they must comply with competition and interconnection rules in the TCC;
- they must comply with the IMDA's information transparency requirement and disclose to end users their network management practices and typical internet broadband download speeds;
- ISPs must meet the minimum broadband quality of service standards prescribed by the IMDA. Reasonable network management practices are allowed, provided that the minimum internet broadband quality of service standards are adhered to, and that such practices will not render any legitimate internet content effectively inaccessible or unusable; and
- they are allowed to offer niche or differentiated services that meet the IMDA's information transparency, minimum quality of service and fair competition requirements.

In particular, the IMDA recognised that, to promote the development of online services, ISPs and network operators must be given the flexibility to manage their networks or differentiate their service offerings to meet the needs of changing customer demands or niche user groups. At the same time, such flexibility cannot result in discriminatory practices that render legitimate internet content effectively inaccessible or unusable. In this respect, the IMDA has indicated in its decision that it intends to deal with any complaints on a case-by-case basis.

In connection with the above, the IMDA requires residential fixed broadband internet access service providers to publish, on their websites, information about their respective network management policies (including whether traffic shaping is implemented).

While there are no express laws or regulations that prevent 'zero-rating' of data transmission by certain services or applications or bandwidth 'throttling' per se, ISPs would nevertheless need to comply with the general principles set out under the IMDA's framework for net neutrality.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

At present, there is no overarching legislation or regulatory framework that specifically deals with digital platforms. In the case of online digital platforms such as search engines, social media platforms and online digital media stores, they may instead be subject to a range of existing legislation and regulatory frameworks that govern specific sectors or subject matter. These may include, without limitation:

- to the extent that a digital platform constitutes a telecoms service, it may be subject to the telecoms licensing and regulatory framework;
- to the extent that a digital platform constitutes a broadcasting service, it may be subject to the broadcasting licensing and regulatory framework. In particular, where the platform operator may be considered to be an internet content provider, it may be deemed to be subject to a broadcasting class licence (see question 19);
- to the extent that the computer or computer system behind the digital platform has been designated as critical information infrastructure (CII) in Singapore, owners of such computers or computer systems are subject to cybersecurity obligations under the Cybersecurity Act 2018 (Cybersecurity Act) (see question 13);
- to the extent that a digital platform collects, uses or discloses personal data relating to individuals, it may be subject to data protection obligations under the Personal Data Protection Act 2012 (PDPA) (see question 12); and
- competition issues involving a digital platform may be governed by the general competition law as established under the Competition Act and which is administered by the Competition and Consumer Commission of Singapore (CCCS), or sector-specific regulatory frameworks as administered by the respective regulatory authorities. For example, competition issues that impact the telecoms and media sector may fall within the purview of the IMDA. The Competition Act provides that it does not apply insofar as another regulatory authority (other than the CCCS) has jurisdiction in a particular competition matter (see question 28).

In relation to the areas of regulation listed above, there have not been any notable cases recently in which enforcement action was taken against an online digital platform. Notably, however, in 2015, the CCCS published two occasional papers that discussed various issues that may be of relevance to this area. The first, entitled 'E-Commerce in Singapore – How it affects the nature of competition and what it means for competition policy' highlighted a number of potential competition issues and observations in relation to e-commerce activities, including the use of various e-commerce platforms. The second, entitled 'Anything wrong with asking for the best price?', discusses the use of most-favoured nation (MFN) clauses, and includes observations on overseas cases in which MFN clauses have raised competition concerns, including cases that involved internet platforms.

More recently, in 2018, the CCCS announced that it will conduct, among other studies, a market study on the online travel booking sector, which will focus on understanding the industry landscape relating to both the provision of flight tickets and hotel accommodation in Singapore. The CCCS will examine the types of commercial arrangements entered into between third party online travel booking platforms and service providers, including how such commercial arrangements are negotiated and applied in Singapore, and how such platforms and service providers compete with each other, to understand how commercial practices and arrangements in the online travel sector impact competition and consumers in Singapore.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

Regulation of the NGNBN

At present, NGNBN entities are regulated under existing telecommunication and media legislation, and through contractual obligations between them and the IMDA. In particular, the respective ICOs of NetLink Trust and Nucleus Connect, in fulfilment of their contractual obligation under their request-for-proposal bid commitment to the IMDA, set out the prices, terms and conditions upon which they would provide certain mandated NGNBN services.

In addition, the IMDA has released specific regulations providing for licensing and regulatory frameworks in 2009 – namely the NetCo Interconnection Code (updated in 2017) and the OpCo Interconnection Code (updated in 2017) – to regulate the activities of the NetCo and OpCo respectively. The Interconnection Codes are the regulatory instruments underlying the ICOs and specify, inter alia, requirements related to the pricing, terms and conditions for the services offered by the NetCo and OpCo under their respective ICOs, as well as the obligations placed on both the NetCo and OpCo and persons requesting services from them. The obligations contained under the Interconnection Codes are in addition to those contained in the Telecoms Act, other statutes, regulations, directions, licences and codes of practice.

Government schemes promoting basic and NGA broadband

The Singapore government has been keenly promoting the development of basic broadband infrastructure, application and services since

the 1990s. Many initiatives have been put in place over the years to promote the establishment of nationwide broadband networks. The government has also devoted significant efforts to encourage the roll-out and take-up of NGA broadband services, in particular service offerings over the NGNBN. In 2015, the Singapore government launched the 10-year Infocomm Media 2025 master plan, which seeks to be a key enabler of the Singapore government's vision to transform Singapore into the world's first Smart Nation, by harnessing the power of technology including in the area of infrastructure.

In terms of government financial schemes for the promotion of a NGNBN, it was announced in December 2007 that the government would grant up to S$750 million for the development of this high-speed broadband network. This is part of the government's intention to adopt a public–private partnership approach with regard to the building, ownership and operation of the network. In particular, the government hopes that more small firms will be able to offer online services without being burdened by the cost of building the network. In line with the promotion of NGNBN, the IMDA has also spearheaded other broadband initiatives, including the Singapore Internet Exchange (SGIX), which serves as a neutral internet exchange for local and international IP traffic. By establishing multiple nodes in different sites in Singapore as its core, the SGIX plays a significant role in the deployment of services over the NGNBN, allowing for the efficient exchange of traffic, reducing latency and ensuring sustainable, reliable transmission of bandwidth-intensive services to end users.

To complement the NGNBN, a wireless broadband network has also been deployed in key catchment areas around Singapore: Wireless@SG allows end users to enjoy indoor and outdoor wireless broadband access in public areas. As part of the Singapore government's Smart Nation vision, it is currently exploring the concept of a nationwide heterogeneous network (HetNet), which will allow devices to stay seamlessly connected throughout Singapore by hopping automatically across wireless networks, such as cellular and Wi-Fi networks. In this regard, the IMDA has worked with local mobile network operators and other industry players to conduct trials to validate the technologies and capabilities of HetNet, beginning from 2015.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

The IMDA has prescribed specific rules for the telecommunication sector. Section 3.2.6 of the TCC contains provisions that govern the use of end-user service information (EUSI) by all FBO and SBO licensees. Different provisions may apply, depending on whether the licensee is dealing with a business end user or a residential end user. The IMDA's standard licence conditions also include provisions requiring licensees to ensure the confidentiality of customer information.

Furthermore, with effect from 2 July 2014, the PDPA established a baseline standard of data protection for all private sector organisations in Singapore. Among other things, organisations are required to obtain an individual's consent before collecting, using or disclosing his or her personal data, unless an exception in the PDPA applies. Other obligations under the PDPA include requiring that organisations make a reasonable effort to ensure that personal data they collect is accurate and complete, if the personal data is likely to be used by the organisation to make a decision that affects the individual or is likely to be disclosed by the organisation to another organisation; and requiring that organisations make reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks.

In addition, the PDPA established a 'do not call' registry with effect from 2 January 2014, which allows individuals to register their Singapore telephone numbers to opt out of receiving telemarketing calls and messages. The Personal Data Protection Commission (PDPC), which is responsible for administering the PDPA, has also issued a set of advisory guidelines that specifically aims to address certain unique circumstances faced by the telecommunication sector in complying with the PDPA.

The PDPA is not intended to override sector-specific data protection frameworks. To the extent of any inconsistency, the provisions of other written laws will prevail. In addition, the PDPA's provisions on data protection do not affect any obligation imposed by or under law (except for contractual obligations), which may include regulatory obligations imposed under other written laws. Hence, licensees will need to ensure that they are in compliance with any sector-specific obligations such as the TCC, as well as the general framework under the PDPA.

On 27 April 2018, as part of its review of the PDPA, the PDPC launched a public consultation on, inter alia, managing unsolicited commercial messages (see question 16).

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The primary legislative framework governing cybersecurity in Singapore is the Cybersecurity Act. On 31 August 2018, the Cybersecurity Act (with the exception of sections 24 to 35 and the Second Schedule) came into effect. The Cybersecurity (Critical Information Infrastructure) Regulations 2018 and Cybersecurity (Confidential Treatment of Information) Regulations 2018 also came into operation on the same date.

Broadly, the Cybersecurity Act:

- creates a framework for the protection of designated CII against cybersecurity threats;
- provides for the appointment of the Commissioner of Cybersecurity (Commissioner) and other officers for the administration of the Cybersecurity Act;
- authorises the taking of measures to prevent, manage and respond to cybersecurity threats and incidents in Singapore; and
- once the remaining provisions come into effect, will establish a licensing framework for providers of licensable cybersecurity services in Singapore; specifically, managed security operations centre monitoring services and penetration testing services.

Under the Cybersecurity Act, the Commissioner is empowered to issue codes of practice and standards of performance to ensure the cybersecurity of CII. Pursuant to these powers, the Commissioner has issued the Cybersecurity Code of Practice for Critical Information Infrastructure as of 1 September 2018.

The Cybersecurity Act provides for the regulation of CII in 11 critical sectors. CII is defined as a computer or computer system that is necessary for the continuous delivery of an essential service, the loss or compromise of which will lead to a debilitating effect on the availability of the essential service in Singapore. The 11 critical sectors containing essential services from which CII may be designated include the info-communications and media sectors.

The Cybersecurity Act will operate alongside the patchwork of existing legislation and various self-regulatory or co-regulatory codes that promote cybersecurity, including but not limited to the following:

- the Computer Misuse Act (CMA), which criminalises certain cyber activities such as hacking, denial-of-service attacks, infection of computer systems with malware, the possession or use of hardware, software or other tools to commit offences under the CMA, and other acts preparatory to or in furtherance of the commission of any offence under the CMA;

- the PDPA and the regulations issued thereunder, which impose certain obligations on organisations to make 'reasonable security arrangements' to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks with respect to personal data held or processed by those organisations. The PDPC has also issued general guides that, while not legally binding, provide greater clarity on, for instance, the types of reasonable security arrangements that can be adopted by organisations in the protection of personal data. These general guides include:
  - the Guide to Managing Data Breaches (the Data Breach Guide);
  - the Guide to Securing Personal Data in Electronic Medium (the Securing Personal Data Guide); and
  - the Guide on Building Websites for SMEs; and
- sector-specific codes of practice, such as the Telecommunication Cybersecurity Code of Practice formulated by the IMDA, which is imposed on major internet service providers in Singapore and includes security incident management requirements.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

In Singapore, there is no legislation or regulation that specifically deals with big data per se. Rather, companies involved in big-data-related activities must ensure that they comply with existing data protection laws and regulatory frameworks as may be applicable, such as the PDPA and the Cybersecurity Act.

The PDPA governs the collection, use and disclosure of personal data by organisations. All organisations that collect, use or disclose personal data relating to an individual are accordingly required to comply with the data protection provisions under the PDPA, unless an exception under the PDPA applies (see question 12). Currently, the PDPA requires organisations to notify and seek consent from individuals before their personal data may be collected, used or disclosed by organisations, unless an exception under the PDPA applies. However, the PDPC has recognised that increasingly, where huge volumes of personal data involving large numbers of individuals are collected rapidly and from a variety of sources, it may not be practical for organisations to seek individuals' consent in every instance of data collection or processing, or to facilitate withdrawals of consent. In this regard, the PDPC published a public consultation paper titled 'Approaches to Managing Personal Data in the Digital Economy' on 27 July 2017, in which it proposed new bases for organisations to collect, use and disclose personal data in the absence of individuals' consent. These include the proposed 'Notification of Purpose' approach, whereby organisations may collect, use or disclose personal data where such collection, use or disclosure of personal data is not expected to adversely impact individuals. It is proposed that organisations that wish to rely on this approach must provide appropriate notification to individuals, including information on how individuals may opt out of the collection, use or disclosure of personal data. Following the public consultation exercise, the PDPC stated in its response to the feedback received (published on 1 February 2018) that guidelines will be published at a future occasion to address the challenges in allowing individuals to opt out in circumstances where large volumes of personal data are instantaneously and seamlessly collected, such as data collected by sensors. At the time of writing, such guidelines have not yet been published.

As mentioned in question 13, the Cybersecurity Act establishes a framework for the cybersecurity of CII. Where the computer or computer system involved in big-data-related activities of organisations has been specifically designated as CII under the Cybersecurity Act, the provisions of the Cybersecurity Act will apply.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There is no overarching law or regulation that requires data in general to be stored locally in Singapore. The PDPA, which governs the collection, use and disclosure of personal data in Singapore, does not require personal data to be stored locally in Singapore. However, organisations that wish to transfer personal data outside of Singapore would need to ensure that they fulfil certain requirements under the PDPA and its accompanying regulations, before such personal data may be transferred outside Singapore. Furthermore, specific types of data may be the subject of regulatory obligations requiring that they be stored in Singapore. For example, licensed telecom operators may be required to store call detail records in Singapore pursuant to their licence conditions.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Converged competition code for telecommunication and media markets

On 20 February 2019, the IMDA launched a public consultation to seek views on its proposed converged competition code for the telecoms and media markets. At present, competition and market related matters in the telecoms and media sectors are governed separately by two different codes of practice. In line with the IMDA's role as a converged regulator, it has decided to review both codes of practice with the aim of merging the two frameworks and developing a harmonised converged competition code for both markets (see question 30).

Introduction of Cybersecurity Act 2018

On 5 February 2018, the Cybersecurity Act was passed by Parliament to establish a legislative framework for the oversight and maintenance of national cybersecurity in Singapore. On 31 August 2018, most of the provisions of the Cybersecurity Act came into effect (with the exception of sections 24 to 35 and the Second Schedule, which establish a licensing framework for certain cybersecurity service providers) (see question 13).

IMDA's multi-year roadmap for cybersecurity in the telecom sector

In light of the evolving needs of the digital economy, and the advent of next-generation connectivity, including 5G and the Internet of Things, the IMDA is undertaking several measures as part of its new multi-year roadmap to improve Singapore's telecom cybersecurity capabilities, so as to address the spectre of next-generation cyber-threats.

First, the IMDA has established the Telecom Cybersecurity Strategic Committee, which will examine areas for improvement in Singapore's telecom cybersecurity capabilities and recommend strategies, policies and initiatives. It is anticipated that the committee will publish its first set of recommendations sometime in 2019.

Second, the IMDA has introduced an electronic Know Your Customer (eKYC) implementation guide to drive innovation in Singapore's digital economy, by providing guidance to operators on how consumers may register for mobile services online securely without face-to-face contact, while managing security concerns. The eKYC implementation guide prescribed that the adoption of eKYC technologies shall minimally encompass the aspects of subscriber acceptance and identification procedure, monitoring of transactions and risk management. Operators who are interested to deploy eKYC solutions are required to submit an application to the IMDA, to seek the IMDA's prior written approval.

Third, the IMDA has developed a cybersecurity guide for Internet of Things systems, which aims to promote best practices in mitigating cybersecurity risks for organisations looking to deploy such systems. Among others, the cybersecurity guide sets out baseline

recommendations to provide a base level of protection that is adequate to address most of the common and straightforward cyberattacks faced by Internet of Things systems. The cybersecurity guide also provides a threat modelling checklist to assist system developers in determining their exposure to attacks, and a vendor disclosure checklist for buyers to evaluate and compare the security implementations of systems offered by various Internet of Things vendors. Concurrently, the IMDA also launched a public consultation to obtain comments and views on a number of key areas, including on the usefulness, adequacy and relevance of the cybersecurity guide and its checklists, as well as whether it would be useful and practical for the IMDA to introduce a certification scheme for Internet of Things devices to be deployed in Singapore. The public consultation on the Internet of Things Cybersecurity Guide was conducted from 25 January 2019 to 8 March 2019. The IMDA has not published its response or decision regarding the public consultation as of the time of writing.

Proposed model artificial intelligence governance framework

On 23 January 2019, the Minister for Communications and Information announced the release of the first-in-Asia model framework for Artificial Intelligence governance (AI Model Framework). The AI Model Framework seeks to serve as a general, ready-to-use tool to promote responsible practices for private-sector organisations that are deploying AI solutions at scale. By way of background, the AI Model Framework is adapted from a discussion paper issued by the PDPC in June 2018, which set out the PDPC's preliminary analysis of the issues pertinent to the commercial development and adoption of AI solutions, and the PDPC's proposal of an accountability-based framework for discussing ethical, governance and consumer protection issues related to the commercial deployment of AI in a systematic and structured manner. Concurrently, the PDPC is holding a public consultation from 24 January 2019 to 30 June 2019, to encourage organisations to discuss and implement the practical measures recommended in the AI Model Framework, and provide their feedback.

Public consultation on embedded SIM (eSIM) technology

On 6 June 2018, the IMDA commenced a public consultation exercise to seek public feedback on the preliminary views and assessment of the impact of eSIM technology in the Singapore context.

The consultation paper on eSIM technology discussed issues such as:

- applying a 'No SIM-lock policy' (which prohibits mobile operators from locking the device to only one network) to consumer devices such as smartwatches, mobile phones and tablets, while retaining a flexible policy in respect of machine-to-machine devices;
- the adoption of GSMA specifications for eSIM devices that are to be sold and used in Singapore to facilitate the deployment of remote provisioning functionality, as well as GSMA SAS and ISO 27001 standards for security; and
- the licensing and regulation of eSIM devices and services.

The public consultation on eSIM technology closed on 17 August 2018. As at the time of writing, the IMDA's response or decision regarding the public consultation has not yet been published.

Public consultation on managing unsolicited commercial messages

On 27 April 2018, as part of its review of the PDPA, the PDPC launched a public consultation on, inter alia, managing unsolicited commercial messages. Among others, the PDPC sought views on its proposal to merge the 'do not call' provisions as set out under the PDPA, and the Spam Control Act, into a single legislation governing all unsolicited commercial messages. The PDPC published its response to feedback received from the public consultation, which closed on 12 June 2018, on 8 November 2018. In the PDPC's response, the PDPC addressed the feedback from various respondents on certain issues, including but not limited to the following:

- the 'do not call' and spam control provisions under the proposed merged statute will not be limited to unsolicited marketing and commercial messages sent via text, and will also apply to images, videos and audio files containing commercial messages;
- the period for organisations to effect a withdrawal of consent to receive marketing messages will be set at 10 business days, as consistently applied across both 'do not call' and spam control provisions under the proposed merged statute, unlike the present situation where different periods of time are prescribed for companies to effect withdrawal of consent under the PDPA and the Spam Control Act;
- the PDPC will prohibit the sending of commercial messages to all telephone numbers, instant messaging identifiers and email addresses generated by or obtained through the use of dictionary attacks or address harvesting software by persons in Singapore under the proposed merged statute;
- the 'do not call' provisions under the proposed merged statute will not cover business-to-business marketing messages;
- the 'do not call' provisions under the proposed merged statute will be enforced under an administrative regime, but repeat or egregious breaches may be prosecuted as criminal offences; and
- the PDPC will introduce a deeming provision in the proposed merged statute, which provides that the subscriber of a Singapore telephone number is presumed to have sent the specified commercial messages regulated under the law unless he or she proves otherwise. However, the PDPC will take into consideration the facts of each case in its investigations, and give due regard to the subscriber's position when exercising the deeming provision in its enforcement work.

As at the time of writing, there is currently no further information on when the review of the PDPA will be completed, or when the proposed merged statute governing all unsolicited commercial messages will be tabled in Parliament.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The IMDA is the statutory body responsible for broadcasting and content regulation (irrespective of the transmission medium) and the primary applicable legislation is the IMDA Act and the Broadcasting Act. The IMDA was formally established on 1 October 2016 as a converged regulator for the info-communications and media sectors. At present, the telecoms and media sectors continue to be governed by separate regulatory frameworks.

Under the existing framework, 'media' is defined in the IMDA Act as referring to any film, newspaper, broadcasting service or publication (as defined in the Films Act, Newspaper and Printing Presses Act, the Broadcasting Act and the Undesirable Publications Act respectively). The Minister may further specify in the Gazette any other thing to be included under 'media'.

In respect of policy formulation, the IMDA consults a number of committees in creating and developing its regulatory framework. These include various programme advisory committees for broadcast programmes in different languages, and a number of other consultative panels. Their members are drawn from a cross-section of society and the media industry.

Furthermore, under the existing framework at the time of writing, content and broadcasting regulation remain separate from infrastructure regulation. Therefore, firms should be mindful that they must comply with both the licensing and regulatory requirements imposed by the IMDA for content and broadcasting, as well as for the establishment and operation of any infrastructure.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Foreign investors

There are provisions under the Broadcasting Act regulating foreign participation in a broadcasting company. Prior approval of the IMDA must be obtained if a person wishes to receive funds from a foreign source to finance any broadcasting service owned or operated by a broadcasting company (section 43(1) of the Broadcasting Act). In addition, no company (unless the Minister approves otherwise) is to be granted or permitted to hold a relevant licence (as defined in the Broadcasting Act) if the Minister is satisfied that any foreign source, alone or together with one or more foreign sources:

- holds no less than 49 per cent of the shares in the company or its holding company;
- is in a position to control voting power of no less than 49 per cent in the company or its holding company; or
- all or a majority of the persons having the direction, control or management of the company or its holding company are appointed by, or accustomed or under an obligation to act in accordance with the directions of, any foreign source.

Ownership controls

The Broadcasting Act contains ownership and control provisions that apply to broadcasting companies as defined therein. A 'broadcasting company' is a Singapore-incorporated company or Singapore branch office that holds a 'relevant licence'. A relevant licence refers to any free-to-air licence, or any broadcasting licence under which a subscription broadcasting service may be provided, that permits a broadcast capable of being received in 50,000 dwelling houses (which is defined to include hotels, inns, boarding houses and other similar establishments) or more. In addition, the Minister may designate any other broadcasting licence as a relevant licence on public interest or national security grounds. A class licence will not be considered a relevant licence.

Under the Broadcasting Act, no person may, on or after 2 September 2002, become a substantial shareholder, a 12 per cent controller or an indirect controller of a broadcasting company without first obtaining the approval of the Minister. The term 'substantial shareholder' is defined under section 81 of the Companies Act and generally refers to a person who has an interest in not less than 5 per cent of the voting shares in a company. The terms '12 per cent controller' and 'indirect controller' are defined in section 36 of the Broadcasting Act.

Pursuant to section 33(2) of the Broadcasting Act, unless the IMDA approves otherwise, the CEO of a broadcasting company and at least half of its directors must be citizens of Singapore. A broadcasting company may request to be exempt from this requirement, and exemptions have been made by the Minister.

Notably, the category of niche subscription television licensees has been exempted from all foreign ownership restrictions.

Broadcasting licensees that are regulated persons (within the meaning of section 2 of the IMDA Act) are subject to the provisions on consolidations and mergers in the IMDA Act and the Media Market Conduct Code (MMCC) (see question 28). That said, refer to question 30 for further information on the converged competition code governing competition and market related matters in both the telecoms and media markets that the IMDA is currently developing, which will supersede the MMCC when it comes into effect.

Cross-ownership

No regulations specifically prohibit the cross-ownership of media companies, including radio, television and newspapers. Such mergers and acquisitions between media companies are regulated by the IMDA. The prior written approval of the IMDA is required for all consolidations or mergers between a regulated person (as defined in the IMDA Act) and another regulated person, or any other person (not being a regulated person) carrying on business in the media industry (section 65 of the IMDA Act). Paragraph 8 of the MMCC details the IMDA's regulation of such consolidation activities. Intra-group consolidations are exempted from the requirement to obtain the IMDA's approval under paragraph 8.2 of the MMCC.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Under section 5 of the Broadcasting Act, the IMDA may grant two types of licences: broadcasting licences and broadcasting apparatus licences.

Broadcasting licences

To broadcast programmes in Singapore, a person must obtain a broadcasting licence from the IMDA. Broadcasting licences may be granted for the following categories of licensable broadcasting services:

- free-to-air nationwide, localised and international television services;
- subscription nationwide, localised and international television services;
- niche subscription television services;
- special interest television services;
- free-to-air nationwide, localised and international radio services;
- subscription nationwide, localised and international radio services;
- special interest radio services;
- audio-text, video-text and teletext services;
- video-on-demand (VOD) services;
- broadcast data services; and
- computer online services.

Listed below are the licence fees that have been published by the IMDA as payable for the following broadcasting services:

- 2.5 per cent of total revenue or $250,000 per annum, whichever is higher, and a performance bond of $200,000 for free-to-air nationwide television and radio service licences;
- S$5,000 per annum for a subscription international television services licence (commonly known as a satellite broadcasting licence). A performance bond of S$50,000 must be given to the IMDA by broadcasters not based or registered in Singapore. The performance bond must be issued by a financial institution approved by the IMDA;
- 2.5 per cent of total revenue for a nationwide subscription television licence, subject to a minimum licence fee of S$50,000 per year throughout. In addition, a performance bond of S$200,000 must be furnished; and
- S$1,000 per year for a television receive-only (TVRO) licence (per satellite dish). For a temporary TVRO licence, the licence fee is $100 per dish for a period of up to 30 days.

Section 8(2) of the Broadcasting Act provides that a broadcasting licence must be in such a form and for such a period and may contain such terms and conditions as the IMDA may determine. The Broadcasting Act sets out certain conditions that licensees must comply with, such as compliance with the IMDA's codes of practice and certain public service broadcasting obligations. Templates of such licences are not publicly available. The IMDA has not indicated publicly how long it will take to process all licence applications. Generally speaking, applicants may need to factor in several weeks for their applications to be processed, depending on whether all the information required for the IMDA's evaluation purposes has been submitted. For more complex or novel applications, the IMDA may take longer.

In addition to the individual broadcasting licences listed above, there is also a class-licensing regime. The IMDA has specified that the following licensable broadcasting services are subject to the class licence regime:

- audio-text, video-text and teletext services;
- broadcast data services;
- virtual area network computer online services; and
- computer online services that are provided by internet content providers and ISPs.

A company wishing to provide a licensable broadcasting service that is subject to the class licence regime must register with the IMDA. In particular, audio-text service providers and ISPs must register with the IMDA within 14 days of commencing the service. The IMDA's guidelines state that a completed application will be processed within four working days.

All class licensees must comply with the licence conditions contained in the Broadcasting (Class Licence) Notification. In addition, internet content providers and ISPs must comply with the Internet Code of Practice (available at https://www.imda.gov.sg/). The yearly fees payable for the services listed below have been published in the Schedule of the Broadcasting (Class Licence) Notification:

- S$2,000 for the provision of teletext services;
- S$1,000 for the provision of computer online services by internet access service providers;
- S$1,000 for the provision of computer online services by non-localised internet service resellers (with 500 or more user accounts);
- S$100 for the provision of computer online services by non-localised internet service resellers (with less than 500 user accounts); and
- S$100 (per premise) for the provision of computer online services by a localised internet service reseller.

The fees payable for the services not mentioned in the Broadcasting (Class Licence) Notification are not publicly available. If broadcasting infrastructure is to be deployed, a separate licence from the IMDA may also be required (see question 2).

Broadcasting apparatus licences

To install, import, sell or operate any broadcasting apparatus in Singapore, a person must obtain a licence from the IMDA under section 20 of the Broadcasting Act. This requirement applies to apparatus currently listed under the First Schedule to the Broadcasting Act (ie, TVRO system). The IMDA retains the discretion to exempt any person or broadcasting apparatus (or class thereof) from this licence requirement.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

There are no express regulations concerning the broadcast of foreign programmes, irrespective of media type. Such broadcasts are, however, subject to paragraph 16 of the Schedule of the Broadcasting (Class Licence) Notification that states that an internet content provider licensee shall remove or prohibit the broadcast of the whole or any part of a programme included in its service if the IMDA informs the licensee that its broadcast is against the public interest, public order or national harmony, or offends good taste or decency.

There are no explicit rules requiring a minimum amount of local content. However, under section 17 of the Broadcasting Act, the IMDA may require a broadcasting licensee to broadcast programmes provided by the IMDA or the Singapore government as a condition of its licence, including the following:

- programmes for schools or other educational programmes;
- news and information programmes produced in Singapore or elsewhere;
- arts and cultural programmes; and
- drama and sports programmes produced in Singapore.

Further, free-to-air television and subscription television broadcasting licensees may be subject to programme codes issued by the IMDA containing programming and content guidelines, such as the Content Code for Nationwide Managed Transmission Linear Television Services and the Content Code for Over-the-Top, Video-on-Demand and Niche Services. Generally, programme codes will contain guidelines congruent with national objectives, uphold racial and religious harmony, observe societal and moral standards and promote positive family values.

Section 19 of the Broadcasting Act also provides for a must-carry obligation (see question 22).

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

At present, stricter content standards are applied to advertisements in public places (in view of their unsolicited viewing) and in media that have a wider impact on the general public, such as advertisements on TV. The Advertising Standards Authority of Singapore (ASAS) lays down broad industry codes and guidelines. The Singapore Code of Advertising Practice (SCAP) is reviewed periodically by the ASAS, and was most recently updated in 2019 to include a chapter on the statutes and statutory instruments that have special relevance to advertising and related trading practices. The basic premise of the SCAP is that all advertisements should be legal, decent, honest and truthful. The SCAP applies to all advertisements for any goods, services and facilities appearing in any form or any media, including online advertisements in information network services, electronic bulletin boards, online databases and internet services. The SCAP seeks to promote a high standard of ethics in advertising through self-regulation against the background of national and international laws and practices, including the International Code of Advertising Practice published by the International Chamber of Commerce. In August 2016, the ASAS also issued 'Guidelines for Interactive Marketing Communication & Social Media' (Interactive and Social Media Guidelines), which set out standards for advertising and marketing communication that appear on interactive and social media. The Interactive and Social Media Guidelines set the standard of ethical conduct that are to be adopted by all marketers, establish the levels

of disclosure that are required of sponsored messages that appear on social media, prohibit false reviews and engagement, and dictate the clarity of the purchase process in e-commerce. Between November 2017 and January 2018, the ASAS conducted a public consultation seeking post-implementation feedback on the Interactive and Social Media Guidelines. In particular, it sought feedback on the implementation of the guidelines, and areas where the guidelines might be fine-tuned or updated. At the time of writing, the ASAS has not published its response to the feedback received.

Alongside the ASAS, the IMDA also plays a role in guiding the advertising industry when the need arises. For TV broadcasts, the IMDA issues advertising codes to broadcasters, which are stricter than those for the print media, because of the wider reach of television broadcasts. The IMDA has issued the Television and Radio Advertising and Sponsorship Code (the Advertising Code), which aims to protect the interests of viewers as consumers and require advertisements to be truthful, lawful and not to contain any misleading claims. All claims and comparisons must be capable of substantiation. The Advertising Code requires advertisements to respect public taste and interests and uphold moral and social values. Among other things, the Advertising Code also stipulates that broadcasters should exercise discretion when scheduling advertisements and trailers to ensure that these are appropriate for the viewing audience.

With regard to holders of class licences, paragraph 16 of the Schedule to the Broadcasting (Class Licence) Notification states that a licensee shall remove or prohibit the broadcast of the whole or any part of a programme included in its service if the IMDA informs the licensee that its broadcast is against the public interest, public order or national harmony, or offends good taste or decency. In the case of online advertising, internet content providers and ISPs are considered class licensees and must also comply with paragraph 16 of the Schedule to the Broadcasting (Class Licence) Notification. In addition, paragraph 13(a) of the same requires licensees to comply with the IMDA's codes of practice. In this respect, the IMDA-administered Internet Code of Practice requires class licensees to use their best efforts to ensure that prohibited material is not broadcast over the internet to users in Singapore. Examples of prohibited material include, without limitation, content that endorses ethnic, racial or religious hatred, strife or intolerance, and material that depicts extreme violence. Internet content providers and ISPs must also ensure that these advertisements are in line with the SCAP.

Separately, the Undesirable Publications Act prevents the importation, distribution or reproduction of undesirable publications. This may include advertisements that are accessible by computers or other electronic devices, such as online advertisements.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

The Broadcasting Act provides for a must-carry obligation. Under section 19 of the Broadcasting Act, the IMDA may require a broadcasting licensee to provide for transmission and reception of any broadcasting service that is provided by any other person or that is specified in its licence (see below for details).

Currently, must-carry obligations are imposed on all nationwide subscription TV licensees to allow their subscribers to access all local free-to-air channels on their network (see question 23).

Paragraphs 2.1.5 and 2.7 of the MMCC establish a cross-carriage measure for the pay-TV sector, under which a mandatory obligation is imposed upon all licensed subscription television service providers who acquire exclusive broadcasting rights to any channel or programming content (supplying licensees) to provide such channels or content for cross-carriage on the pay-TV network of other subscription nationwide television service providers, who are in turn obliged to carry such channels and content on all 'relevant platforms' (as defined in paragraph 2.3(ea) of the MMCC) in their entirety, without any alteration or degradation in quality. A relevant platform means a managed network over or using any (or any combination of) hybrid fibre coaxial, optical fibre or asymmetric digital subscriber line. Supplying licensees may stand to benefit from an increased subscriber base, as the MMCC requires that any consumer accessing such cross-carried content shall, for billing and operational purposes, also be considered a subscriber of the supplying licensee. The mandatory cross-carriage obligation applies to all exclusive channel and content arrangements signed or renewed on or after 12 March 2010.

Under paragraph 2.4 of the MMCC, free-to-air television and radio licensees (and any other person as the IMDA may direct) must comply with the IMDA's requirements regarding the broadcast of events that are of national significance. The IMDA will provide written notification to free-to-air television and radio licensees regarding the events of national significance that they are to broadcast. The IMDA will generally designate only very select events as events of national significance that are to be broadcast live or delayed.

The following events are currently identified in the MMCC as being events of national significance:

- National Day parade;
- National Day rally;
- the Prime Minister's National Day message;
- parliamentary proceedings, including the budget speech and debate;
- general election, by-election and presidential election; and
- state funerals.

The IMDA may specify additional events or remove existing ones.

If it is not desirable for more than one entity to locate cameras and other equipment at the site of such an event, the IMDA may select a broadcaster to be the sole broadcaster for the event (the lead broadcaster) or conduct a competitive tender for the position. The lead broadcaster must make the feed from the event available to all free-to-air television and radio licensees and any other person that the IMDA specifies.

Any television or radio licensee that receives the feed from the lead broadcaster has an obligation to compensate the lead broadcaster for reasonable costs that are not otherwise compensated (eg, through government subsidies) incurred by the lead broadcaster in providing the television or radio licensee with the feed.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

IPTV services

The IMDA adopts a two-tier licensing framework for the provision of internet protocol television (IPTV) services in Singapore: nationwide subscription TV licence and niche subscription TV licence (niche licence).

The niche licence was introduced to facilitate the growth of IPTV and other novel services in Singapore by offering operators greater flexibility to roll out services for different market segments, with less onerous regulatory obligations. It is for service providers targeting specific niche market segments.

The nationwide subscription TV licence applies to operators targeting the mass market. The first nationwide IPTV licence was awarded to SingNet Pte Ltd (SingNet) in January 2007 for the provision of its mio TV service, which has since been renamed Singtel TV.

Licence applicants are free to decide which licence tier they wish to operate under.

Online news sites

Since 1 June 2013, online news sites that report regularly on issues relating to Singapore and have significant reach among local readers are required by the IMDA to obtain an individual licence, placing them on a more consistent regulatory framework with traditional news platforms that are already individually licensed.

Under the licensing framework, online news sites will be individually licensed if they report an average of at least one article per week on Singapore news and current affairs over a period of two months, and are visited by at least 50,000 unique IP addresses from Singapore each month over a period of two months.

These sites were previously automatically class-licensed under the Broadcasting Act. Presently, when the IMDA has assessed that a site has met the criteria to be individually licensed, the IMDA will issue a formal notification, and work with the site to move it to the new licensing framework.

The IMDA has stated that it does not expect any changes in content standards to result. Individually licensed news sites will be expected to comply within 24 hours to the IMDA's directions to remove content found in breach of content standards, and will be required to put up a performance bond of S$50,000.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Singapore has completed its digital switchover and analogue TV channels have been switched off as of 1 January 2019.

In June 2012, the then Media Development Authority (now IMDA) announced that all free-to-air channels would be transmitted digitally by the end of 2013 using the DVB-T2 (digital video broadcasting – second generation terrestrial) broadcasting standard. In this regard, the nationwide free-to-air broadcaster MediaCorp announced that it would transmit all free-to-air channels in digital format from December 2013. To ensure a smooth switchover, there was a simulcast period during which all free-to-air channels were broadcast in digital and analogue until the switchover was fully completed.

In January 2016, the MCI, which is the parent ministry overseeing the IMDA, announced that it aimed to complete the switchover and to switch off analogue broadcasting by the end of 2017. Freed up spectrum has been reallocated to mobile broadband services in the 2016/2017 spectrum allocation exercise by the IMDA, which administers the allocation of RF spectrum.

In November 2017, the Singapore government announced a further one-year extension of the cessation of analogue broadcast from end-2017 to end-2018. The purpose of this extension was to give households more time to make the switch from analogue to digital broadcasting. On 1 January 2019, the switchover was completed and all broadcast free-to-air TV programmes are now exclusively shown in digital format.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The IMDA's Spectrum Management Handbook explains that planning and channelling of the broadcasting spectrum is carried out at the international level (ITU), regional level (Asia-Pacific Broadcasting Union, ABU) and bilateral levels (ie, border coordination with neighbouring countries). As such, there are only a certain number of channels in each broadcasting band that can be used in Singapore. The usage plans for broadcasting services have already been established. With the advent of digital broadcasting, the IMDA has also planned the spectrum allocations for both digital audio and digital video broadcasting. To provide broadcasting services, a broadcast service licence and a broadcasting station licence are required from the IMDA.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Singapore does not currently have a formal process or framework in place to assess media plurality.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

Cessation of analogue TV broadcasts from 1 January 2019

In November 2017, the Singapore government announced that analogue broadcasting will be switched off by the end of 2018, thus completing the switchover from analogue to digital broadcasting. Following the current timeline, all broadcast free-to-air TV programmes are now shown exclusively in digital format from 1 January 2019 (see question 24 for more information on the digital switchover).

Amendments to the Films Act passed by Parliament

On 21 March 2018, the Films (Amendment) Act 2018 (No. 25 of 2018) (Films (Amendment) Act) was passed in Parliament. The passage of the Films (Amendment) Act followed the close of a month-long public consultation that was held in December 2017.

Broadly, the Films (Amendment) Act will make the following main changes to the Films Act:

- dissolve the existing Board of Film Censors and transfer its functions under the Films Act to the IMDA;
- establish a co-classification scheme for the video distribution and film exhibition industries, under which registered film content assessors will co-classify video and film titles up to PG13 rating;
- enable class licence schemes to be established for activities connected with certain types of films;
- clarify and update the licensing and classification scope in view of changes in the media landscape;
- amend the process for appeals against the IMDA's decisions under the Films Act, to allow the Minister to hear and decide on appeals against the IMDA's classification decisions for films determined to be against national security; and
- enhance the IMDA's investigation and enforcement powers in relation to certain of the more serious offences under the Films Act. Following the amendments, the IMDA will be empowered, in relation to such offences, to:
  - request for information and documents that are necessary to ensure compliance with the Films Act and gain access to places where films are publicly exhibited or distributed for inspection purposes;
  - require the attendance of persons for the purpose of investigating breaches and offences under the Films Act;
  - enter a place with the occupier's consent or a court warrant, and search and seize evidence with a court warrant for Films Act offences; and
  - in cases where the IMDA officer reasonably suspects that serious offences such as those involving obscene and unclassified films are involved, or that the evidence of the commission of specified offences can be found in the premises and it is necessary to secure the evidence to prevent it from

being concealed, lost or destroyed, to enter, search and seize evidence without warrant.

While the Films (Amendment) Act received the President's assent on 12 April 2018, it has not entered into force pending an official date appointed by notification in the Gazette by the Minister.

Select Committee on Deliberate Online Falsehoods

Between January to March 2018, a 10-member Parliamentary select committee chaired by Deputy Speaker Charles Chong conducted hearings to consider information presented by experts, industry stakeholders and the public on the topic of fake news in Singapore's online space. The committee has a mandate to examine and report on the following:

- the phenomenon of using digital technology to deliberately spread falsehoods online;
- the motivations and reasons for the spreading of such falsehoods, and the types of individuals and entities, both local and foreign, that engage in such activity;
- the consequences that the spread of online falsehoods can have on Singapore society, including to Singapore's institutions and democratic processes; and
- how Singapore can prevent and combat online falsehoods, including the principles that should guide Singapore's response; and any specific measures, including legislation, that should be taken.

On 20 September 2018, the committee submitted a 317-page report to Parliament, which contained, inter alia, 22 recommendations on combating the spread of online falsehoods. On 1 April 2019, the Protection from Online Falsehoods and Manipulation Bill and the Protection from Harassment (Amendment) Bill were tabled in Parliament. In an interview published on 15 April 2019, the Minister for Communications and Information stated that the proposed bills are expected to be passed into law and come into effect in the second half of 2019.

Singapore copyright review and proposed amendments to the Copyright Act

On 17 January 2019, the Ministry of Law announced that it will amend the Copyright Act sometime in 2019 to update Singapore's copyright regime to better support creators and the use and enjoyment of creative works in the digital age. The proposed changes were set out in the Singapore Copyright Review Report, which was released jointly by the Ministry of Law and the Intellectual Property Office of Singapore. In particular, the report proposed new enforcement measures to prohibit retailers and service providers from importing and selling set-top or media streaming boxes that provide access to pirated content from unauthorised sources.

Goods and Services Tax (GST) on imported digital services

In February 2018, the Singapore government announced during its annual Budget speech that from 1 January 2020, GST will be imposed on certain businesses that provide imported digital services to consumers in Singapore, such as movie and music streaming services and mobile apps. Under current GST rules, services (other than an exempt supply) supplied by a supplier who belongs in Singapore are subject to GST, while the same services supplied by a supplier who belongs outside Singapore are not. The Singapore government has decided to implement the new regime to level the GST treatment for services consumed in Singapore.

A public consultation exercise on two draft versions of the GST Guide on taxing imported services were conducted by the Inland Revenue Authority of Singapore (IRAS) between 20 February 2018 and 20 March 2018 to, among other things, explain how the proposed tax will be administered, the types of services that will be affected, and to gather public feedback on the proposed tax regime. The IRAS published its response to the public consultation exercise on 31 May 2018.

In general, while cross-border telecommunication services such as Voice over Internet Protocol, audio conferencing and conference bridging are explicitly excluded and will not be subject to the proposed tax, broadly speaking, business-to-business services such as marketing, accounting, IT and management, and business-to-consumers services such as online subscription-based media services, apps, and software will be subject to GST.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The IMDA was officially formed on 1 October 2016 as a converged regulator for the info-communications and media sectors, following the restructuring of the IDA and the MDA. At present, the telecoms and media sectors continue to be governed by separate regulatory frameworks.

Under the existing regulatory framework, competition issues in the telecoms and media sectors may be governed by sector-specific rules as administered by the IMDA. In this regard, the Competition Act, which establishes the general competition law and is administered by the CCCS, provides that it does not apply insofar as another regulatory authority (other than the CCCS) has jurisdiction in a particular competition matter. Accordingly, the CCCS does not have jurisdiction over competition issues that fall under the purview of the IMDA.

The IMDA has issued the TCC, which regulates competition in the provision of telecoms services. Section 10 of the TCC (relating to consolidations and merger control), together with part VA of the Telecoms Act at the end of 2011, sets out a merger review framework for the telecoms sector.

With regard to the media sector, the IMDA has issued the MMCC, which provides for market conduct and competition rules applicable to the media industry only.

As mentioned below, the IMDA has launched a public consultation from 20 February 2019 to 15 May 2019 to seek views on the broad policy proposals for a proposed converged competition code governing the telecoms and media sectors (see question 30), with a second public consultation on the actual drafting of the converged competition code targeted to be launched in the second half of 2019.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Under section 69 of the Telecoms Act, any telecoms licensee aggrieved by an IMDA decision or direction, or anything in any code of practice or standard of performance, and certain other aggrieved persons, may request the IMDA to reconsider the matter or appeal to the Minister, who may confirm, modify or reverse the same. Where a reconsideration request and an appeal have been simultaneously filed, the IMDA will reconsider the matter and the appeal to the Minister will be deemed withdrawn.

Under section 68 of the IMDA Act, any person aggrieved by any act, direction or decision of the IMDA under Part 7 of the IMDA Act may appeal to the Minister, who may confirm, vary or reverse the same. Under section 59 of the Broadcasting Act, any licensee aggrieved by

any decision of the IMDA in its discretion under the Broadcasting Act, or anything contained in any code of practice or direction issued by the IMDA, may appeal to the Minister, who may confirm, vary or reverse the decision or direction, or amend the code of practice.

An aggrieved person who has unsuccessfully appealed to the Minister may also be able to mount a further challenge by commencing an action for judicial review in the courts.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

Public consultation on proposed converged competition code for telecommunication and media markets

On 20 February 2019, the IMDA launched a public consultation to seek views on its proposed converged competition code for the telecoms and media markets. As mentioned above, competition and market related matters in the telecoms and media sectors are currently governed separately by two different codes of practice, namely, the TCC and MMCC (see question 28).

In line with the IMDA's role as a converged regulator, and against the backdrop of rapid convergence in the telecommunication and media landscapes, the IMDA has decided to undertake a comprehensive review of the separate codes of practice governing the telecommunication and media markets, with the aim of merging the two frameworks and developing a harmonised converged competition code for both markets, so as to ensure that the competition framework for both markets remains relevant.

The IMDA has proposed to launch two public consultations on the proposed converged competition code. The first consultation, which would invite comments from 20 February 2019 to 15 May 2019, is for the purpose of inviting comments on the broad policy proposals for the proposed converged competition code, as well as comments on how the digital transformation of industries could affect competition policy in the long term. The second public consultation, which is targeted to be launched in the second half of 2019, will seek comments on the actual drafting of the proposed converged competition code.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

In Switzerland, the telecommunications sector is regulated at federal level. The Federal Communications Commission (ComCom) is the independent licensing and market regulatory authority for the communications sector. The main activities and competences of ComCom relate, in particular, to the granting of licences for the use of radio communication frequencies as well as the regulation of the terms of application of number portability and free choice of supplier. ComCom instructs the Federal Office of Communications (OFCOM) with respect to the preparation of its business and the implementation of its decisions. Moreover, it has delegated some of its tasks to OFCOM.

OFCOM itself is part of the Federal Department of the Environment, Transport, Energy and Communications (DETEC) and acts as the supervisory authority in the communications sector.

The Federal Act on Telecommunications (TCA) dated 30 April 1997 (as amended on 1 March 2018) and the Federal Ordinance on Telecommunications Services (OTS) dated 9 March 2007 (as amended on 1 March 2018) represent the main sources of law with respect to telecommunications. The TCA regulates the transmission of information by means of telecommunications techniques, including the transmission of radio and television programme services. The aim of the TCA is to ensure that a range of cost-effective, high-quality and nationally and internationally competitive telecommunications services are available to individuals and companies in Switzerland and that effective and fair competition among carriers, operators and service providers will be guaranteed.

In principle, certain foreign ownership restrictions may apply. If no reciprocal rights are granted abroad, and subject to international obligations to the contrary, foreign companies can be prohibited from providing telecommunications services in Switzerland, can be refused to be granted a licence, or can be prohibited from transferring a licence.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Licences for telecommunications services have been, in principle, abolished. A telecommunications service provider (TSP) is only obliged to register with OFCOM and to notify the authority of the services to be offered in Switzerland (see question 16 with respect to the planned changes). The annual administrative fee currently amounts to 960 Swiss francs and the registration fee is 210 Swiss francs per hour. The same holds true for public Wi-Fi services as there is no licence required, as long as the Wi-Fi services remain within the authorised frequencies and fulfil the technical requirements. Licences must only be acquired for radio communications and universal services. Accordingly, the use of the frequency spectrum for the provision of telecommunications services requires a radio communications licence (see question 16 with respect to the planned changes). Special rules apply if the broadcaster of a radio programme service is granted a licence under the Federal Act on Radio and Television (RTVA) dated 24 March 2006 (as amended on 1 January 2017); see question 19.

Pursuant to the TCA, licences for radio communications and universal services are of limited duration. In 2012, licences for the entire frequency spectrum, including the digital dividend, for the provision of mobile telecommunications services were reallocated in a public tender procedure. Each of the three previously existing mobile network operators in Switzerland acquired a licence. These new licences will expire at the end of 2028 and were issued in a technology-neutral manner, allowing the use of the latest mobile radio technologies such as LTE. Owing to this reallocation, a migration of frequency bands was necessary, which took place in summer 2014. In February 2019, ComCom has auctioned new frequencies (700MHz, 1400MHZ and 3500MHz), which are needed for the development of 5G technology. The frequencies are allocated for 15 years and each of the three previously existing mobile network operators in Switzerland acquired a licence.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Radio communications licences do specify the permitted use (eg, radio, TV, amateur radio) and different rules on the trading and returning of allocated radio frequency spectrum apply. Under the TCA, a licence can only be transferred in whole or in part with the consent of the licensing authority. This also applies to situations involving an economic transfer of the licence. Such economic transfer occurs in case of acquisition of control (in the meaning of the Federal Cartel Act) of the licensee (see question 18 with respect to the transfer of licences in the field of broadcasting and question 16 with respect to the planned changes).

There is no specific regulatory framework for the assignment of unused radio spectrum. OFCOM is responsible for the management of the radio spectrum and establishes the National Frequency Allocation Plan that is approved by the Federal Council.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Switzerland relies in general on ex-post regulation (see question 6 with respect to universal service licences).

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is no legal basis for a structural separation between an operator's network and service activities, nor is the introduction of such legal basis currently contemplated.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

ComCom awards one or more universal service licences to TSPs wishing to provide a universal service for the whole population in all parts of the country. There is no obligation to provide a universal service. However, if no TSP applies for a universal service licence, ComCom could force a TSP to do so.

Universal service licences are put out to tender and awarded on the basis of a competition based on specific criteria (such as the applicant's technical capability, financial soundness and ability to comply with the law and the licence conditions). For universal service licences the Federal Council decides on quality criteria and periodically fixes upper limits for the prices of the services of the universal service. These upper limits apply uniformly over the whole area and are determined by the development of the market. Regarding the provision of universal services, the Federal Council resolved to raise the minimum data transmission rate for internet access from 2,000/200kbit/s to 3,000/300kbit/s effective as of 1 January 2018. Further, special rules apply to providers that have a dominant position in a market. They are obliged to grant access to infrastructure and services to other providers in a transparent and non-discriminatory manner at cost-oriented prices (see question 16 with respect to the planned changes). The provisions regarding the calculation of cost-oriented prices in the OTS were revised and the amendments became effective on 1 July 2014. The calculation is based on the LRIC, an added constant premium based on a proportional share of the relevant joint and common costs and a return on the capital used for investments as well as the replacement costs of modern equivalent assets (current cost accounting). According to the revised OTS, ducts are assessed based on infrastructure renewal accounting. Since 1 July 2014, costs have been based on a modern fibre and IP-infrastructure (next-generation network and access). In a decision issued in February 2019, ComCom has applied this test for the first time with regard to the prices of the incumbent Swisscom for the period 2013–2016. It concluded that the prices for carrier line services were 65–80 per cent and for copper lines were 10–25 per cent too high (ie, several million Swiss francs per year).

The Federal Council periodically reviews the universal service catalogue and adapts it to new needs and technological progress. As of 2018, universal service includes:

- public telephone services;
- access to the internet with a minimum data transmission rate of 3,000/300kbit/s;
- services for the hearing impaired; and
- directory and operator services for the visually impaired and people with limited mobility.

To date, new technologies such as fibre optic or mobile phone services are not included in the universal service.

In 2016, ComCom has decided that the universal service in relation to telecommunications will continue to be provided by Swisscom. ComCom awarded the licence to Swisscom from 2018 onwards, for a term of five years.

If it is clear before the granting of the licence that even with efficient management it will not be possible to cover the costs of the provision of the universal service in a given area, the licensee is entitled to financial compensation. The compensation would be financed by levying a fee on all TSP. To date, no such compensation has been awarded.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

OFCOM is responsible for the issuance of the national numbering plan and for the distribution of the ranges of numbers belonging to the plan. In the form of technical and administrative regulations, OFCOM allocates the ranges of numbers to the various usage categories and defines their conditions of use.

The numbering scheme under the national numbering plan allows number portability between TSPs offering the same category of telecommunications services. Within such categories, TSPs are obliged to grant number portability. The relevant categories are:

- public telephone services (such as fixed net services);
- mobile telephony; and
- non-geographic services (such as premium-rate services).

TSPs that are required to grant number portability must bear their own costs. However, a TSP that passes a number to another can demand that the latter contributes to administrative costs. The costs of transmitting a passed-on number to its destination are regulated in interconnection contracts between the TSPs. If there is no agreement, the rules of interconnection apply by analogy. The new TSP can pass part of the costs of number portability to the subscriber. To grant faster number portability, as of November 2015, donor service providers are required to confirm number porting applications to the recipient service providers within one working day (instead of five working days as in the past) and regardless of possible telecoms contract disputes with the client.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Regarding customer terms and conditions, there are no specific rules. However, the Federal Council periodically fixes upper limits for the prices of the services of the universal services (see question 6). Thus, the prices for connection, national calls to fixed-network connections, the surcharge for the use of a public pay telephone and the use of the transcription services are defined in the OTS.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

To date, Switzerland has not adopted specific regulations on net neutrality (see question 16 with respect to the planned changes). In March 2015, the Swiss Council of States explicitly voted against a specific regulation on net neutrality. The Swiss Parliament is currently discussing a revision of the TCA, which contains specific rules regarding net neutrality. Net neutrality shall be required by law. Providers are only allowed to transmit information differently: (i) if it is necessary to comply with a regulation or a court decision; (ii) to protect the integrity or safety of the net; (iii) upon express request of the customer; or (iv) to fight temporary and exceptional network congestion. Further, the providers may offer special services (eg, voice telephony via fourth generation

mobile telephony (VoLTE) and certain television services (IPTV)) over the same line as internet. However, the quality of the internet access must not be impaired in any case.

The largest Swiss ICT companies agreed on a code of conduct and issued explanatory notes on the code of conduct on net neutrality in November 2014, to ensure open internet access in Switzerland. Under the code of conduct, the providers undertake not to lock services and applications and not to limit the freedom of speech and information. In principle, all users shall be granted access to the full range of content, services, applications, hardware and software. However, according to the code of conduct, specific prioritisation of certain content, inter alia for the purpose of network management and to improve the network's quality, remains possible. It is explicitly stated that zero rating is permitted. Bandwidth throttling, as a part of traffic management measures, may be applied according to the code of conduct. Yet, users may call upon a conciliation body in the event of a provider's alleged breach of obligations under the code of conduct. The conciliation body continuously evaluates the code of conduct and its impact on the openness of the internet and reports on this subject matter on an annual basis. The conciliation body started its work in September 2015.

Platform regulation

10 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no specific legislation or regulation. Despite the fact that the Federal Council has, in principle, identified the need for clarification, its explanatory report with regard to the partial revision of the TCA (see question 16) does not specifically address this issue.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

The Swiss legislation on telecommunications is technology-neutral and does not contain any specific definitions referring to NGA networks. Therefore, they are, in principle, subject to the provisions of the TCA.

There is no federal scheme to promote broadband penetration. However, some local authorities are actively supporting the development of broadband networks. For example, the city of Zurich has assigned financial means to its own electric utility to build an area-wide fibre optic network.

Furthermore, the licence for universal services obliges Swisscom to provide a broadband internet connection with at least a 3,000/300-kbit/s transmission speed to all households in addition to analogue and digital telephone connections (see question 16 with respect to the planned changes).

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

TSPs are subject to a general confidentiality obligation (article 43 of the TCA). They cannot disclose to a third party any information relating to a subscriber's communications or give anyone else an opportunity to do so. Subscribers must be granted access to the data on which invoices are based, in particular the addressing resources, the times when calls were made and the payment due.

Moreover, anyone requiring this data to trace nuisance calls or unfair mass advertising must be informed of the name and address of the subscribers whose lines were used for such calls.

Under the TCA, TSPs may process customer location data only for the provision of telecommunications services and for charging purposes. The processing of data for other services requires prior consent of customers or anonymous processing.

In addition, the Federal Act on Data Protection (FADP) dated 19 June 1992 (as amended 1 January 2014) applies. The FADP aims to protect the privacy and the fundamental rights of persons when their data is processed by private persons or federal bodies.

Anyone who processes personal data must not unlawfully breach the privacy of the data subjects in doing so. In particular, he or she must not process personal data in contravention of the principles of the FADP, process data pertaining to a person against that person's express wish without justification or disclose sensitive personal data or personality profiles to third parties without justification.

The principles of the FADP are, inter alia, that personal data may only be processed lawfully, that its processing must be carried out in good faith and must be proportionate and that the purpose of its processing must be evident to the data subject. The FADP also provides certain specific regulations for the communications sector as, for example, the limitation of the right to information for journalists.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Although no specific law on cybersecurity exists, certain legal rules also apply to cybersecurity. Already in 2012, the Federal Council approved the 'National strategy for the protection of Switzerland against cyber risks' (NCS), which specifies the various risks that originate from cyberspace, identifies weaknesses and describes how Switzerland is going to proceed in this matter. The NCS is reflected in the Federal Act on the Intelligence Service allowing the Federal Police to monitor the internet proactively. In 2018 the Federal Council approved a second 'NCS 2018–2022' which contains a total of 28 measures regarding cyber risks (eg, evaluation of a reporting obligation for cyber incidents, education and training, raising public awareness regarding cyber risks, expansion of the Reporting and Analysis Centre for Information Assurance). As a first step, a competence-centre for cybersecurity shall be established in 2019.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

The FADP and the TCA contain provisions regarding the issue of data protection (see question 12), which also apply to big data and its challenges. However, big data remains a legal grey zone because most databases contain 'anonymised', and therefore theoretically not personally identifiable, information as regulated in the FADP/TCA. The FADP is currently being revised. Changes are in particular expected in the area of information, documentation and notification obligations, automated decisions and criminal penalties. The Federal Council has adopted the report regarding the revision of the FADP in September 2017. The parliamentary consultation is pending and the wording of the new FADP is still subject to change. A first discussion in the parliament is expected for March 2019.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

The FADP guarantees the protection of the private sphere of companies and individuals regarding data processing carried out in Switzerland. It

also provides strict obligations regarding the transfer of data abroad. Certain data transmissions abroad must be announced to the Federal Data Protection and Information Commissioner. Furthermore, certain sector-specific regulations such as, for instance, in the banking sector may stipulate additional requirements or even prohibit the transfer of data abroad.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The Federal Council launched a consultation process on the partial revision of the TCA in December 2015. A proposal for a revised TCA was sent to parliament in September 2017. Inter alia, the general obligation to register for telecommunications service providers shall be eliminated; only undertakings using specific public resources shall have to register. In addition, amendments to the intervention possibilities for TSPs regarding the access to the infrastructure of dominant undertakings are planned. The requirement to have a radio licence shall only apply under exceptional circumstances and the possibility of spectrum trading and spectrum leasing shall be established in the context of the transfer of a licence. Net neutrality shall be required by law with some exceptions (see question 9). Regarding international roaming, the revised TCA foresees different measures for the Federal Council against disproportionately high retail tariffs and new transparency rules were included in the draft. Finally, the draft revision, inter alia, provides for new rules regarding the administration of internet domains, measures against unwanted telemarketing and technical child protection measures. The discussion in the parliament is still ongoing. With regard to access to the last mile, the parliament does not want to oblige the incumbent Swisscom to grant competitors access to glass fibre cables but only to copper cables.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The broadcasting sector has three main authorities responsible for the granting of licences. The Federal Council is the licensing authority for the Swiss Broadcasting Corporation (SBC). With respect to other licences, licensing competence has been delegated to DETEC. OFCOM puts the licences out for tender and consults interested groups.

OFCOM further fulfils all sovereign and regulatory tasks related to the telecommunications and broadcasting (radio and television) sectors. It fulfils an advisory and coordinating function for the public and policymakers. It also guarantees that basic services will be provided in all parts of the country and for all sections of the population.

The Federal Media Commission, operational since August 2013, consists of 13 representatives from various areas of the Swiss media sector. It advises the Federal Council and the Federal Administration in relation to media issues.

The RTVA provides for an Independent Complaints Authority for Radio and Television, which deals with complaints that relate to the editorial programme and rules on disputes on denied access to a programme.

In Switzerland, apart from the communications sector, regulation of the media sector is also dealt with at a federal level. The broadcasting, processing and reception of radio and television programme services are regulated by the RTVA, the Federal Ordinance on Radio and Television (RTVO) dated 9 March 2007 (as amended on 1 January 2018) and related decrees.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Licences for broadcasting may – subject to any international obligations to the contrary – be refused to foreign natural persons with their domicile in Switzerland, companies with foreign control or Swiss companies with foreign participations, provided that the respective foreign state does not grant reciprocal rights to Swiss citizens or Swiss companies.

In addition, the licence granted to broadcasters of radio and television programme services can only be transferred with approval of the licensing authority. The licensing authority examines whether the licence requirements are also met after the transfer. Economic transfer of the licence (ie, the transfer of more than 20 per cent of the share capital of the licensee) is also deemed to be such a transfer.

The RTVA provides that a media corporation may not receive more than two radio and two television licences (does not apply to SBC). In addition, the participation of the SBC in other companies that are broadcasting radio or television programmes requires the approval of DETEC. There are currently no amendments planned regarding cross-ownership.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Broadcasters of programme services are in principle required to obtain a licence. However, broadcasters that request neither a share of fees nor guaranteed wireless terrestrial distribution can operate their service without a licence. The only requirement is prior notification to OFCOM. Also, broadcasters of programme services of minor editorial importance (such as programme services that can only be received by fewer than 1,000 devices at the same time) do not fall under the scope of the RTVA and do not need a licence or registration.

The SBC is subject to a special licence with an extensive mandate. The Federal Council is the licensing authority for the SBC.

With respect to the other licences, the licensing competence has been delegated to DETEC (see question 17). If the broadcaster of a radio programme service is granted a licence under the RTVA, it is at the same time granted a licence under the TCA for use of the frequency spectrum (no separate application is needed). Cable TV operators are under a duty to broadcast in the respective coverage area TV programme services of broadcasters that have been granted a licence. Licences are awarded by public tender. To be awarded a licence, the applicant must:

- be able to fulfil the mandate;
- possess sound financial standing;
- be transparent about its owners;
- guarantee that it complies with the employment law regulations and the working conditions of the industry, the applicable law and in particular the obligations and conditions associated with the licence;
- maintain a separation of editorial and economic activity; and
- have residence or registered offices in Switzerland.

The number of licences a broadcaster and its group companies may acquire is limited to a maximum of two television and of two radio licences (does not apply to SBC). If there are several candidates for one licence, preference is given to the applicant that is best able to fulfil

the performance mandate. If several candidates are equivalent, the applicant that best enhances diversity of opinion and offerings is given preference. Often, independent applicants (ie, those not belonging to a media corporation that already possesses other licences) are deemed to be better able to fulfil this criterion by DETEC.

The fee per year for a broadcasting licence amounts to 0.5 per cent of the gross advertising revenue that exceeds 500,000 Swiss francs. Furthermore, administrative charges will incur in relation to the radio and TV licence as well as to the telecommunications licence. These charges are calculated on the basis of time spent. A reduced hourly rate applies to the granting, amending or cancelling of a licence for the broadcasting of a radio or television programme service as well as for the radio communications licence.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Broadcasters may be granted a licence for national and language region-specific programmes. These licences may contain obligations with respect to the portion of own productions and Swiss productions, in particular Swiss films.

Local and regional providers of radio and television programme services must primarily take into account the particular characteristics of their service area. They must contribute to the forming of opinion on topics of local and regional social life and to the promotion of the cultural life in the service area. These licences will, therefore, contain specific obligations regarding local and regional content.

Online as well as mobile content providers are not subject to this regime.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Swiss law provides for both rules on advertising in general and specific rules for advertising in broadcast media.

The Federal Act against Unfair Competition (UCA) dated 19 December 1986 (as amended 1 July 2016) contains several general provisions on advertising. It provides in particular that any advertisement that is deceptive or that in any other way infringes the principle of good faith and that affects the relationship between competitors or between suppliers and customers is deemed unfair and unlawful. In addition, the advertisement industry has installed soft law rules and established the Commission on Integrity in Commercial Communication. The Commission is a respected monitoring organisation that handles complaints from both consumers and competitors. It bases its decision on its own guidelines.

Broadcast media advertising (form and content) is specifically regulated in the RTVA and the RTVO.

As regards form, advertising must be clearly separated from the editorial programmes and must be clearly identifiable as such. Therefore, the beginning and end of an advertising slot must be indicated by a clear visual or audible marker. An advertisement that lasts longer than a minute must be identified as such for reasons of transparency.

While surreptitious advertising is always illegal, product placement may be allowed if it fits into the dramaturgy of a programme and is clearly declared as sponsorship.

Regular radio and television programme staff are banned from appearing in advertisements. Local and regional broadcasters with limited financial resources are excluded from this restriction.

There are scheduling and airtime restrictions for radio and TV advertising. Depending on the type of programme (eg, cinematographic film, documentaries, news programmes, programmes with a religious content, series, programmes for children) different scheduling restrictions apply. More severe restrictions apply to the SBC. As regards airtime, advertising may account for a maximum of 15 per cent of the daily transmission time and a maximum of 20 per cent (12 minutes) within one hour.

The RTVO contains provisions on the use of new advertising forms such as split screen, interactive and virtual advertising (ie, the insertion of advertisements into an existing image by means of post-production).

As regards content, the RTVA prohibits advertising for certain groups of products and services on radio and television, including tobacco products, certain alcoholic beverages, therapeutic products and political parties. Advertising is also prohibited if it disparages religious or political convictions, is misleading or unfair, or encourages behaviour that is prejudicial to health, environment or personal safety. Since April 2010, less restrictive rules (in particular with regard to commercial breaks and product placement) apply to private broadcasters.

There is no specific regulation for online advertising, as traditional online content is usually not covered by the RTVA (see question 23 for exceptions). Therefore, online advertising is only subject to the general advertising rules of the UCA.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

As regards must-carry obligations, the RTVA differentiates between broadcasting distribution networks that transmit content by wireless terrestrial broadcasting and by wire.

In case of wireless terrestrial broadcasting, the programme services of the SBC and the programme services of broadcasters that hold a licence with a performance mandate are entitled to access the network. Broadcasters pay the owner of a radio communication licence cost-based compensation for the broadcasting.

In case of broadcasting by wire, in addition to the above-mentioned programme services the Federal Council has specified the programme services of foreign broadcasters that are to be transmitted by wire because of their special contribution to education, cultural development or free opinion-forming. Furthermore, on application by a broadcaster and subject to certain conditions, OFCOM can require a TSP for a specific period to provide broadcasting by wire of a programme service within a specific area. The RTVO provides for a maximum number of programme services that have to be broadcasted by wire free of charge.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

The delivery of traditional online content (websites, newsgroups, weblogs, etc) is not specifically regulated. Of course, general laws such as law against unfair competition, criminal law, laws that protect intellectual property rights, etc, do apply. Online content that meets the legal definition of a programme service (ie, content that is delivered as a continuous sequence of broadcasts that are transmitted at certain times only and addressed to the general public (such as IPTV and streaming media)) falls, in principle, under the RTVA. However, programme services that can only be received simultaneously by fewer than 1,000 devices (ie, offerings of minor editorial importance) as well as on-demand content are excluded from the RTVA (see question 19).

Therefore, most of today's online content is not regulated. Broadcasts that are subject to the RTVA have to abide by the same rules (eg, regarding advertisement) as broadcasts via traditional media (see question 19). While there is no licence required, the broadcasters have to inform OFCOM of their programme service.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

As per 1 January 2015, must-carry obligations regarding analogue terrestrial TV programme services have finally been abolished and switched over from analogue to digital TV broadcasting. Regarding the broadcasting of radio programme services, there is no specific timing required by law for the switchover from analogue to digital broadcasting. However, OFCOM may grant financial help to licensed broadcasters to establish new broadcasting technologies if there are insufficient resources in the relevant area. The necessary funds are generated by licensing and consumer fees. Further, the radio industry indicated its intention that by 2024 all radio programme services in Switzerland shall broadcast only digitally on DAB+ platforms. It is planned to achieve this aim in two steps. By the end of 2019, all radio programmes shall be broadcasted digitally on DAB+ platforms. Analogue VHF broadcasting shall then be phased out. This process shall be completed by 2024 at the latest.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

In Switzerland, no specific rules for digital formats exist. Digital broadcasting is subject to the general rules (see question 23). The provisions of the RTVA apply, if the digital formats meet the legal definition of a programme service (see question 23).

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The number of licences a broadcaster and its group companies may acquire is limited to a maximum of two television and of two radio licences (does not apply to SBC).

Furthermore, there are measures against media concentration once a licence has been granted. However, these are only applicable if an undertaking abuses its dominant position. In these cases, DETEC consults the Federal Competition Commission (ComCo). If ComCo's report ascertains that a dominant undertaking jeopardises diversity of opinion and offerings as a result of its abuse of its dominant position, DETEC may demand that the undertaking:

- ensures diversity by measures such as granting broadcasting time for third parties or cooperating with other participants in the market;
- takes measures against corporate journalism, such as issuing editorial statutes to ensure editorial freedom; or
- should such measures prove to be clearly inadequate, adapts the business and organisational structure of the undertaking.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

In October 2018, a revision of the RTVO entered into force containing only limited changes. The most important amendment was the introduction of a legal basis to conclude a service agreement with a news agency of national importance. Currently, a revision of the Federal Act on Copyright and Related Rights is being discussed in parliament with the controversial issue being whether, in connection with replay-TV, fast-forwarding of advertising shall only be allowed if the TV broadcaster has agreed to it. This topic will be discussed in the Council of States during the course of 2019.

In March 2019, the US government intervened with the Swiss government with regard to the cooperation of Swiss telecom companies with Huawei. Huawei delivers components for the fix-net and the building of the 5G network in Switzerland. The US government raised security concerns that Huawei might use its technology for espionage. The Federal Council is aware of the situation and will observe the situation. However, it is up to the companies to protect and secure their infrastructure and the state has no immediate legal influence on the procurement of network components from foreign suppliers.

In 2018 there were several mergers in the media sector in Switzerland (see question 30 for details) and there is a clear trend towards consolidation in the media sector.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The communications sector is regulated by ComCom as the market regulatory authority and OFCOM as the supervisory authority. However, it is not possible to draw a strict line between the competences of OFCOM and ComCom as the latter has delegated some of its competences to OFCOM (see question 1).

The authorities regulating the media sectors are the Federal Council, DETEC and OFCOM. Further, there are the recently established Federal Media Commission with advisory tasks and the Independent Complaints Authority for Radio and Television (see question 17).

In addition, anticompetitive practices and mergers in the telecoms and broadcasting sectors are subject to general competition laws enforced by ComCo. The cases are prepared and processed by the staff of the ComCo Secretariat. In merger situations, and subject to the notification thresholds of the Federal Cartel Act (CartA) being met, the parties require both clearance from ComCo and an approval of the transfer of the broadcasting and telecommunications licences by the respective licensing authority. Moreover, with regard to specific questions related to the conditions of competition, the telecoms and media regulators are obliged to consult ComCo (see question 26). Thus, there is close collaboration between the authorities to avoid jurisdictional conflicts, particularly concerning issues such as reviewing price-fixing arrangements, mergers and strategic alliances as well as the behaviour of dominant market players.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

In the telecommunications and media sector, the law provides for the following appeal procedures: decisions of ComCom, OFCOM, DETEC and ComCo can be appealed to the Federal Administrative Court. The scope of judicial reviews is extensive. Therefore, an appeal can be lodged on the following grounds:

- wrongful application of the law;
- the facts established by ComCom, OFCOM, DETEC or ComCo were incomplete or wrong; or
- ComCom's, OFCOM's, DETEC's or ComCo's decision was unreasonable.

The judgments of the Federal Administrative Tribunal may be challenged before the Federal Supreme Court on the basis of law and procedure. An exception applies to decisions of the Federal Administrative Court regarding publicly tendered licences and disputes regarding access based on interconnection rules. These decisions are final and cannot be appealed to the Federal Supreme Court.

Decisions of the Independent Complaints Authority for Radio and Television can be appealed directly to the Federal Supreme Court.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

In the past year, a series of mergers and joint ventures in the media sector have been reviewed by ComCo. For example, ComCo conducted a Phase II investigation regarding AZ Medien and NZZ who planned to combine their regional media activities in a joint venture. Also, the acquisition of control by Tamedia, a leading media company, over Goldbach, a leading marketer for online media, lead to an in-depth investigation as well as the acquisition of control by Tamedia over Basler Zeitung, a media company in the area of Basel. All concentrations were ultimately cleared. Although there were indications that the concentrations could create or strengthen a dominant position in several markets, the concentrations did not lead to any relevant change in the competitive situation. The ComCo pointed out that in all cases the precondition for an intervention (ie, the possibility of eliminating effective competition) was not met and according to the Cartel Act political aspects such as media diversity cannot be considered.

Regarding legislative changes, the Swiss government is currently analysing whether Switzerland should switch from the currently applied CSDP (creation or strengthening of dominant position) to the SIEC (significant impediment of effective competition) test. The government believes that this change of test for merger proceedings would have both a medium-term and long-term positive effect on competition. The Swiss government is currently preparing a draft revision of the CartA. Under the SIEC test, the above-mentioned media mergers might not have been cleared unconditionally.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Telecommunication businesses are under the jurisdiction of the National Communication Commission (NCC), which is an independent body composed of seven members nominated by the premier and then approved by the Legislative Yuan (the Congress). The NCC performs its function via committees and all matters handled by the NCC are subject to the decisions made in the committee meetings. A single NCC committee member does not have the authority to exercise power or perform independently. The Telecommunications Act (last amended on 11 December 2013) is the major legislation governing the telecommunications sector. The NCC has set forth various regulations, as authorised by the Telecommunications Act, to regulate the details of the licensing and operation of the different telecommunication services.

Facilities-based or Type I telecommunication service (such as municipality, long-distance and international fixed lines; all generation mobile phones, submarine cable and satellite telecommunication services) can only be operated by a Taiwan-incorporated vehicle that is subject to a 49 per cent direct foreign investment cap and where direct plus indirect foreign investment should not exceed 60 per cent of the total capital.

No foreign investment restrictions are applicable to non-facilities-based telecommunication service (or Type II) operators provided that a foreign operator sets up a Taiwan subsidiary or branch office through which to apply for and hold the necessary licence for engaging in such business.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Article 11 of the Telecommunications Act classifies telecom operators into Type I and Type II telecom operators, depending on whether an operator sets up telecom line facilities and equipment (which are defined as the network transmission facilities connecting the sending and receiving terminals, the switching facilities integrated therewith and the auxiliary facilities related thereto) for its provision of telecommunication services. A Type I telecom operator is defined as one that provides facilities-based services; Type II services are all other services. The operation of either of such services is subject to a franchise (Type I), or prior approval in the form of a licence (Type II). Fixed-line, submarine cable, 4G mobile phones and satellite telecom operators are all categorised as Type I telecom services. Taiwan no longer has 2G or 3G mobile phone services. A franchise issued by the NCC is required for the provision of such services. Operators of these services must be companies incorporated pursuant to Taiwan's Company Law, with limited liability, and capital dividend by issued shares. Specific regulations promulgated under the Telecommunications Act further govern minimum capital requirements, licensing procedures and conditions, and operations.

In the Type I market, the Executive Yuan (the Cabinet) determines and announces the scope and timetable for deregulation and the number of operators allowed. The mechanisms used for granting Type I service franchises include public bids, application reviews and other procedures as determined by the NCC. Applications for Type II licences can be made at any time and there is no maximum number of Type II licences that may be issued.

The application process for Type I telecom services franchises and for certain types of Type II licences (international simple resale (ISR), VoIP and all types of international telecommunication services) is divided into three stages: application, construction and inspection. During the first stage, the applicant submits an application with a detailed business plan, network construction plan and operating plan to the NCC. The administrative procedural laws require that the application review process should be completed within three months, but is extendible for two more months, if necessary. In practice, however, the application procedure may take longer. Once the regulator approves the application, the applicant begins construction of its network pursuant to the construction plan. Once the network construction has been completed, the regulator must conduct an inspection, and the franchise or licence is only issued after such inspection has been completed and the regulator deems the network satisfactory. An operator may begin operation only after issuance of the franchise or licence. The application process for other Type II telecom services (eg, domestic non-facilities-based services) licences is a relatively routine procedure where the NCC issues the licence upon its approval of the application with the business plan but without going through the inspection process.

The validity of Type I service franchises (except for 4G mobile phone franchises) ranges from six to 25 years depending on the type of service franchise. The validity for Type II services is three years, but for those licences issued prior to 15 November 2005, the validity is 10 years. All franchises and licences are renewable, with the exception that whether any 4G mobile franchise is renewable is subject to the NCC's further determination.

4G franchises that were issued in 2013, 2015 and 2017 are valid until 31 December 2030, 31 December 2033 and 31 December 2030 (for those franchisees operating in the frequency of 1,800MHZ), and 31 December 2033 (for those franchisees operating in the frequency of 2,100MHZ), respectively. The NCC is authorised by law to determine whether those franchises should be renewable then. 4G franchises were granted via a spectrum bidding process. Spectrum required for all other wireless services was granted by the NCC to the licensees.

The annual franchise fee payable for other Type I service operators ranges from 0.5 per cent to 2 per cent of the individual operator's annual turnover provided that 3G and 4G mobile phone operators do not need

to pay annual franchise fees and, instead, are required to pay a franchise fee upon successfully winning a licence or spectrum in auction and may elect to pay this in one lump sum or in instalments. Type II telecom service operators providing ISR services or VoIP services must pay 1 per cent of their total annual turnover as an annual licensing fee. Other Type II operators must pay an annual licensing fee ranging from NT$6,000 to NT$150,000, depending on their paid-in capital. An operator providing more than one telecom service must pay a separate annual franchise fee for each service, calculated pursuant to the provisions mentioned above. Additional administrative fees (eg, network inspection fees and application fees) are also payable in negligible amounts. A spectrum fee is also levied on those operators that utilise spectrum, with the exception of 4G operators.

The frequencies of 2.4GHZ and 5GHZ have been allocated for use for Wi-Fi in Taiwan and no fee is payable for that. Licensed internet access service providers are authorised to use such frequencies for providing internet access service via Wi-Fi without needing to obtain any separate licence or authorisation or paying frequency usage fees. Licensed mobile network operators are also authorised to set up Wi-Fi APs to sub-stream their services without being subject to any separate licensing or authorisation or frequency fee requirements. The NCC also allows government bodies to set up Wi-Fi access points (APs) and provide free service to the public, which, again, is not subject to any NCC licence, authorisation or fee obligations.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Spectrum shall always be used exclusively for the specific purpose for which it has been granted.

Spectrum is neither tradable nor assignable, with the exception that a 4G operator could, upon the approval of the NCC, transfer its spectrum to another 4G operator.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Generally speaking, all Type I telecommunication service markets are subject to ex-ante regulations, which include interconnection obligations (and all interconnection arrangements shall be transparent, reasonable, non-discriminative, network unbinding and cost-based pricing), separate accounting and non-cross-subsidiary requirements among difference services, number portability requirements and the NCC's prior approval of pricing and service terms. Dominant market players for Type I services specified by the NCC are subject to further marketing and business activity restrictions, which include:

- not to obstruct, through proprietary techniques, either directly or indirectly, requests for interconnection from other Type I service operators;
- not to refuse to disclose to other Type I service operators their calculation methods for interconnection charges and other relevant materials;
- not to improperly determine, maintain or change their tariff or methods of offering its telecommunication services;
- not to reject requests from other Type I service operators to lease network components without due cause;
- not to reject requests from other telecommunication service operators or users to lease circuits without due cause;
- not to reject requests from other telecommunication service operators or users for negotiation or testing without due cause;
- not to reject requests from other telecommunication operators for co-location without due cause;
- not to discriminate against other telecommunication service operators or users without due cause; and
- not to abuse their dominant market position, and not to engage in any other acts of unfair competition.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

Structural or functional separation is not mandatory and, to the contrary, is not allowed under current telecommunication laws. The NCC has proposed new legislation that introduces the separation of structure and function and allows a telecom service provider to use the networks established by other operators but without making structural and functional separation mandatory. The proposed legislation is now pending review and approval by Taiwan's Congress.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The NCC is authorised by telecommunication legislation to designate one or more Type I operators to provide universal services, which are financed by a fund contributed to by those telecommunication operators that have been designated by the NCC and that contribute to the fund on an annual basis in amounts set by the NCC. The NCC currently designates certain operators to provide universal services such as traditional voice and data communications.

Although the NCC does not require these universal services to be provided via broadband, according to the most recent universal service plan implementation report published by the NCC in 2015, universal service providers have already achieved a 100 per cent broadband coverage rate for the universal services that they provide.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

All Telecom numbers, including numbering codes, subscriber numbers and identification codes are administered by the NCC in Taiwan. The numbers are allocated by the NCC to licensed telecom service operators via applications made pursuant to the NCC's regulations. Numbers allocated to license telecom service operators can only be used for those services for which the application applied. Numbers allocated by the NCC are not tradable or transferable, with very few exceptions; for example, a mobile network operator may transfer the numbers to a mobile virtual network operator that resells its services.

Number portability is mandatory, but the regulator has discretion in setting the applicable time frames. Currently, mobile phone number portability is mandatory, while local landline number portability is only required in five municipalities.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

The regulations set forth by the NCC governing different telecommunication services provide the mandatory service terms. In addition, the terms and conditions for customers of Type I services operators are

subject to prior approval by the NCC. The terms and conditions for Type II services operators must be filed with the NCC. The NCC also has the right to order a telecom operator to amend any of their terms and conditions if the NCC determines them to be unfair or harmful to customers.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

No.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

No.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are currently no specific regulations governing NGA networks. The Taiwan government did determine to provide financial assistance for the development of 5G mobile communication-related businesses. Tax incentives are available for broadband service providers and broadband-related businesses that meet certain qualifications.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

The Personal Data Protection Act (PDPA) is Taiwan's major legislation governing personal data protection, and it applies to all business sectors including the telecommunications sector. Telecommunication service operators are thus subject to the general personal data protection requirements and obligations set forth by the PDPA. The PDPA authorises the NCC, as the regulator for telecommunication businesses, to set forth regulations specifically for personal data protection matters within the telecommunications sector. The NCC currently has a set of guidelines for information security within the telecommunications sector that include guidelines for personal data protection. A licensed telecom service operator is required to submit an annual information security self-assessment report to the NCC. The NCC has also prohibited the transmission of any personal data to mainland China by Taiwan's licensed telecommunication service operators.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Cybersecurity Management Act (CSMA) is the major Taiwan legislation addressing cybersecurity. Taiwan's general criminal law also includes specific provisions related to cybercrime. The CSMA applies not only to government bodies, but to private companies engaging in the provision of data services and in core internet infrastructure operations. The CSMA mainly requires applicable government bodies and private companies to establish and implement cybersecurity plans and requires that the government be notified of cybersecurity incidents.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

No.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

No. However, the NCC prohibits any Taiwan licensed telecom service provider from transmitting any personal data that it has collected to mainland China.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The NCC has proposed new legislation that would replace the Telecommunications Act, if, and when, it becomes effective. The proposed new legislation significantly relaxes the regulations on telecom service providers by replacing the licensing requirements with mere registration requirements for specific telecom service providers. It is also proposed that the foreign investment cap would only apply to those service operators that require the use of frequency or telecom numbers. The new legislation also abandons the existing differentiation between facility-based and other telecom businesses and imposes more restrictions on dominant market players. The NCC has also proposed new legislation to govern internet service providers and internet services. The said two newly proposed pieces of legislation are currently pending with the Legislative Yuan (the Congress) for readings and final approval.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The NCC is also the government agency overseeing the broadcasting industry. The Radio and Television Broadcasting Law (last amended on 13 June 2018) governs terrestrial broadcasting, the Cable Radio and Television Broadcasting Law (last amended on 13 June 2018) governs the cable broadcasting sector, and the Satellite Radio and Television Broadcasting Law (last amended on 13 June 2018) governs satellite broadcasting.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

The restrictions on foreign ownership for broadcasters are:

- terrestrial broadcasters – no foreign investment is allowed;
- cable broadcasters – total direct and indirect foreign investment shall be less than 60 per cent of the broadcaster's total issued shares. Direct foreign investment shall be less than 20 per cent of the total shares issued; and
- satellite broadcasters – direct foreign investment in a Taiwan-incorporated satellite broadcaster shall be less than 50 per cent of the total issued shares. An offshore satellite broadcaster may

offer programmes in Taiwan by setting up a branch office or appointing a distributor, provided that the NCC has granted broadcasting approval.

There are currently no regulations specifically prohibiting or restricting cross-ownership among broadcasters. However, for cable television multiple system operators, relevant cable laws provide that a cable system operated together with its related companies and related cable system operators is prohibited from controlling more than one-third of the total number of subscribers in the country, and cable system operators shall not have more than one-quarter of the channels available on their respective network broadcasting programming produced in-house or provided by affiliates.

In addition, cross-ownership among broadcasters is subject to general competition laws.

There is new media antimonopoly and divestiture legislation that has been proposed by the NCC and being reviewed by the Executive Yuan, which aims to regulate mergers or other forms of consolidation among various broadcasters and other media such as newspapers. In brief, prior approval from the NCC would be required for any merger or other consolidation among specific broadcasters and other media if, after the merger or other consolidation, the reviewer ratings for the merged or consolidated broadcaster and media enterprise would meet stipulated thresholds and such approval would not be granted if the post-merger or post-consolidation viewer ratings would exceed higher stipulated thresholds.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

All broadcasters broadcasting within the territory of Taiwan, regardless of the broadcasting platform, are subject to licences issued by the NCC, with the exception of internet protocol television (IPTV) and internet programming services, which are currently not regulated. An offshore broadcaster broadcasting into Taiwan via satellite needs to either set up a branch office in Taiwan or appoint a local distributor. An offshore satellite broadcaster licence shall be obtained by the branch office in Taiwan or the local distributor on behalf of the offshore satellite broadcaster.

The term of a licence for a terrestrial broadcaster is nine years. Such a licence is renewable upon expiry of each nine-year period. A cable broadcasting licence is also valid for nine years. An application for renewal of a cable broadcasting licence must be filed within the six-month period following the beginning of the ninth year of the licence. The duration of the satellite broadcasting licence is six years, provided that the licence term for a local distributor of an offshore satellite broadcaster is limited to the distribution term, with a maximum of six years. An application for renewal of a satellite broadcasting licence must be filed no later than six months prior to the expiry of the then-applicable licence period.

No franchise fees are imposed on broadcasters. However, licensed cable broadcasters must make annual donations to a government foundation in an amount equal to 1 per cent of business turnover for that year. The subscription fees charged by a cable operator from its subscribers are subject to prior approval by the government authorities.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

There are no regulations restricting the broadcasting of foreign programmes. Locally produced programmes must make up at least 70 per cent of total programming broadcasted by a terrestrial broadcaster. In addition, at least 50 per cent of the primetime dramas broadcasted by terrestrial broadcasters must be locally produced.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Advertising content must not violate the law, jeopardise public policy or adversely affect acceptable social customs, adversely affect the physical or mental wellbeing of children or juveniles, incite people to commit crimes, or spread rumours or false information so as to mislead the public. The content of advertisements for certain products and services must receive prior approval from the relevant government agencies if other applicable laws so provide. For example, advertisements for medicines, cosmetics, medical equipment and medical treatments must have the approval of the health authorities.

For terrestrial broadcasters, advertising time must not exceed 15 per cent of total broadcasting hours. For cable broadcasters or satellite broadcasters, advertising time must not exceed one-sixth of total broadcasting time for each programme. Online advertising is not subject to the same restrictions as IPTV is not yet regulated in Taiwan.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

A cable broadcaster is required to simultaneously retransmit the programmes and advertisements broadcast by licensed terrestrial broadcasters by including those in the cable broadcaster's basic channel service. Cable broadcasters must retransmit such programmes and advertisements in their entirety without any changes to format and content. No fees are payable for such retransmission.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

Currently, there are no specific rules for broadcasting new media content.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

Terrestrial TV digitalisation

The digital switchover for terrestrial television broadcasting was completed on 30 June 2012. The spectrum freed up by such switchover was allocated for 4G mobile phone service franchisees.

Cable TV digitalisation

Almost all of the networks currently operated by domestic cable broadcasters are capable of transmitting digital content. Certain

cable operators have begun broadcasting in full digital. The competent authority in charge, the NCC, has adopted the following steps for promoting cable television digitalisation:

- encouraging cable system operators to provide a free set-top box to each user;
- adopting the achieved percentage of cable television digitalisation as the key evaluation point for cable system operator licence renewal;
- combining the achieved percentage of cable television digitalisation and cable television tariff policy for policy consideration;
- opening the cable television tiering system in accordance with the achieved percentage of cable television digitalisation; and
- issuing new cable broadcaster licences to only those operators that propose to broadcast in full digital.

By the end of 2018, digital penetration had reached 99.95 per cent in Taiwan, with approximately 5.07 million digital TV users.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

The laws do not set forth specific restrictions with the exception that the cable broadcasting laws prohibit cable broadcasters from broadcasting home shopping channels in excess of a number specified by the NCC. In addition, all of the programming that a cable broadcaster intends to broadcast is subject to the NCC's general review and approval.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

Refer to the last paragraph of question 18.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

The NCC had proposed two new pieces of draft legislation that aim to replace the existing three broadcasting laws governing terrestrial, cable and satellite broadcasters. One of the proposed new pieces of legislation would govern cable broadcasting platform operators, while the other would govern terrestrial broadcasters, satellite direct-to-home broadcasters and television channel broadcasters. The proposed new cable broadcasting platform legislation significantly relaxes the regulations for cable system operators, especially those platform operators that do not have strong market power. The current antimonopoly restrictions applicable to cable system operators would be significantly relaxed and cable system operators would no longer be obliged to carry the programming of licensed terrestrial broadcasters.

The Executive Yuan rejected the proposed new legislation and asked the NCC to consider the issue further and to make necessary amendments to its proposal. The NCC is currently reconsidering the legal framework for media legislation and no new proposal has yet been submitted to the Executive Yuan yet.

Also refer to the newly proposed media antimonopoly and divestiture legislation discussed in the last paragraph of question 18.

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REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The NCC is the government agency overseeing the telecom and broadcasting industry. The NCC makes policy decisions, initiates most of the telecom and broadcasting-related legislation and has primary responsibility for implementation and enforcement of telecom and broadcasting laws. A separate independent regulator, the Taiwan Fair Trade Commission (TFTC), is the antitrust regulator in Taiwan. Just as for the NCC, the members of the TFTC are nominated by the premier and then approved by the Legislative Yuan.

The Telecommunications Act provided that any merger or acquisition between or among Type I telecom service operators is subject to prior approval from the NCC. In practice, the NCC also considers any merger or acquisition between or among broadcasters to represent a change to the business plans originally submitted to the NCC by those broadcasters and, thus, any changes to such business plans would require the prior approval of the NCC. Such mergers or acquisitions in the communication and media sectors are subject to prior notification to the TFTC as well, if the market thresholds stipulated by the Fair Trade Law, Taiwan's general competition law, would be met as a result of the merger or acquisition.

No specific law exists for avoiding conflicts in jurisdiction between the NCC and the TFTC for mergers or acquisitions within the telecom and media sector. The NCC and the TFTC have the authority to make their own respective decision on the same proposed transaction. In fact, the TFTC has set forth its own guidelines for its review of cross-sector combination transactions between or among telecommunication and broadcasting industries.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

An objection to the decision by the NCC or the TFTC should be appealed to the High Administrative Court directly on the grounds that the NCC's

or TFTC's decision failed to comply with applicable laws. A decision by the High Administrative Court may be appealed to the Supreme Administrative Court.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

The NCC rejected the proposed acquisition of a controlling stake of one of Taiwan's major satellite television broadcasters and programme distributors, Eastern Broadcasting, by a Taiwan cable system operator, Taiwan Optical Platform (TOP) after many months of review and consideration of the said proposed acquisition. The NCC's rejection was based on the belief that, among the other things, the acquisition would result in TOP having vertical ownership of a cable system and a programmer with significant market share, not to mention the fact that TOP already has a record of having breached certain cable broadcasting laws. The TFTC had actually approved the transaction, though it had attached various conditions, but it was the NCC that later rejected that application, marking a rare situation where the TFTC and the NCC reach differing conclusions on a proposed transaction. The NCC's decision was also criticised by the public for its lack of clarity, particularly as to what level of market share it believes warrants a rejection, or whether it believes that acquisition involving vertical integration warrants a rejection.

Thailand

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Regulatory and institutional structure

Legislation that governs the telecommunications sector includes the Act on the Organisation to Assign Radio Frequency and to Regulate Broadcasting and Telecommunications Services 2010 (the NBTC Act) and the Telecommunications Business Act 2001 (the Telecommunications Business Act).

The NBTC Act establishes the National Broadcasting & Telecommunications Commission (NBTC) as an independent regulator of broadcasting and telecommunications businesses. Subject to supervision by the NBTC, a Telecommunications Committee regulates telecoms business in compliance with the Telecommunications Business Act.

The Telecommunications Business Act applies to operators of telecommunications services. 'Telecommunications service' is defined as a service that sends, transmits or receives signs, letters, figures, pictures, sounds, codes or anything else made comprehensible by frequency waves, wireless, lighting, electromagnetic systems or any other systems, or other activities prescribed by law to be telecommunications services.

Thailand currently has three types of telecoms licence: a Type 1 licence, for telecommunications business operators who provide telecommunications services without operating a telecommunications network; a Type 2 licence, for operators who provide services to a specific group of customers with or without operating a telecommunications network; and a Type 3 licence, for operators who operate a network providing services to the general public.

Additionally, any operator wishing to issue telephone numbers shall obtain a separate licence from the NBTC, subject to a Telecommunications Numbering Plan issued by the NBTC.

General obligations applicable to licensed operators are as follows:

- Universal Service Obligations – the licensee is required to contribute a percentage of revenue from their telecommunications services to the Broadcasting, Television and Telecommunications Development for Public Benefit Fund;
- access and interconnection of telecommunications networks – telecommunications business operators who own a network must allow other operators to interconnect with and access their networks;
- standard of telecommunications network and equipment – telecommunications networks, equipment and devices used in telecommunications services shall be inspected and certified prior to use;
- competition – licensed telecommunications business operators shall comply with the rules and regulations prohibiting activities that are harmful to competition as published by the NBTC; and
- contract for telecommunications services – a service contract between a licensee and a user shall be subject to the Telecommunications Committee's prior approval.

Foreign ownership restrictions

The Foreign Business Act 1999 regulates business where a majority of stakeholders are non-Thai (ie, foreign business operators). Foreign businesses are required to obtain a foreign business licence from the Ministry of Commerce prior to operating in Thailand. This is a licence separate from a telecoms licence and generally applies to all business sectors.

Foreign telecommunications or media businesses are subject to sector-specific rules of foreign ownership. In case of a conflict between a provision of sectoral rules and general rules, the rules that impose a stricter standard will apply.

The Telecommunications Business Act imposes various foreign ownership restrictions in accordance with the relevant type of telecoms licence as follows:

- Type 1 licence – no ownership restrictions apply; thus, operators with a Type 1 licence are only subject to the Foreign Business Act, and a foreign business licence is required;
- Type 2 licence – foreign ownership is limited to 49 per cent of the total shares; thus, a Type 2 licence holder may only have up to 49 per cent of its shares held by non-Thai shareholders; and
- Type 3 licence – the restrictions on Type 3 licence holders are the same as for Type 2 licence holders.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

General qualifications of telecommunications business operators

As mentioned, licences for telecoms business are categorised into three types: Type 1, Type 2 and Type 3. The licence shall cover various services as indicated in the operator's licence application.

The applicant shall be a juristic person established under Thai law and shall not be bankrupt or a person who has previously had a telecoms licence revoked.

Once a licence is obtained, the licensee is required to pay an annual licence fee based on its annual revenue, together with the universal service obligation fee.

Internet service providers (ISPs)

ISP licences are categorised into three types, similar to the licence types for telecommunications business operators. An applicant shall be a legal person established under Thai law who has a full legal personality and has not previously had a licence revoked. The duration for each licence is as follows: five years for Type 1 licences, five years for Type 2 licences, and 10 years for Type 3 licences.

Mobile phone service providers

International mobile telecommunication in the 2.1GHz band (3G).

The 2.1GHz band refers to the range of the spectrum between 1,920MHz–1,965MHz and 2,110MHz–2,155MHz, in which service providers are required to operate in accordance with the standards set by the International Telecommunication Union. Authorisation is granted to each applicant by an auction conducted by the NBTC.

The applicant shall be a juristic person categorised as a limited company or a public limited company established under Thai law with a majority of Thai shareholders. The winner of the auction will be licensed to use the 2.1GHz international mobile telecommunications frequency and will be issued with a Type 3 licence for a duration of 15 years.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

A licensee shall not use the spectrum for a purpose that differs from the purpose granted under the licence. The authority may revoke a licence if the licensee fails to comply with the licence regarding the use of spectrum.

A licence to use the spectrum is an exclusive right of the licensee. The licensee may not assign or grant another person the ability to operate on behalf of the licensee, whether in whole or in part. However, a licensee may authorise a third party to rent air time, subject to the rules and regulations prescribed by the NBTC.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

There are certain regulations that impose oversight on operators under various circumstances in relevant telecommunications markets. The NBTC categorises the relevant markets as follows:

Retail markets, consisting of:

- domestic fixed-line telephone services;
- domestic mobile telephone services;
- international telephone services;
- fixed-line internet services; and
- mobile internet services.

Wholesale markets, consisting of:

- international internet gateway services;
- international telephone gateway services;
- network interconnection for fixed call termination services;
- network interconnection for mobile call termination services;
- wholesale broadband access services; and
- leased line services.

The NBTC is authorised to identify telecommunications business operators that have 'significant market power' (meaning operator capability that may pose a barrier to competition in the relevant market). The NBTC shall assess markets that are non-competitive, and that have barriers to competition and then identify the operators that have significant market power ('SMP operators').

A market shall be deemed as non-competitive if it has: a high market concentration (according to the Herfindahl-Hirschman Index (HHI) as determined by the NBTC); a high barrier to new entry; or low competition with no potential for improvement.

If a market is deemed to be non-competitive, then the NBTC shall categorise operators in such market as SMP operators as follows:

- operators that have a market share (including the market share of its subsidiaries) of at least 40 per cent; or
- operators that have a market share from 25 per cent to 40 per cent but that the NBTC considers as having SMP, taking into account the following:
- size of overall business;
- control over fundamental network facilities;
- technological advantage (compared to other operators in the same market);
- bargaining power;
- access to funding resources;
- variety of products and services;
- economies of scale;
- economies in production;
- vertical integration of service businesses;
- high volume of distribution or sale of products;
- competency to compete in the market;
- barriers to business growth; and
- capability of new entry by competitors to the market.

If it is not possible to identify only one SMP operator because of market concentration, similarity of products or services, similarity of cost structure, or similarity of market share, then the NBTC may identify more than one operator in the market as an SMP operator.

SMP operators or any operators with more than 25 per cent market share in any relevant markets are forbidden from conducting the following activities:

- price discrimination;
- stipulating a fixed fee;
- stipulating service fees or product prices lower than cost to limit competition;
- stipulating conditions to force other operators to use certain services or to limit choices of services;
- unreasonably restrain from, reduce or limit provision of services or sale of products;
- stipulating unfair conditions on the provision of services to other operators;
- refusing to provide necessary networks or facilities to other operators;
- bundling services or products to other operators;
- concealing information necessary for using or providing services;
- using information derived from other operators to create competitive advantage;
- using techniques with the intent to limit the services of other operators; and
- entering into agreements or conditions with other operators or other persons with the intent to reduce or limit competition; and other activities that the NBTC may, from time to time, stipulate.

In addition, the NBTC may issue specific measures to impose obligations or stipulate conditions on any individual operators or SMP operators, which may include orders to:

- perform or restrain from activities deemed harmful by the NBTC;
- keep a separate accounting system for some services (see question 5);
- disclose or report information;
- change cost-calculation formulas;
- set prices or fees for certain services;
- provide services to other operators;
- separate services;
- cancel or amend terms in service agreements; and
- other measures that the NBTC may stipulate.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is currently no regulatory framework that requires structural separation. The NBTC has set out a framework to have structural separation in the television sector, but has not enacted regulation.

As for functional separation, there is a regulation that requires a telecommunications business operator to separate telecoms-related business from non-telecoms-related business for accounting purposes. An SMP operator may be further subject to the NBTC's discretionary authority and may be requested to further separate categories of telecommunications business in its accounting in addition to the aforementioned.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

The Universal Service Obligations (USO) require service providers to provide certain types of telecommunications services in rural areas, for educational institutions, social assistance agencies, and for underprivileged citizens. These services will be funded by income allocated by the licensees through USO fees, which licensees are required to pay annually to the Broadcasting, Television and Telecommunications Development for Public Benefit Fund.

The obligations imposed may not pose an undue financial burden on a service provider or cause discrimination among service providers. The NBTC must notify a service provider of their obligations before submitting a licence application. The current USO fees policies issued by the NBTC charge licensees at the rate of 2.5 per cent of the net income from telecommunications services, plus 7 per cent Value Added Tax.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The NBTC is the authority responsible for allocating numbers used for services or service areas under the following rules and regulations:

- use of international access numbers with service codes;
- telecommunication numbering allocation;
- telecommunication numbering plan;
- criteria for the assignment and permission of special telecommunication numbers; and
- criteria for allocation and administration of telecommunication numbers.

The NBTC prescribes that a service user is entitled to mobile number portability and service providers are prohibited from acting in any manner that obstructs or impedes the porting of mobile numbers to other service providers.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Telecoms law imposes tariffs, service charges and certain consumer protections on telecommunications business operators. Contracts with consumers for mobile phone services are subject to governance by the relevant regulations and consumer protection laws.

The NBTC regulates the content of telecom service contracts and subjects them to be pre-approved by the NBTC before becoming effective. The NBTC also issues notifications regulating the rates of fees and charges for telecommunications services. A telecommunications business operator that wishes to charge more than the maximum rate as determined by the NBTC must submit a request to the NBTC for approval. Telecommunications business operators are also required to establish procedures and policies to receive and address consumer complaints.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

There are no regulations that impose restrictions on zero-rating or bandwidth throttling. ISPs may allow access to certain services or applications free of charge and can prioritise the type or source of data they deliver.

However, as ISPs are subject to competition law, they are required to provide services on a non-discriminatory basis, allow interconnection with other ISPs, and facilitate equal access to services.

Non-discrimination

Under the Telecommunications Business Act, ISPs shall provide services on equivalence and non-discrimination principles. ISPs are also prohibited from taking any action that may monopolise, reduce or limit competition in the ISP market.

Interconnection

Operators that own their own network must allow other operators to interconnect with and access their networks. However, operators may refuse access to their network if the use of the network results in technical problems that may obstruct their business, or under any circumstances as prescribed by the NBTC from time to time.

Access

ISPs shall ensure that all users have equal access to telecommunications services.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

The Computer Crimes Act 2017 (as amended) (the CCA) requires a 'service provider' (defined as a person who provides other persons with access to the internet or the ability to communicate through a computer system) to retain computer traffic data of users for a revolving 90-day period. Law enforcement is authorised to access that data for the purposes of investigating computer crimes. The CCA imposes criminal liability on any individual that engages in activities that violate the CCA.

Additionally, the content on an ISP's platform may be subject to other generally applicable laws, as outlined below.

E-commerce platforms (online platforms that allow for the sale and purchase of products or services) are considered a direct marketing business and regulated under the Direct Sale and Direct Marketing Act 2002.

Laws concerning intellectual property may apply to certain online activities. However, if a service provider is not responsible for controlling, initiating or ordering an alleged infringement, and such service provider has proceeded in compliance with a court's order to remove an infringing work or to suppress the copyright infringement by other means, then the service provider shall not be liable for the alleged

infringement occurring prior to the issuance of the court order or after the date of such order's expiry.

In addition, a Cyber Security Bill will create a National Cyber Security Committee with the authority to command operators in the private sector to implement procedures to prevent cyber threats. Failure to comply with such orders may be subject to criminal punishment.

Next-Generation-Access (NGA) networks

11 | Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

In Thailand, NGA networks are referred to as Next Generation Networks (NGNs). An NBTC notification regarding the Specified Technical Standard for the connection of telecom networks regulates the obligations of NGNs. The notification specifies the minimum standards for connection of the NGN with which the service provider is required to comply.

Data protection

12 | Is there a specific data protection regime applicable to the communications sector?

A Personal Data Protection Bill was approved by the National Legislative Assembly on 28 February 2019. Subject to final approval by the King of Thailand, the bill will be published in the Government Gazette before being enacted into law, which is expected to be within 2019.

Once the bill comes into effect, it will limit what companies (under the role of data administrator) may do with people's personal data to the extent that they must inform the data owner of the purpose for the collection, use or disclosure of their personal data and obtain their consent either in writing or by electronic means. Such consent shall not be obtained fraudulently, such as by misleading the data owner about how the information will be used. The use or disclosure of personal data in a manner that differs from the purpose that was originally consented to by the data owner is prohibited unless permitted by law, or the personal data administrator informs the data owner of the new purpose and obtains their amended consent. A data owner may withdraw their consent at any time unless restricted by law or any agreement that is beneficial to the data owner. If a personal data administrator fails to comply with the provisions of the act, then the data owner may request to have their personal data deleted, destroyed, temporarily suspended or converted into an anonymous form.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

The Cyber Security Bill, which is yet to be enacted into law, is intended to protect Thailand's national security systems from cyber-related threats and crime. The bill broadly defines 'cyber' as any information or communication from a computer network, a telecommunications network, or the internet. It focuses on the safety of government computer systems and provides the authority for government entities and officers to carry out the provisions of the bill. As mentioned, a National Cyber Security Committee will be created if the bill is enacted into law and will be responsible for all national security matters in connection with the government's data and computers. Similar to the Personal Data Protection Bill, the Cyber Security Bill was approved by the National Legislative Assembly on 28 February 2019. Subject to final approval by the King of Thailand, the bill will be published in the Government Gazette before being enacted into law, which is expected to be within 2019.

Cyber threats are categorised into three levels under the bill as follows:

- non-critical – any threat that may negatively impact the performance of a government computer system;
- critical – any threat to a government computer system related to the national infrastructure, national security, the economy, healthcare, international relations, the functions of government, etc., which may cause damage or impair a government computer system; and
- crisis – any threat greater than a critical level event, which may have a widespread impact such as causing the government to lose control of a computer system, an immediate threat to the public that could lead to mass destruction, terrorism, war, the overthrow of the government, etc.

The Thai government is yet to issue regulations as to the government's authority to inquire with private operators in case of a non-critical level event. The responsible authority, which is established under the Cyber Security Bill, is the National Cyber Security Committee. As of the date of writing, such committee has not been formerly appointed.

Under the Cyber Security Bill, there is language to address the government's authority in case of a critical level event. To determine whether or not an event is critical, an official may evaluate a threat by asking for cooperation from related parties such as requesting access to information and facilities of private entities, or requesting information from related parties that will require the prior written consent of the parties having such information. If an official believes that there is a critical level threat, then an official is authorised, with judicial permission, to access information and facilities of private entities including seizure of computer systems, data and related equipment to prevent cyber threats.

Under the Cyber Security Bill, there is language to address the government's authority in a crisis level event. In case of a crisis level threat, which is deemed by an official as urgent and requiring immediate action, an official is empowered to perform any act to the extent that it is necessary to remove or diminish such threat without judicial permission. Officials are required to report all information regarding such acts to a relevant court immediately after their performance.

It is only speculative at this juncture as to whether or not a private party has recourse if a court finds that an official wrongly assessed a situation to be at a crisis level. One point to keep in mind is that information discovered by an official under such circumstances may be shared with other government agencies for prosecution under various laws such as banking laws, criminal laws, the Computer Crimes Act, etc.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Currently, there is no specific legislation for big data.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

Currently, there is no specific law or regulation that requires data to be stored locally in Thailand. Nevertheless, certain industry-specific regulations require some data to be available or processed within Thailand. The banking industry, for example, is required to process debit card transaction data and make electronic payment system data available in Thailand.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

The NBTC has enacted rules and procedures to grant a licence to use the 1,800MHz spectrum (4G) for telecommunications. The 1,800MHz spectrum that shall be licensed is in the range of 1,740–1,785MHz and 1,835–1,880MHz.

Under such rules and procedures, the NBTC shall grant nine licences as follows:

- the first lot covers the range of 1,740–1,745MHz paired with the range of 1,835–1,840MHz;
- the second lot covers the range of 1,745–1,750MHz paired with the range of 1,840–1,845MHz;
- the third lot covers the range of 1,750–1,755MHz paired with the range of 1,845–1,850MHz;
- the forth lot covers the range of 1,755–1,760MHz paired with the range of 1,850–1,855MHz;
- the fifth lot covers the range of 1,760–1,765MHz paired with the range of 1,855–1,860MHz;
- the sixth lot covers the range of 1,765–1,770MHz paired with the range of 1,860–1,865MHz;
- the seventh lot covers the range of 1,770–1,775MHz paired with the range of 1,865–1,870MHz;
- the eighth lot covers the range of 1,775–1,780MHz paired with the range of 1,870–1,875MHz; and
- the ninth lot covers the range of 1,780–1,785MHz paired with the range of 1,875–1,880MHz.

To qualify for these licences, the applicant is required to be a company established under Thai law, with majority Thai ownership. In addition, the applicant is required to obtain a Type 3 telecoms licence.

The licensee's obligations regarding social responsibility and consumer protection under this type of licence are as follows:

- The licensee is required to arrange for a telecom network to cover no less than 40 per cent of the population within four years after a licence is granted and to cover no less than 50 per cent of the population within eight years after the licence is granted. If the licensee fails to comply with this requirement without justifiable reasons, then the licensee, after the four-year or eight-year period has passed, shall be subject to a daily fine of 0.05 per cent of the highest auction price for the duration that the licensee fails to comply with the requirement.
- The licensee is required to specify a service fee for voice and data services that is, on average, lower than the service fee of a mobile telephone service using 2.1GHz (3G). In this regard, the licensee is required to arrange for at least one sales promotion to increase the opportunity for a user to be able to use 4G services. The licensee is also required to control the service quality and cannot provide lower than a 3G service.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The Broadcasting and Television Business Act 2008 regulates the media sector in the following ways:

- Licensing requirements – certain types of business (specifically, operating public services or community services) are reserved for government entities and non-profit organisations. Services intended for generating profit are available for operation by the private sector, subject to licensing requirements from the NBTC.
- Use of frequency spectrum – a licence from the NBTC is required to operate sound broadcasting business or television business that utilises a frequency spectrum. Licences are limited to the frequency assignments stipulated by the NBTC.
- Station management – for media businesses, a director (who must be of Thai nationality) will supervise and control programming, programme hosting and broadcasting, and ensure that the respective station is in compliance with the regulations prescribed by the NBTC.
- Prevention of monopoly – the licensee is prohibited from being a stakeholder of another company in the same category of business and from cross-holding a business in sound broadcasting and television using a frequency spectrum in excess of the proportions authorised by the NBTC.
- TV programmes – TV operators shall comply with the must-carry and must-have rules issued in the NBTC's notifications. Under must-carry rules, free-to-air TV operators are responsible for expenses they incur in providing public broadcasting services. Under must-have rules, free-to-air TV operators must broadcast seven TV programmes, namely: the SEA Games, ASEAN Para Games, the Asian Games, the Asian Para Games, the Olympic Games, the Paralympic Games, and the FIFA World Cup Final; other operators that are not free-to-air TV operators are prohibited from broadcasting such must-have programmes.
- Promotion and control of the professional ethics of licensees, programme producers and mass media professionals – such licensees, programme producers and mass media professionals have a duty to set ethical standards for the profession and shall apply such standards to self-regulate the industry.
- Construction of, use and connection to broadcasting network – the NBTC must approve the construction of any fundamental network. Furthermore, a network owner shall allow licensees to utilise their network in accordance with the criteria and procedures prescribed by the NBTC.

In addition to the Broadcasting and Television Business Act 2008, the Film and Video Act 2008 regulates the content of films, videos and their advertising media. A censorship committee of officials will review, approve or censor the content of films, videos and their advertisements, as well as approve other activities relating to film and video such as the production or distribution of foreign films in Thailand.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

As mentioned, the Foreign Business Act 1999 regulates all business in which a majority of the shareholders are non-Thai. Foreign businesses are required to obtain a licence from the Ministry of Commerce prior to operating in Thailand. The act generally applies to all business sectors.

Note that foreign media businesses are subject to foreign ownership restrictions. In case of a conflict between sectoral rules and general rules, the rules applying a stricter standard will prevail.

The Broadcasting and Television Business Act 2008 imposes foreign ownership restrictions according to the type of broadcasting licence (eg, radio, TV, etc) as follows:

- a licence to operate public services (where the main objective is to provide public services) – this licence is only available to government entities and certain associations, charities, foundations and educational institutions, and not to private sector operators;

- a licence to operate community services (where the objective of the business is to provide a public service that meets the needs of the community or locality receiving the services) – this licence is only available to government entities and certain associations, charities, foundations and educational institutions, and not to private sector operators; and
- licences to operate business services (where the main objective is to generate profit) are subdivided into three classes: national, regional and local. Foreign ownership is limited to 25 per cent. The foreign ownership restriction under this sector-specific law applies over the general Foreign Business Act; as such, the holder of such licence may only have up to 25 per cent of its shares held by non-Thai shareholders.

A licensed operator that intends to merge with another licensed operator shall submit a request for permission from the NBTC at least 60 days prior to the execution of such transaction under the following circumstances:

- register an official corporate registration for a merger that will result in either licensed operator being dissolved; or a merger that will result in both licensed operators being dissolved and a new legal entity being established;
- enter into a share acquisition agreement by which a licensed operator acquires all or part of the assets of another licensed operator; or
- enter into a share acquisition agreement by which a licensed operator acquires all or part of the shares of another licensed operator to manage, direct or control such licensed operator.

Cross-shareholding between two licensed operators requires the prior approval of the NBTC at least 60 days before executing such transaction.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

General qualifications

An applicant must be of Thai nationality, shall not be on a probationary period restricting the applicant from using the licence, and cannot have yet exceeded three years of a licence withdrawal period. The approval process normally takes up to 60 days after all the necessary documents are submitted. If approved, then the applicant will be granted the right to operate under the express terms of the granted licence. A broadcasting schedule may be allocated to other licensed broadcasters under the condition that the broadcaster complies with the rules and regulations prescribed by the Broadcasting and Television Committee.

Sound broadcasting business or television business using a frequency spectrum

There are three types of licence for this kind of operation: a licence to operate public services; a licence to operate community services; and a licence to operate business services. The requirements for a licence to operate public services and a licence to operate community services are as specified in question 18. As for a licence to operate business services, in addition to the ownership restrictions discussed in question 18, if the operation is executed at regional and local levels, then the applicant shall have at least one-third of the equity, and shall have stable financial status as determined by the NBTC and any other qualifications that can guarantee the stability of operations. Additionally, the applicant shall be a state enterprise or a company established under Thai law.

The same criteria apply to licences regarding Sound Broadcasting Businesses or Television Businesses that do not utilise a frequency spectrum.

Duration and fee

The Committee will grant a seven-year term for sound broadcasting licensees and a five-year term for television broadcasting licensees. Licences may be renewed 90 days before expiry. Meanwhile, the licensees are obliged to pay annual fees for their respective licence.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Thailand does not have regulations concerning the broadcasting of foreign-produced programmes or the proportionality between foreign and local content. Nonetheless, licensees of sound broadcasting or television businesses using a frequency spectrum are required to broadcast programmes composed of news or content that is useful to the public as determined by the NBTC, as well as other required programmes at certain specific times, such as the national anthem at 8 am and 6 pm. Additionally, the NBTC may implement additional measures for the benefit of the disabled or underprivileged.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Duration

Pursuant to the Broadcasting and Television Business Act 2008, an advertisement publicised through sound broadcasting or television using a frequency spectrum shall not exceed 12-and-a-half minutes per hour and the total runtime of advertisements for a whole day shall not exceed an average of 10 minutes per hour.

Advertisements publicised on a non-frequency use spectrum may not exceed six minutes per hour and the total amount of time for advertisements in a single day shall not exceed an average of five minutes per hour. Online advertisements are not restricted by time limits. However, an operator must ensure that the duration of an advertisement does not affect consumers under the Consumer Protection Act 1979.

Advertising content

The content of advertisements is governed by regulations relevant to the purpose of the advertisement. For example, a cosmetics advertisement would be governed by the Cosmetic Product Act 2015.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

In addition to the discussion in question 17 herein regarding TV programmes, broadcasting licensees must broadcast news and warnings to the public in the event of a disaster or emergency case as prescribed by the NBTC. Programmes affecting state security, disrupting public order, containing revolutionary material concerning the overthrow of government, or containing obscenities that are against community standards are prohibited. Licensees are obligated to examine and suspend broadcasting of programmes that have the aforementioned characteristics.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media is relatively recent and is not as rigidly regulated as traditional broadcast media. However, the government is currently considering policies to regulate new media content.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

In 2012, the NBTC promulgated the First Broadcasting Master Plan (2012–2016) delineating that the transition to digital broadcasting transmission falls into one of seven main categories that are subject to regulation. The Plan established transition policies and plans to switch to digital television broadcasting within one year, and to switch to digital audio broadcasting transmission within two years. Commencement of digital audio broadcasting and television broadcasting was anticipated at that time to begin within four years. The authorisation to use frequency for digital television services will be granted by auction while other categories (such as community or public services) will be granted at the discretion of the NBTC.

Policies and plans to switch over from analogue to digital television broadcasting have been completed within the expected period, which was within 2015. Currently, digital television is being widely broadcasted in Thailand. For digital audio broadcasting (at the frequency spectrum of 174–230MHz), it is now being tested in several provinces throughout Thailand in accordance with the policies and plans issued by the NBTC.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

There are no measures restricting how broadcasters can use their spectrum, except a licensee is obligated to comply with the rules and regulations of the particular licence they have been granted.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

To evaluate the efficiency of market competition, the HHI is applied to assess market concentration. The assessment will result in the squared sum total of market share for each licensee. If the value of HHI reflects that market concentration is high, then that will be taken by the NBTC to mean that market competition is inefficient. The NBTC may then roll out specific precautionary measures to prevent any licensee that has a significant market power from monopolising, restricting or hindering competition, or misusing market power. If precautionary measures are imposed on a licensee that has dominant market power, then such licensee may object and the NBTC may hold a public hearing on the objection. Likewise, measures set forth by the NBTC are subject to adjustments at its discretion.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

A proposal known as over-the-top services (OTT) is also under review by the NBTC. Under this proposal, the scope of what constitutes broadcasting will be determined. Recently OTT operators were informed that they had to register themselves with the NBTC and that they would be governed by specific rules and regulations regardless of nationality; however, the attempt was heavily criticised by the public and OTT operators as well as by technology-related NGOs, and the NBTC consequently withdrew its requests to OTT operators. No further updates have been issued regarding this matter since such withdrawal by the NBTC.

In addition to licensing requirements, foreign operators may be required to have a local office and an authorised executive in Thailand for tax purposes. Further, telecommunications business is subject to excise tax in addition to corporate income tax. Excise tax is imposed on telecommunications operators. Under the current applicable Ministerial Regulation, as published on 16 September 2017, the rate of excise tax for telecommunications business is 0 per cent.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The media and telecom sectors are regulated by the NBTC, which is an independent organisation established by the NBTC Act. Under the supervision of the NBTC, a Broadcasting Committee regulates media businesses and a Telecommunications Committee regulates telecommunications businesses.

Under the Trade Competition Act 2017, which became effective in October 2017, the trade competition authority relinquished its authority to regulate specific sectors including broadcasting and telecommunications businesses. In other words, since the Trade Competition Act 2017 became effective, the broadcasting and telecom sectors that used to be regulated by specific legislation on trade competition have been exempted from complying with general competition laws and are only subject to sectoral regulations on competition.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

A broadcasting or telecoms operator has the right to appeal orders or decisions of the NBTC to the Broadcasting Committee (if the order involves broadcasting business) or to the Telecommunications Committee (if the order involves telecoms business) within 15 days of receiving an order or decision.

If the order or decision is upheld, then the appellant has the right to further appeal to the Administrative Court within 90 days from the date on which the appellant received notice of the appeal decision.

Challenges to the NBTC are limited to having cause in one of the following:

- the issuance of an order or decision without or beyond the scope of powers and duties granted to the regulatory body;
- the issuance of an order or decision inconsistent with the law, process or procedure;

- the issuance of an order or decision in bad faith;
- abuse of discretion; or
- discrimination.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

Antitrust is generally regulated by the Trade Competition Act under the governance of the Office on Trade Competition Commission (OTCC); the NBTC is authorised to regulate antitrust specifically in the broadcasting and telecommunications sectors. Further, the Trade Competition Act relinquishes the OTCC of its authority to regulate specific business sectors, including broadcasting and telecommunications, which will be solely regulated by the NBTC.

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The United Arab Emirates (UAE) consists of seven Emirates, each of which operates as its own legal jurisdiction, and laws are made at both a federal and an Emirate level. Some Emirates have defined areas within them that have been designated as freezones, which typically have separate civil and commercial laws for businesses and individuals in the relevant freezone, although they all remain subject to the UAE federal criminal law. Examples of freezones in the UAE include Dubai International Financial Centre, Dubai Creative Clusters Authority and Abu Dhabi Global Markets. For the purposes of this chapter, unless otherwise specified, we focus on the laws and regulations applying at a federal level.

The principal law in the UAE that relates to the communications sector is Federal Law No. 3 of 2003 Regarding the Organisation of the Telecommunications Sector (the Telecoms Law). The Telecoms Law establishes the Telecoms Regulatory Authority (the TRA) as the regulator of the telecommunications and information technology sector in the UAE. The Telecoms Law establishes a licensing-based regulatory framework for the supply of telecommunications services to customers in the UAE. Article 37 of the Telecoms Law, for instance, provides that individuals and corporate entities may not provide 'telecommunications services' through 'public telecommunications networks' to customers and 'subscribers' without obtaining a licence. Article 37 of the Telecoms Law is complemented by the TRA's Resolution No. (6) of 2008 regarding the Licensing Framework (the Licensing Framework). The Licensing Framework provides that 'regulated activities in the state are licensable' by the TRA. Here, 'Regulated Activities' means the operation of a 'public telecommunications network' or the provision of 'telecommunication services'.

Telecommunications services are defined in the Telecoms Law as delivering, broadcasting, converting or receiving, through a telecommunications network:

- wire and wireless communications;
- voice, music and other audio material;
- viewable images;
- signals used or transmission (other than public broadcasts);
- signals used to operate and control machinery or equipment;
- activities relating to the interconnection of equipment with a public telecommunications network;
- operating data transmission services, including the internet; and
- any other services approved by the High Committee appointed under the Telecoms Law.

Foreign ownership restrictions apply across the UAE and, generally, across all sectors. The precise requirements vary depending on the type of entity in question and the incorporation location of the entity. Local Limited Liability Companies generally cannot have a foreign shareholder holding a majority interest.

Companies established in freezones are exempted from these foreign shareholder restrictions and can be wholly foreign owned, and several international communications operators have established wholly owned entities in such freezones; however, they cannot offer public telecommunications services in the UAE which, since 2006, has been a closed duopoly market.

The two providers of public telecommunications services ('Etisalat' and 'du') are licensees of the TRA. The eligibility element of each licence refers to the licensee being a 'UAE juridical entity established and in good standing under the laws of the UAE'.

Other than public telecommunications services, there is some scope for non-UAE businesses to actively participate in the broader communications sector, although even international businesses that have procured a specific licence from the TRA have largely done so through a UAE-incorporated entity as the licensee.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Under the Telecoms Law, the provision, operation or sale of any telecommunications services through a public telecommunications network in the UAE requires a licence from the TRA.

Currently only two operators are licensed for public telecommunications in the UAE: du and Etisalat. This follows government policy on the operation of a duopoly in the telecommunications field. We understand the TRA is not currently considering further licences to break the duopoly.

The licences granted to Etisalat and du have various features; for example, each is required to filter the content that flows through its networks in line with the priorities of the state. Notable content filtering takes place in relation to matters concerning the state, foreign policy and morality issues. The decision as to which content should be filtered is essentially made through private discussions between the TRA and the mobile operators (with reference to TRA policies on internet access), but there is no practice of publishing details on specific content-level filtering rationale.

In addition to the duopoly policy on fixed and mobile public telecommunications services, the TRA has issued licences to other UAE entities for specific purposes, such as broadcast satellite transmission, public access mobile radio, mobile satellite and satellite services.

All such licences are issued individually to entities meeting various requirements under the Telecoms Law and pursuant to a decision made by the TRA board. A licence can be categorised as either a class licence or an individual licence. Individual licences refer to whether

scarce resources are requested such as spectrum or frequencies; class licences are issued where non-scarce resources are required and where the activities are insignificant enough that less regulatory supervision is required.

The TRA provides a short application form to be completed by a potential licensee, which includes relevant information such as management and shareholding structures, their business operations, including the type of networks and services they intend to provide and funding sources for these business operations. There is a fixed licence application fee, which is currently set at 20,000 dirham.

Flexibility in spectrum use

3 | Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

The Telecoms Law gives the TRA responsibility for managing and regulating radio spectrum in the UAE. There is no established spectrum trading or leasing practice. The TRA grants temporary authorisations on application for up to 90 days and such authorisations are specific to the applicant.

In common with many other jurisdictions, the UAE has a National Spectrum Plan. This is issued by the TRA and provides that certain services can only be provided within certain spectrum bands. In practice, the TRA is known to have shown some flexibility in certain cases where this would not cause interference. The UAE is aiming for early 5G development before 2020. All of the 800, 900 and 1,800MHz spectrum has been divided between the two mobile operators, which means higher bandwidths can be supported in all frequency bands. Not all the 2,100MHz band is currently licensed and the 3,500MHz band is licenced for fixed wireless access.

Ex-ante regulatory obligations

4 | Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Under the Telecoms Law, the TRA does have the power to issue ex-ante regulations and decisions in regard to practices, as well as conduct ex-post investigations. Until 2012, it was not uncommon for the TRA to publish determinations and decisions in relation to telecommunications services publicly, including on their website. Since 2012, it appears the regulator has taken the decision not to publish such determinations and decisions publicly, but communicate them only to the relevant entities instead.

The TRA has issued a short regulatory policy on ex-ante competition safeguards, which details the factors it will take into account in assessing competition and dominance in the UAE. The policy provides wide discretion to the TRA with regard to the remedies to be imposed depending on the outcome of an assessment of the level of competition in the relevant market.

Structural or functional separation

5 | Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is currently no directive that imposes structural or functional separation between an operator's network and its services in the UAE.

Universal service obligations and financing

6 | Outline any universal service obligations. How is provision of these services financed?

It is the responsibility of the TRA to oversee the provision of telecommunications services throughout each Emirate of the UAE and ensure that they are sufficient to meet public demand across the UAE; however, this has not taken the form of a hard universal service obligation. The TRA fulfils this obligation via its relationships with the state-backed public telecoms companies who each have references in their licences to financial obligations around universal service obligations; however, these provisions are typically only references back to the general regulatory framework rather than a specific, hard obligation. Etisalat's TRA licence differs from that of du on the issue of universal service and has a harder obligation that extends to certain services such as dial-up internet services.

The two public telecoms operators, Etisalat and du, are majority owned by the government and have invested heavily in infrastructure and broadband. Given the nature of the duopoly, there are no direct government subsidies.

Number allocation and portability

7 | Describe the number allocation scheme and number portability regime in your jurisdiction.

Under the Telecoms Law, the TRA has the authority to control the allocation of telephone numbers and numbering plans. To this end, the TRA has released a National Numbering Plan that sets out this approach to number allocation. This includes the numbering regimes used to indicate which Emirate the call arose from, as well as reserving certain numbers for the emergency service and premium paid-for calls.

The licensed operators can apply to the TRA for allocation of a batch of numbers, which is granted on the basis of capacity, future demand, utilisation by the licensee and administrative effort. The TRA allocates rights to use numbers in continuous blocks of up to 100,000 numbers. The licensed operators are then responsible for allocating the numbers to their subscribers.

At the end of 2013, the UAE implemented a mobile number portability programme. Notwithstanding the MVNO/Independent Branded Services mentioned in question 16, there are only two mobile network operators in the UAE and so, the only number portability is between the two. Both networks offer a number porting application form that can be submitted to request a number transfer.

Customer terms and conditions

8 | Are customer terms and conditions in the communications sector subject to specific rules?

The TRA is empowered by the Telecoms Law to represent customer interests in the UAE. This includes issuing rules or regulations relating to the terms of supply to the customer. In January 2017 the TRA issued the latest version of the Consumer Protection Regulations, which include key terms that must be included in contracts with customers, such as restrictions on usage and rights to terminate, and detailed information that must be provided to the customer prior to the purchase of a service.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

There are no specific regulations requiring net neutrality in the UAE. Both of the public telecoms operators have offered plans with 'zero-rating' on certain social media applications, such as Facebook, WhatsApp or Twitter.

Bandwidth throttling by ISPs is quite common. Network traffic that relates to Voice over Internet Protocol (VoIP) services is often blocked or has its capacity reduced in order to give partial effect to the TRA's policy on VoIP services, whereby such services (where there is network breakout) are not permitted unless provided by one of either Etisalat or du.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no specific legislation or regulation in relation to digital platforms.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There are no specific regulations in relation to NGA networks. Etisalat and du are both committed to providing high-speed networks across the UAE, and the UAE has a very high penetration of fibre to home connectivity. Given the nature of the public telecommunications duopoly in the UAE, there are no direct government subsidies or financial schemes available.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

No, the only communications sector-specific data protection principles come from general consumer protection guidance issued by the TRA rather than through a data protection regime covering the communications sector. The UAE does not currently have a stand-alone data protection law in place, so privacy is protected by a variety of different laws such as the Penal Code (Federal Law No. 3 of 1987) restrictions on publishing information that relates to private or family life.

Certain freezones, such as the Dubai International Finance Centre, Abu Dhabi Global Market and Dubai Healthcare City have enacted data protection laws that ensure that all personal data in the freezone is treated lawfully and securely when it is stored, processed, used, disseminated or disclosed. These include certain formalities before personal data may be transferred outside their respective jurisdictions (such as obtaining the consent of relevant individuals).

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Key primary legislation relating to cybercrime includes Federal Decree Law No. 5 of 2012 on Combating Information Technology Crimes (the Cybercrime Law) and the Penal Code.

The Cybercrime Law specifically deals with activities that would variously be described as hacking, identity theft and fraud, crimes that involve computers, networks and electronic information. The Penal Code consists of general provisions prohibiting various criminal acts, some of which will apply to cybercrime.

The Cybercrime Law applies across all sectors, with no exceptions. In practice, it will be of particular relevance to telecommunications and financial services sectors, as these are typically entrusted with critical data and therefore more likely to be targets of cybercrime.

The National Electronic Security Authority (NESA) is the UAE federal authority responsible for the cybersecurity of the UAE. NESA operates under the direction of the UAE Supreme Council for National Security. Government organisations, semi-government organisations and business organisations that are identified as critical infrastructure in the UAE are required to follow NESA compliance guidelines. The primary standard to follow for NESA compliance is the UAE Information Assurance Standards.

The TRA has also established the UAE's Computer Emergency Response Team, which was established by statute and has published a wide-ranging information security policy.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no specific federal legislation or regulation in place; however, the Emirate of Dubai has introduced the Dubai Law No. 26/2015 (the Dubai Data Law), which provides for local government and private entities to contribute certain non-confidential information relating to the Emirate, known as 'Dubai Data', to a knowledge and data base from which such entities can benefit. The intention is to improve integration, harmonisation and efficiency between services and encourage the development of a smart economy.

Data localisation

15 Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no general laws or regulations that prevent data from being exported from the UAE.

Certain key sectors, including telecommunications, have been given guidance by their regulators on data domiciliation within the UAE, but this does not come in the form of hard law or publicly available guidance. State-owned entities are also likely to have to abide by data domiciliation rules, which are not set out in any hard law. The financial sector has specific laws in this regard (particularly entities registered in the Dubai International Financial Centre or Abu Dhabi Global Market where there is a specific regime around transfers of personal data that impacts those businesses' freedom to outsource or offshore certain functions). Other financial services requirements can impact the communications and ICT sector; for example, digital payment service providers have recently been required through UAE Central Bank regulation to store transaction data within the UAE for at least five years.

Key trends and expected changes

16 Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

As there is no expectation that the TRA will permit any additional public telecommunications service providers to enter the UAE market in the near future, they key changes in the market dynamics and regulation are likely to result from increased competition between the two

operators. The TRA has stated previously that the intention behind introducing a second licensed operator was that 'Competition is the drive for development, where it leads to higher quality of services, lower prices and the adoption of latest technologies. It is a race that pumps innovation and progress into the veins of the sector.' There is an expectation going forwards that the TRA will be keen to ensure that as much real competition as possible emerges between the operators.

Being considerably newer in its establishment, du has been playing catch-up around the infrastructure and expertise to compete on a truly level playing field with Etisalat. The two providers have often divided regions up geographically rather than compete directly for the same customers, so customers are effectively faced with a service provider with a de facto monopoly. From 2015 the two providers started bitstream access, a method by which the one network could be shared by the two operators, permitting customers more flexibility to choose provider where the infrastructure previously restricted their choice. Greater ability for customers to switch between the providers has also been encouraged. It is likely that the TRA will continue to encourage this competition.

The marked perception of increased competition in the mobile market was increased in 2017 when each of du and Etisalat launched mobile services under new brands: du acquired rights to launch a Virgin mobile branded service and shortly after, Etisalat launched a prepaid service branded as 'SWYP'. Neither the Virgin Mobile nor the SWYP services are regulated independently of their respective MNOs.

As regards the ICT services growth being experienced by the operators, enterprise adoption of cloud-based solutions and 'smart city' or Internet of Things initiatives will continue to require regulatory guidance from the TRA, as well as other concerned regulatory bodies in the UAE, to ensure the balance between advancement in technology and risk management is addressed.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The principal source of law in relation to the media sector in the UAE is Federal Law No. 15 of 1980 concerning Printing and Publishing (the Media Law). The law covers a large number of regulations on the media including ownership, prohibitions on certain types of reporting and defamation.

Originally under the Media Law, the Ministry of Culture and Information was the national media regulator. Then in 2006, Cabinet Resolution No. 14/2006 abolished the Ministry and established a new regulator for the media industry, the National Media Council (the NMC). As well as being the regulator, it also operates the government's official news agency.

The Media Law is now considered by many to be out of date owing to its obvious focus on print (rather than digital) media. In 2009 the NMC circulated a draft revision to the Media Law, but the content was criticised for being overly restrictive, containing heavy penalties for journalists, still failing to update the law sufficiently for the digital age and it was eventually shelved. In theory, it could still be signed into law at any time, but in practice this is considered unlikely.

In 2010 the NMC issued a Chairman of the NMC Resolution No. 20 of 2010 (the Chairman Resolution), which stated that all media, including audio, visual and print forms, must comply with the content of the Media Law. This both reiterated the primacy of the Media Law and confirmed its application beyond the printed media the law envisaged.

The Media Law contains restrictions on content that can be published, including:

- criticising the government or rulers of the emirates or the UAE;
- material that could cause harm to the state interests or security;
- criticism of or disrespect to Islam;
- criticism of the rulers of any Islamic or friendly foreign state; or
- circulating or promoting subversive ideas.

In March 2018, the NMC published a set of regulations around electronic media (the EMR), which regulates a wide range of digital media activities including websites that sell content and individuals who seek to monetise their social media popularity by way of an annual licence arrangement.

There are also relevant provisions relating to media found in the Penal Code, particularly in regard to defamation, and the Cybercrime Law, when considering digital communications.

Across the UAE there are various media-related freezones that have their own civil regimes, while still being subject to the same criminal restrictions as the main jurisdictions. Many national and international media companies are established in these zones.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Article 25 of the Media Law and the resolutions by the NMC provide that the owner of a media service must:

- be a UAE national;
- be at least 25 years of age;
- be 'fully competent' to run the service;
- be of good character and behaviour;
- not have been convicted of certain offences relating to morality;
- not occupy a public service role; and
- not be employed by any foreign agency.

Many media outlets are owned, in whole or in part, by the government or powerful ruling families closely aligned with the government.

There are also certain academic and experience qualification requirements on editors-in-chief and standard writers and journalists, though these are typically not enforced in practice.

The recently introduced EMR set out requirements of applicants for the licensing regime as well as the mandatory appointment of a 'responsible manager' to act as a representative, although breaches of the EMR by an applicant or licensee do not extend to liability on the part of this responsible manager. There is no requirement in the EMR for the responsible manager to be a UAE national.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Under the Media Law, all newspapers and news agencies are required to hold a licence before they can be published. The resolutions issued by the NMC have made clear that they consider this to apply to all forms of media outlets in the UAE, not just the printed media.

The proposed news media outlet must apply to the NMC, requesting the granting of such a licence. This can be done online via the NMC's website, and must include details of the owner and the proposed media outlet brand. Applications must be in Arabic. The NMC will review the application and, if it is in favour of the licence being granted, will support the application in front of the federal government. The federal government must then approve the application and grant the licence.

The Media Law provides for an applicant to deposit a guarantee of 50,000 dirham for an application for a newspaper and 25,000 dirham for other media outlets to be paid along with the application. Fines imposed will be removed from this deposit, which must then be topped up to maintain its original level. The NMC can also charge a range of service fees ranging from 3,000 dirham to 50,000 dirham, dependent on the type of licence sought and the activities covered.

The EMR also sets out an annual licensing regime for electronic media activities that has variable fees depending on the category of the regulated activity: the most expensive of the categories identified in the EMR is the electronic or online accounts and websites, including the specialised ones (commercials, advertising, news, etc), which attracts a new application processing fee of 15,000 dirham and the same amount for a renewal.

Foreign programmes and local content requirements

20 | Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

There are no specific regulations preventing the broadcasting of foreign-produced programmes, providing that they do not contain any content that is not permitted under the Media Law. There are also no official requirements in relation to the minimum amount of local content.

Advertising

21 | How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The Media Law contains several restrictions on advertising similar to those found in many other nations, though unlike in jurisdictions that rely largely on self-regulation, advertising standards are enforced by the NMC.

Prohibited advertisements include those that are 'inconsistent with public conduct', a phrase capable of covering a broad range of cultural sensitivities including inappropriate dress or behaviour. It also prohibits adverts that mislead the public, could cause harm to the state or the value of society or contain subversive ideas.

The EMR addresses electronic advertisements, including the use of digital social media and imposes a broad licensing requirement on those involved in such online advertising.

The TRA Customer Protection Regulations also contain restrictions on advertising of products or services regulated under the Telecoms Law. These include the requirement to be able to evidence to the TRA's satisfaction any statements or claims made in the advertisement, whether direct or implied, and restrictions on the form of comparative advertising.

Must-carry obligations

22 | Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

No, there are no official must-carry obligations in the UAE. In line with the requirements on the media not to insult or harm the state and for official news reporting to be undertaken through a centralised, state-controlled function (see question 26), certain state media content will sometimes unofficially be required to be included as part of the schedule. Also, local broadcast media channels will observe mourning content (eg, soft music or recitation of the *Holy Quran*) in circumstances where there has been a death of a royal or some other nationally observed tragic event.

Regulation of new media content

23 | Is new media content and its delivery regulated differently from traditional broadcast media? How?

There is no distinction in the Media Law between different types of media content according to their delivery. The Chairman Resolution specifically confirmed the application of the Media Content across different forms of delivery. In July 2017, the UAE Cabinet issued Resolution No. 23 of 2017 concerning media content consolidated content rules and extended these specifically to digital content and then, more recently, the EMR established a licensing and compliance framework for digital media (including licensure relating to social media 'influencers'). Ultimately, the fundamental principles behind the UAE's regulation of traditional media and the UAE's regulation of new media are not different.

Digital switchover

24 | When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover from analogue to digital broadcasting completed in 2012, coordinated with other GCC states such as Qatar and Saudi Arabia.

The additional radio capacity was allocated to improve mobile telephone services, such as next-generation 4G.

Digital formats

25 | Does regulation restrict how broadcasters can use their spectrum?

No, there is no regulation that restricts how broadcasters are permitted to use their spectrum allocation.

Media plurality

26 | Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There is no official assessment or regulation of media plurality in the UAE. Many media service providers are owned or part-owned by the UAE government or members of the ruling families closely linked to the government.

The NMC oversees the content prepared by the media, and any material that is considered to be undesirable in likely to be blocked. Particularly in commentary in relation to the state, foreign affairs or Islam, journalists are likely to self-censor and a similar position will typically be taken across all media outlets. On controversial or sensitive issues, journalists will often take their lead from the single official government news agency, the Emirates News Agency operated by the NMC, and adopt identical reporting positions.

Key trends and expected changes

27 | Provide a summary of key emerging trends and hot topics in media regulation in your country.

Notwithstanding the introduction of the EMR, there remains a general expectation that there will at some point be an overhaul of the legal framework surrounding the media in the UAE, in particular, to address digital media and journalist liability. There are no clear indications that this is likely to take place shortly or whether the 2009 draft media law would point to the likely outcome of such overhaul. Given the breadth of the EMR, we await feedback on its enforcement and the effect that the new licensing regime will have on the media industry. Another key area

to observe will be around the website censorship committee established through the NMC but with representatives of each of the Ministry of the Interior, the TRA and the NESA.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

The communications and media sectors are regulated by the TRA and the NMC respectively. Given the convergence in the sector, there is some overlap between these and indeed other UAE regulators and their respective jurisdictions.

With regard to competition, despite the UAE adopting a competition law framework in the form of the Federal Law No. 4 of 2012 concerning the Regulation of Competition (the Competition Law) several years ago, regulation in the UAE is still in its very early stages. The Competition Law has technically been in force since 2013; however, the executive regulations (Council of Ministers' Resolution No. 37 of 2014) (the Regulations) were not passed until 2014 and two relevant resolutions, which provided key thresholds and definitions, were not passed until 2016 (the Resolutions).

The Competition Law also provided for a Competition Regulation Committee (the Committee) to be established to oversee general competition law policy in the UAE. Day-to-day enforcement of the Competition Law is the responsibility of the Ministry of Economy, acting through its Competition Department. To date there have been no publicised cases of Competition Law enforcement, although we are aware that the Competition Department has been established.

The Competition Law provides that its provisions shall be enforced on all businesses in relation to their economic activities or the effect of their economic activities in the UAE (even where the conduct takes place outside of the UAE). It is as yet unclear how the courts will react to any jurisdictional disputes.

The telecommunications sector is currently specifically excluded from the remit of the Competition Law. The Telecoms Law stipulates that the TRA shall have the competence to issue regulations, instructions, decisions and rules regulating and ensuring competition in the telecommunications sector. The TRA includes terms in the licences issued to operators requiring them not to participate in anticompetitive practices.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Decisions of the Competition Department can be appealed directly to the Minister of Economy within 14 days of the applicant becoming aware of the decision. Such appeals will be considered by the Committee, which will submit recommendations to the Minister within 10 days. The Minister must then respond to the applicant within 30 days of the appeal being filed; if nothing is heard in this time, the decision is deemed to be rejected. After this, the only remaining appeal is to a court of law (which must take place within 60 days of the decision or the deemed decision).

Decisions issued by the NMC may under the Media Law be challenged before the courts within 60 days of the decision that is objected to. In practice, it would be normal to first object to the decision unofficially and discuss the matter directly with the NMC, prior to launching a formal court action.

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Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

See question 28.

The key concepts in the Competition Law include a prohibition on anticompetitive agreements, a prohibition on any abuse of a dominant position and merger control. Anticompetitive behaviour is broadly similar to the regimes in jurisdictions with more developed competition law systems, such as Europe and the US. The threshold for dominance is defined by the Regulations to be 40 per cent of the relevant market. Mergers or joint ventures of a certain size must be pre-notified to the relevant government ministry at least 30 days before completion.

The Competition Law also provides for the issue of individual exemptions for businesses in relation to particular agreements or practice where this is considered appropriate, which can be obtained by application to the Ministry's Competition Department.

It remains to be seen how the Competition Law will be implemented in practice. Once the Competition Department and Competition Regulation Committee begin to make decisions and recommendations, it is unlikely that these will be available to the public. The Competition Law specifically requires the Competition Department to take steps to maintain the confidentiality of information provided by the parties, which is considered confidential.

United Kingdom

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 | Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

Communications law and regulation in the UK is principally founded on the Communications Act 2003 (the Act). This legislation implemented a number of EU laws aimed at harmonising, simplifying and increasing the usability of telecoms regimes across all European Union member states. The Act also grants authority to the Office of Communications (Ofcom), the UK's national regulatory authority for communications.

The role of Ofcom is to set and enforce regulatory rules in all sectors for which it is responsible and, along with the Competition and Markets Authority (CMA) (see question 28), to promote fair competition across the industry by enforcing competition laws.

As part of Ofcom's regulatory principles, Ofcom must take the least intrusive approach to intervention and will only do so where the intervention would be evidence-based, proportionate, consistent and transparent.

Although Ofcom is accountable to Parliament, the Department for Culture, Media and Sport is the UK government department with overall responsibility for developing the telecoms regulatory framework within the UK. Ofcom is restricted to acting within the powers conferred on it by Parliament.

The proposed Ofcom 2019/2020 Annual Plan focuses on supporting investment in infrastructure (moving towards universal availability of high quality and secure communication networks), maintaining high quality broadcast content for audiences, protecting consumers from harmful pricing practices, and reviewing their approach to the potential regulation of harmful online content.

Although there are currently no restrictions on foreign ownership of telecoms services within the UK, the current UK government pledged to introduce new rules on foreign control for the telecoms industry as part of its election manifesto in May 2017.

If the UK leaves the EU without a deal in place, parts of the UK electronic communications regulatory framework would no longer be appropriate without corrections. For example, the requirement to notify matters to the European Commission would not be applicable because the UK would cease to be a member of the EU. On 13 September 2018, the UK government published guidance for the telecoms industry, which stated that, under the EU Withdrawal Act 2018, it would correct references within the UK's regulatory framework to EU bodies, processes and legislation, to ensure that the regulatory framework remains operable come exit-day. At the time of writing, the draft Electronic Communications (Amendment etc) (EU Exit) Regulations 2019 had been laid before the UK Parliament and the Broadcasting (Amendment) (EU Exit) Regulations 2019 had been made but were not in force. Both of these statutory instruments would amend certain deficiencies within the Communications Act 2003.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

The general authorisation regime under the Act does not make a distinction between fixed, mobile and satellite networks and services. All electronic communications networks (ECNs), electronic communication services (ECSs) and associated facilities (AFs) fall under the scope of the Act, irrespective of the means of transmission. Moreover, under the general authorisation regime, there is no requirement for specific licensing of ECNs, ECSs and AFs.

The broad definition of ECN to include any transmission system for the conveyance of signals between a transmitter, a medium and a receiver, by use of electrical, magnetic or electromagnetic energy, is in line with the EU's overarching principle of technology neutrality. Equally widely defined, an ECS is a service that has as its principal feature the conveyance of signals by means of an ECN, excluding content services (the provision of material such as information or entertainment). Under the Act, an AF is a facility, element or service that is, or may be, used to enable the provision of an ECN or ECS or other services on that network or service, or supports the provision of such services.

ECNs or ECSs are able to provide networks or services to the public without the need for prior authorisation from Ofcom where they have complied with the General Conditions of Entitlement (the General Conditions). A revised version of the General Conditions came into force on 01 October 2018. In more limited circumstances, the ECNs or ECSs may also need to comply with specific conditions. The General Conditions apply to ECNs irrespective of whether a provider owns or rents some or all of the network in question. The ECS will generally be the entity with a direct contractual relationship with the end user, or the reseller or other intermediary in the case of a wholesale provider. Ofcom provides further guidelines on which organisations will fall within these categories.

Entities using radio spectrum, such as mobile network operators or satellite service providers, will require the grant of a licence from Ofcom under the Wireless Telegraphy Act 2006 (the WTA). Each grant will detail the specific frequency, use, fees and duration of the licence. Some services, such as receive-only earth stations, may not fall within the scope of the WTA licence condition, but still require Ofcom to authorise any such use under a scheme of recognised spectrum access. Operators of set-top boxes that convert signals for viewing will also need an operating licence under the Broadcasting Act 1996. The use of certain frequencies in the radio spectrum for short-range devices, such as alarms and radio frequency identification equipment, is exempt from the need to obtain licences.

Ofcom's approach to spectrum award is to allow the market as much flexibility in how the spectrum is used without assigning it to a

particular technology or application. While spectrum licences are most commonly awarded via auction, Ofcom is able to design these in such a way as to ensure that there is the greatest possible competition within the market. The UK's 4G spectrum was auctioned by Ofcom in 2013, with a further 4G and 5G spectrum auction in April 2018.

There are currently 17 General Conditions in force, the majority of which must be complied with by all ECNs and ECSs. The remainder apply in more limited circumstances, such as for public pay telephones. The most recent iteration of the General Conditions was published on the Ofcom website on 01 October 2018. Under the Act, Ofcom has the power to amend or revoke any of the General Conditions as appropriate.

In the smaller number of cases where an ECN or ECS is subject to specific conditions, Ofcom will notify that provider of the fact that those conditions are to be imposed. A summary of the main types of specific condition is given below.

Universal service conditions
The basis for this condition is to ensure that everyone within the UK is afforded basic access to telephony. In the UK, the designated service providers are KCOM in the Hull area and BT for the rest of the UK. See question 6 for more detail.

Access-related conditions
To ensure end-to-end connectivity for end users through the interconnection of different networks, Ofcom may impose specific conditions relating to access on ECNs.

Privileged supplier conditions
Where a supplier has special or exclusive rights in relation to the provision of any non-communications service (services other than ECNs or ECSs) then Ofcom must ensure that the privileged supplier complies with specific accounting requirements under the Act.

Significant market power conditions
An operator will have significant market power (SMP) if it is in such a position to act independently of its competitors and consumers or end users. See question 4 for more detail.

Licence duration
Licences issued by Ofcom under the WTA have varying durations depending on the type of licence granted. The mobile 3G licences granted in 2000 were subject to a fixed term of 20 years. Following the WTA (Directions to Ofcom) Order 2010, and subsequent consultation by Ofcom, mobile licences will continue for an indefinite period but be subject to annual renewal fees. ECNs and ECSs provided under the general authorisation regime are not subject to licensing requirements and, therefore, there is no set licence duration applicable to the provision of ECNs and ECSs.

Modification of licences
Although ECNs and ECSs will not be subject to any direct licence modification, under the Act Ofcom may impose changes to the General Conditions or specific conditions from time to time. The Act requires that Ofcom publish a notice, outlining the proposed changes and justifying its reasons for these, providing a period for proposals from those providers affected of not less than one month. Variations to SMP conditions are subject to additional requirements, including consultation with the European Commission and the EU independent advisory body for telecoms regulations, the Body of European Regulators in Electronic Communications (BEREC). Licences under the WTA may be varied by Ofcom providing written notice to the licence holder or publishing a general notice to all holder of a class of licence.

Fees
As a result of the passing of the Digital Economy Act 2017, Ofcom is entirely funded through industry fees and charges. Communications service providers (with a revenue of more than £5 million) must pay a fee based on 0.1160 per cent of relevant turnover for the year ending 31 December 2016. Operators that have code powers under the Electronic Communications Code (conferring benefits such as not having to apply for a street works licence to install certain equipment) will also have to pay an annual fee to Ofcom. The charge for 2018/2019 was £1,000. Operators also have to pay a one-off charge of £10,000 for Ofcom's cost of dealing with the application for code powers.

Radiocommunications
Ofcom has the power under the WTA to set fees in relation to wireless telegraphy licences, other than for those awarded by auction. Under the WTA, Ofcom is able to prescribe 'Administered Incentive Pricing', allowing for fees to be set at above administrative costs so as to encourage efficient use of the spectrum. Ofcom must set out the fees through published regulations. Ofcom is able to either update existing regulations or publish new ones. Since the Wireless Telegraphy (Licence Charges) Regulations 2011, Ofcom has taken the former approach of prescribing new fees by means of updates. The latest changes were made in 2016. Ofcom held consultations on proposed Annual Licence Fees for mobile network operators of 900MHz and 1800MHz frequency bands, which closed on 3 August 2018 and for UK Broadband's 3.4GHz and 3.6GHz spectrum, which closed on 11 February 2019. See Ofcom's website for more details.

Television and radio
Ofcom also charges licence fees for the radio and television sectors. The percentage of annual turnover payable varies according to the turnover of the operator. Further details can be found on Ofcom's website.

Public Wi-Fi
The Investigatory Powers Act 2016 (IPA) applies to public Wi-Fi providers, which may result in them being required to retain and disclose communications data to authorities.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

In its 2014 Spectrum Management Strategy statement, Ofcom highlighted the importance of providing as much flexibility as possible in spectrum licence conditions to liberalise the rights of the licensee, allowing that user to re-purpose the use of its spectrum without needing to seek a licence variation. Subject to certain boundaries (such as interference risks), licensees are afforded the ability to determine how that licence should be used without referral to Ofcom. Defining interference parameters remains an important tool for allowing licence owners to understand how they can use their own network and the possible interference levels they may experience. In its 2014 statement, Ofcom indicated that the process of liberalising certain classes of mobile and business radio services was already complete.

Spectrum trading
Spectrum trading is allowed in the UK, with the prior consent of Ofcom only required for the trading of mobile licences. The laws governing such trading are: the WTA, the Wireless Telegraphy (Spectrum Trading) Regulations 2012 (the Trading Regulations) and the Wireless Telegraphy (Mobile Spectrum Trading) Regulations 2011 (the Mobile Trading Regulations). The parties to the transfer must notify Ofcom with certain

information about the trade before Ofcom can then publish a notice setting out information on the trade and basic details about the licence. For mobile transfers, Ofcom must consent to the transfer, possibly giving further directions to the parties. Ofcom is consulting on an update to the Mobile Trading Regulations to include 700MHz and 3.6–3.8GHz bands in preparation for the future rollout of 5G mobile connectivity. The consultation closed on 12 March 2019. Certain types of partial transfers are also permissible under the Mobile Trading Regulations, although these may be restricted to limit the number of available licences in the band.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Ofcom has powers to impose ex-ante regulations on markets where that market is found not to display effective competition. The range of markets that the EU believes should be subject to ex-ante regulation has been reduced over the years to just four:

- wholesale call termination on individual public telephone;
- wholesale voice call termination on individual mobile networks;
- wholesale local access provided at a fixed location or wholesale central access provided at a fixed location for mass-market products; and
- wholesale high-quality access provided at a fixed location.

Jurisdictions may, however, extend the number of markets. As discussed in question 2, under these ex-ante regulatory powers, Ofcom may impose certain SMP conditions on a communications provider where that provider is deemed to have SMP such that it is able to dominate a market. In 2002, the European Commission published guidance on how national regulators should approach imposing SMP conditions on a provider. Following a consultation by the European Commission in June 2017, revised draft guidelines were published by the European Commission in February 2018 to reflect the changes to EU competition law generally as well as changes to the telecoms sector. The European Commission launched a consultation on 15 February 2019 (which closes on 10 May 2019) to review the relevant markets in the electronic communications sector, to take into account major market and technological developments (such as the deployments of 5G networks, internet-based applications and services, the convergence between different types of networks and services and the development of Next Generation Access Networks and Services). The results of the consultation are expected to inform a new recommendation on relevant markets that will be adopted by 21 December 2020. At the time of writing, it is unclear whether the UK will adopt the recommendations on relevant markets because of uncertainty in relation to the outcome of the Brexit process.

SMP conditions may only be imposed on a communications provider where the relevant market has been properly identified and reviewed by Ofcom, and, where necessary, a consultation with the European Commission and BEREC has been undertaken. Under the EU framework, Ofcom must review these markets, along with any other markets it deems necessary, every three years. The current position is as follows:

- wholesale broadband access (WBA) markets – Ofcom consulted in 2017 and its preliminary conclusion was that BT retained SMP in a small proportion of the WBA market;
- business connectivity markets – on 02 November 2018 Ofcom published a draft consultation following its latest review of the business connectivity market and is expected to publish a final statement in Spring 2019;
- mobile call termination markets – Ofcom published a statement in March 2018 with network access and charge control obligations imposed on mobile operators;
- narrowband markets (a review of the products and services underpinning the delivery of retail fixed telephony services in the UK) – Ofcom published a statement in November 2017 applying SMP conditions to BT and KCOM in Hull; and
- physical infrastructure market – Ofcom has set out proposals to give companies unrestricted access to Openreach's network of underground 'ducts' and telegraph poles.

On 6 February 2019, Ofcom imposed reporting directions across all markets in which KCOM is regulated (the wholesale local access market, the business connectivity markets, the narrowband markets and the wholesale broadband access market).

In the event of the UK leaving the EU without a deal, Ofcom's decision making in relation to SMP markets and related conditions will no longer be subject to the oversight of the European Commission.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

In 2005, BT gave binding undertakings to Ofcom under the Enterprise Act 2002 (the EA) under which it agreed to implement a 'functional separation' of its network division – Openreach – from the rest of the BT group. Organisational boundaries and information barriers comprised the basis of this functional separation, with Openreach obliged to deliver products providing access to the 'first mile' infrastructure to all communications providers on a non-discriminatory basis.

The status and operation of Openreach was reviewed in 2016 with Ofcom considering proposals, including retaining functional separation with increased independence of Openreach's governance, along with stricter access and quality requirements for Openreach (following a number of criticisms levelled at BT for abuse of their Openreach monopoly, underinvesting in the UK's broadband infrastructure and charging high prices with correlating poor customer service). Following Ofcom's announcement of its intention to file a formal notification to the European Commission to commence the separation process, in March 2017, BT Group agreed to implement a legal separation of Openreach from the BT group. On 31 October 2018, Ofcom published a notice confirming that BT was released from its Enterprise Act undertakings given in respect of Openreach.

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

As mentioned in question 2, under the Universal Service Order (SI 1904/2003) (USO) BT and KCOM must comply with conditions aimed at ensuring the provision of universal service. The obligations include: special tariff schemes for low-income customers, reasonable geographic access to public call boxes, a connection to the fixed network (including functional internet access), as well as the provision of a text relay service for customers with hearing impairment. There is no universal service funding and the costs to fulfil the obligation are borne by BT and KCOM on the basis that the revenue generated by supplying the services exceeds the costs of providing them.

The Digital Economy Act 2017 established a USO for a legally binding minimum level of broadband service with a connection of at least 10Mbps and upload speeds of at least 1Mpbs by giving each household and business a new legal right to demand an affordable broadband connection up to a reasonable cost threshold. With the Broadband Delivery UK (BDUK) programme (as referred to in question 11) expected

to bring fixed-line superfast broadband to 97 per cent of the UK by 2020, the USO will be geared towards achieving the final 3 per cent. While a 30Mbps USO was dropped, despite being voted through the House of Lords, a new mechanism was nonetheless introduced that will allow the UK government, once 75 per cent of households have upgraded to a 'superfast broadband' service, to raise the USO's minimum speed beyond 10Mbps. With regard to funding this new obligation, a final public consultation will be needed to decide the exact specification and funding mechanism to be employed. The Electronic Communications (Universal Service) (Broadband) Regulations 2018, which came into force on 4 December 2018, set out the process Ofcom will use to designate the persons it considers as universal service providers and to whom broadband conditions are to be applicable.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

Under European law, end users have a right to keep their original telephone number when switching communications provider. In accordance with its powers under the Act, Ofcom has laid out the conditions for number portability under General Condition B3. Under this condition, an end user's original service provider must provide them with a Porting Authorisation Code in the shortest possible time when requested. The end user may then pass this code to a new provider and the porting must then take place within one business day.

Ofcom has, however, outlined its preferred view that number portability should, in fact, be 'gaining-provider led'. Under this approach, the transfer of a number would be controlled by the new provider, with the consumer only needing to contact this party. Ofcom believes that this would allow for easier and quicker transferring of numbers. Ofcom started a consultation on the mobile switching process (including number portability) in 2016/2017 and in December 2017 published the decision to reform the process for switching mobile provider. In January 2019, further guidance was published relating to requests for switching multi-SIM contracts and accounts. See the Ofcom website for more details.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

Part C of the General Conditions impose consumer protection conditions. Condition C1 imposes minimum information provision requirements in consumer contracts, including a maximum initial duration of two years and conditions for termination. One of the matters to be disclosed includes details of prices and tariffs, which is further extrapolated under Condition C2. Under this Condition all ECN operators must make available, clear and up-to-date information on their prices and tariffs, as well as on their standard terms and conditions of access to, and use of, publicly available telephone services.

Condition C4 and the Act further require that dispute resolution mechanisms provided by the communications provider or otherwise are accessible to their domestic and small business customers (ie, businesses with 10 or fewer employees). The two dispute resolutions schemes approved by Ofcom for this purpose are the Ombudsman Services and the Communication and Internet Services Adjudication Scheme.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

The 2015 EU Roaming and Open Internet Access Regulation (the 2015 Regulation) (implemented in the UK by the Open Internet Access (EU Regulation) Regulations 2016 – necessary for the purposes of designating Ofcom as the UK national regulatory authority) prohibits discrimination, interference or paid prioritisation affecting end-user access. It includes transparency rules requiring internet access services to publish information on any traffic management measure that could affect end users (in terms of quality, privacy and data protection), as well as information on fair use policies, actual speeds, data caps and download limits (among others). It further requires Ofcom to monitor and enforce the rules. Ofcom published its first report on compliance in June 2017, finding no major causes for concern but highlighting some areas in need of better ISP compliance. See the Ofcom website for more details.

The UK government has published a draft Open Internet Access (Amendment etc) (EU Exit) Regulations 2018 (draft SI) to address issues arising from the UK exiting the EU. The draft SI provides for amendments such as removing references to 'national regulatory authority', 'common rules' and requirements for Ofcom to follow requirements set by the European Commission and BEREC. Again, it is unclear whether the UK would adopt similar requirements post-Brexit.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

While there is, at present, no legislation or regulation specifically governing digital platforms in the UK, general authorisation provisions under the Act will apply. Ofcom's remit covers the following platforms: digital terrestrial television, digital audio broadcasting (DAB), radio and video-on-demand (VOD) services. Any other digital platforms are subsequently only subject to general competition law and sector-specific regulations.

The complex nature of digital platforms and the difficulties in understanding their competitive effects has led the UK government and CMA to take a flexible and case-by-case approach to policing digital platforms.

The UK, along with a number of other member states, advised in an open letter dated 4 April 2016, that while the Commission is right to emphasise the importance of the issue of digital platforms and collect evidence to inform and define the role of such platforms within the Digital Single Market Strategy, care should be taken to avoid excessive regulation that could end up harming rather than furthering the initiative.

On 1 March 2018, the European Commission issued a Recommendation regarding measures to tackle illegal content online. On 26 April 2018 the Commission proposed an EU Regulation of fairness and transparency in online platform trading. These legislative instruments aim to address unfair contractual clauses in platform-to-business relationships, and make progress with procedural aspects and principles on removal of illegal content. The proposed regulation will apply to providers of online intermediation services and online search engines.

As part of the report published on 13 March 2019 by the Digital Competition Expert Panel, led by Jason Furman, 'Unlocking digital competition' (the Furman Report), the panel recommended that a new code of conduct should be established for companies designated as having 'strategic market status' on acceptable norms of competitive conduct on how they should act with respect to smaller firms and consumers. Further details on the report can be found in question 30.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

There is currently no legislation or regulation covering NGA networks in the UK. Indeed, Ofcom has stated its role is not to provide operators with incentives to make particular investments, but rather to attempt to ensure that the incentives for efficient investment are not distorted as a result of disproportionate regulation.

Pursuant to the undertakings entered into between BT and Ofcom in 2002, BT must allow its competitors access to its virtual unbundled local access points to foster competition over the supply of superfast broadband services to consumers. BT is also required to allow other providers the option of investing in NGA by giving access to its ducts and poles and other physical infrastructures. On 20 April 2017, Ofcom published a consultation on opening up BT's infrastructure to improve access to Openreach's underground ducts and poles for competing providers of fibre broadband.

There is a general EU prohibition restricting the UK government's ability to invest directly in broadband infrastructure in the UK. However, the UK government is, through BDUK, supporting investment in: the provision of superfast broadband coverage to 95 per cent of the UK (achieved by December 2017); the provision of access to basic broadband (2Mbps) for all; and the stimulation of private investment in full fibre connections by 2021. The UK government announced, in November 2017, that local bodies could apply for funding for investment in fibre networks, the Local Full Fibre Network challenge fund. In August 2018, the third and final allocation of funding, worth £95 million, was opened up to bidding. At the time of writing, the UK government had confirmed nine winning bidders who cumulatively had secured £53 million of the total available.

Ofcom plays a key role in facilitating both investment and competition in superfast broadband. March 2017 saw Ofcom announcing plans to cut the wholesale price that Openreach can charge telecoms companies for its superfast broadband service to allow cheaper prices to be passed on to consumers and promote further competition and thus investment and development. The rules also include stricter requirements on Openreach to repair faults and install new broadband lines more quickly.

The Body of European Regulators for Electronic Communications (BEREC) released a draft report, dated 6 December 2018, concerning access to physical infrastructure in the context of market analyses, citing that physical infrastructure (such as ducts and poles) represent a significant proportion of the investment in NGA networks. The report emphasises the benefits of measures that are aimed at facilitating greater use of existing physical infrastructure that can reduce the civil engineering works required to deploy new networks, significantly lowering costs. In time, this may see regulatory change around access to physical infrastructure supporting NGA networks.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

The General Data Protection Regulation (GDPR) governs data protection in the UK with effect from 25 May 2018. The GDPR generally imposes more stringent compliance obligations on both data controllers and data processors, alongside more onerous information requirements, to ensure that the personal data of data subjects is afforded an adequate level of protection. The scope of the regulation is also expanded and may, therefore, affect telecoms providers located outside the EU.

The GDPR is supplemented by the Data Protection Act 2018 (DPA), which received Royal Assent on 23 May 2018 and came into force on 25 May 2018. The purpose of the DPA includes: incorporating elements of the GDPR into UK law, meaning that the UK and EU data protection regimes are aligned after Brexit (which may increase the likelihood of an adequacy decision from the Commission); exercising derogations to the GDPR in certain areas; clarifying the role of the Information Commissioner's Office (ICO); and consolidating data protection enforcement, by increasing fines and introducing two new criminal offences.

The GDPR is complemented by the Privacy and Electronic Communications (EC Directive) Regulations 2003 (as amended) (the PEC Regulations). The PEC Regulations (which implement E-Privacy Directive (2002/58/EC)) provide for measures such as the safeguarding of security of a service by public ECSs; notice requirements, should there be any breaches of security; prohibitions on unsolicited or direct marketing communications; restrictions on the processing of user identity and location; and how long personal data may be held or held without modification.

In 2017, the European Commission published a draft of the E-Privacy Regulation to bring the provisions of the existing E-Privacy Directive in line with the GDPR and to take account of technology changes. Failure to comply with either of these Regulations could lead to fines being imposed on a business of the higher of 4 per cent of worldwide annual turnover or €20 million. If the E-Privacy Regulation has not come into effect prior to the UK's departure from the EU, then it will not form part of UK law automatically by virtue of the Withdrawal Act. In this case, organisations may need to comply with dual regimes under UK and EU law to the extent that the E-Privacy Regulation differs from the PEC Regulations.

The IPA deals with data retention, interception and acquisition. Some of the key changes introduced by this legislation included: an extension of government powers to require telecoms operators to retain data about users including their web-browsing history; the potential for communications providers to be prevented from implementing end-to-end encryption of user data; and an expansion of the types of operators that will be affected by such investigatory powers to include by public and private telecoms operators. The UK government is legislating to bring elements of the IPA into force (the most recent update being on 4 February 2019) but the IPA is also being challenged in the courts and in November 2018 a human rights group won the right to a judicial review of Part 4 of the IPA, which gives government agencies powers to collect electronic communications and records without reason for suspicion.

Additionally, Ofcom offers guidance as to how communications providers should implement technical and organisational security measures to manage the security risks of public ECNs and ECSs. This guidance was updated in December 2017.

Cybersecurity

13 Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

There is no single piece of legislation or regulation in place concerning cybersecurity or network security in the UK. It is instead covered by several pieces of legislation, such as the Act, PECR, GDPR and also the Network and Information Systems Regulations 2018 (NIS Regulations). The NIS Regulations impose cybersecurity and incident reporting obligations on two classes of operator in the UK: relevant digital service providers; and operators of essential services (provided they operate in certain sectors and meet threshold requirements).

The Act requires public ECN and ECS providers to take appropriate technical and organisational measure to manage the ECNs and ECSs, the focus of which is to minimise the impact of security breaches on end users and on the interconnections of public electronic communications networks. The Act also imposes a number of notification requirements on these providers. The PEC Regulations similarly impose obligations

on public ECSs to ensure that personal data is handled appropriately and subject to appropriate security policies.

Under the GDPR (see question 12) data controllers and data processors have to ensure that appropriate technical and security measures are put in place when handling a data subject's personal data.

Big data

14 | Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

While general data protection legislation applies to big data, no particular UK legislation or regulation covers big data specifically. However, a number of inquiries have been conducted by UK bodies into benefits and challenges arising from the exponential growth in the use of big data (and its link to the Internet of Things). In November 2018, the UK government created the Centre for Data Ethics and Innovation which aims to assist the UK government with identifying and addressing areas where clearer guidelines or regulation in relation to data and data-related technologies are needed.

Furthermore, the fallout from Cambridge Analytica harvesting data from Facebook on a large scale has turned the spotlight on big data collection and processing activities and, in November 2018, the ICO produced a report into this subject entitled 'Investigation into the use of data analytics in political campaigns'.

In its Furman Report, the Digital Competition Expert Panel recognises the importance of data as a competitive tool in the UK's digital market. Specifically, it has seen how digital markets can often tend towards concentration, with limited degrees of in-market competition, leading to significant barriers to entry because of the accumulation of data by incumbent firms. Some recommendations, therefore, seek to enable greater personal data mobility and systems with open standards. The Panel also encourages policies of data openness in granting access to non-personal or anonymised data to new market participants.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no data localisation requirements in the UK. There are, however, rules in the GDPR that require personal data transferred outside the European Economic Area to be subject to 'adequate protection'.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Brexit

As noted in question 1, the Act, and much of the regulation surrounding the telecoms market, has its foundations in EU law. Following the UK's decision to leave the EU on 23 June 2016 (Brexit), it is somewhat unclear how the regulatory system will operate after the UK leaves the EU. Although there is unlikely to be any immediate change to the relevant existing UK legislation, Ofcom will not be subject to EU oversight and the considerations that influence its regulation of the market will likely be more UK-centric as a result. Consequently, it is possible that a more divergent approach will be seen between the UK and the EU over time. For example, aspects such as the general conditions and specific conditions could be altered to better serve the interest of the UK public, rather than having a broader EU focus.

In March 2018, the EU Commission published a summary of the likely implications of Brexit on communications service providers. In summary:

- communications service providers established in the UK would cease to benefit from the general authorisation regime in the EU-27 member states (and vice versa); and
- fixed and mobile termination rate and roaming regulation would cease to apply to the UK and EU-27 relationship. As a result, call charges between the UK and EU-27 and roaming charges for visitors in either direction could increase.

Although the UK government has stated its commitment to certain areas of current and future EU legislation (such as the GDPR), the lack of certainty for many areas of the law means that any changes will have to be closely monitored in the future.

The European Electronic Communications Code (EECC) (Directive 2018/1972) came into force on 20 December 2018. This Directive will replace and reform existing directives (the Framework Directive (Directive 2002/21/EC), the Authorisation Directive (Directive 2002/20/EC), the Access Directive (Directive 2002/19/EC) and the Universal Service Directive (Directive 2002/22/EC), which were all transposed into UK law through national legislation (mainly the Communications Act 2003 and Wireless Telegraphy Act 2006) and incorporate them into a single document on 21 December 2020. The UK government indicated in its 'no deal Brexit' technical notice on telecoms that if the Code is adopted before exit day but with a transposition date post-exit it would be minded to implement the Code's substantive provisions according to a similar timetable.

Spectrum changes

Spectrum allocation and bandwidth remains a major issue in the UK market both to manage existing capacity and coverage constraints and requirements, but also to prepare for 5G service roll out. Ofcom expects to start taking applications for an auction for the 700MHz and 3.6–3.8GHz spectrum bands in December 2019.

Ofcom Proposed Annual Plan 2019/20

The Ofcom Proposed Annual Plan for 2019/20 focuses on:

- moving towards universality in broadband and mobile service;
- promoting investment in fibre network infrastructure;
- spectrum auctions (see above);
- preparing for the launch of 5G mobile services;
- building cyber-security capability and ensuring providers are managing security risks;
- review of the BBC's news and current affairs output; and
- improving pricing for bundled mobile airtime and handset contracts.

There have also been important market reviews conducted by Ofcom that aim to assess and address competition issues in the fixed line and mobile markets (see question 4).

Following the legal separation of BT and Openreach agreed in March 2017, Ofcom is continuing to monitor progress and plans to publish a report on the overall outcomes in 2020/21.

MEDIA

Regulatory and institutional structure

17 | Summarise the regulatory framework for the media sector in your jurisdiction.

Question 1 of this chapter outlines the regulatory framework for the media and telecoms sector within the UK. Press Regulation is set out later in this chapter, in question 26. Regulatory Agencies are also set out in question 28.

Broadcasting is regulated by the legislation set out in the above question with additional regulation from the Broadcasting Act 1990 (as

amended by the Broadcasting Act 1996 and the Act). There have also been some minor changes to the regulatory regime through the Digital Economy Act 2017.

Subject to the outcome of Brexit, regulatory changes may come in the future as a part of the Commission's Digital Single Market Strategy.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Restrictions as to who can hold a broadcasting licence and control a broadcaster are set out in both the 1990 and 1996 Broadcasting Acts; these were revised by the Act, which relaxed these provisions. If at any point there is a change in control over the licence or the owner of the licence, they must notify Ofcom, which will ensure that no person disqualified from holding the licence has taken control. Ofcom will also undertake a review to ensure that change of control will not negatively affect the programme content. If Ofcom does believe certain aspects of the programming may change, it could vary the licence.

Those who will be disqualified from holding a broadcasting licence will generally fall under two categories: religious or political groups and advertising agencies.

Although religious bodies are generally restricted from holding a broadcasting licence, there are exceptions to this rule. They may own local analogue radio and satellite, cable broadcasting, local digital sound programme, national digital sound programme, television restricted service, digital programme service and digital additional service licences.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

BBC

The main document that regulates the BBC is the founding charter. The revised charter came into force on 1 January 2017. This revised charter made multiple changes to the regulation of the BBC. A unitary board was formed to replace the BBC Trust and BBC Executive; this new board ensures that the BBC's strategy, activity and output are in the public interest. From 2017, the BBC fell under the remit of Ofcom.

Channel 4

The most recent licence for Channel 4 came into effect in January 2015 and was varied in December 2017 following a 2014 spectrum management decision by OFCOM. Channel 4 previously operated on a digital replacement licence that replaced its original analogue broadcasting licence in 2004. The most recent licence keeps things essentially the same, although the 2017 variation provides for the clearance of the 700MHz band for mobile data use by 1 May 2020.

Channels 3 and 5

The most recent licences for both Channels 3 and 5 came into effect in January 2015 and were varied in December 2017 following a 2014 spectrum management decision by OFCOM. Channels 3 and 5 previously operated on digital replacement licences, which came into effect in 2004 and replaced the analogue Channel 3 and 5 licences. The current licence includes amendments to the regional programming commitments in Channel 3 licences for English regions; and creates a more localised Channel 3 news service, while also lowering obligations. The 2017 variations also provide for the clearance of the 700MHz band for mobile data use by 1 May 2020.

Digital television programme services (DTPS)

Other than those provided by Channel 3, 4 or 5, DTPS licences cover the provision of television programmes services. The broadcasts covered will be in digital form for general reception on a digital television terrestrial multiplex. They will also cover ancillary services such as subtitling.

Digital television additional services (DTAS)

DTAS licences cover television services text and data services including teletext and electronic programme guides. These are not covered by DTPS licences as they are not considered an ancillary service or digital television programme services. They are broadcast in a digital form on a digital television multiplex.

Television licensable content services (TLCS)

A TLCS licence covers services broadcast from a satellite, distributed using an ECN or ECS made available by a radio multiplex. Its principal purpose must be the provision of television programmes or electronic programme guides, or both. The service must also be available for reception by members of the public.

Services such as Channels 3, 4 and 5, covered by the other licences outlined in this section, do not require a TLCS licence. Internet services, pure video-on-demand services and two-way services, such as videophone, do not require a TLCS licence.

A new local television licence regime was created as part of the Local Digital Television Programme Services (L-DTPS) Order 2012. An L-DTPS will have sufficient capacity at its location for one standard definition digital service on the local multiplex. These are operated on Multiplex L with 29 L-DTPS licences awarded.

Under the Broadcasting Act 1990, Ofcom must not grant a licence to any person unless it is satisfied that the person is a 'fit and proper' person to hold it and is not disqualified by statute from holding the licence. The proposed service cannot be contrary to the standards objectives laid out in the Act.

The complete Ofcom tariff table is available on its website.

Radio

Under the Act, Ofcom has the authority to regulate the following in relation to independent radio services:

- analogue sound broadcasting services at a national or local level;
- radio licensable content services (services provided in digital or analogue form, broadcast from a satellite or via an ECN, for use by the public and consisting of sound programmes);
- additional radio services (a service consisting of the sending of signals for transmission by wireless telegraphy using space capacity within signals carrying any sound broadcasting service);
- digital radio multiplex services;
- digital sound and digital additional sound services at both a national and local level (text and data services not intended to be related to programming); and
- radio restricted services (licences intended to cover small-scale community uses).

Fees, duration and permissible content vary depending on the type of licence to be granted. Ofcom suggests that the easiest way to set up a radio service is to start an online radio station. Ofcom currently does not regulate online-only radio services which, therefore, do not require a licence from Ofcom.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The Act contains a limited number of provisions covering the broadcasting of foreign programmes. Regulations set out in the Audiovisual Media Services Directive 2010/13/EU (as amended by Directive (EU) 2018/1808 and incorporated into the Broadcasting Code), require that, where practicable, European production should account for over 50 per cent of the transmission hours of each broadcaster established in that market (subject to certain exclusions). The amending Directive (EU) 2018/1808 provided, among other things, for an increased European content quota for on-demand services, raised from 20 per cent to 30 per cent. In addition, the Secretary of State maintains powers under the Act to disallow foreign television and radio should it fall foul of provisions in the Act (such as those that offend against taste or decency). Regarding online and mobile content, there are no equivalent foreign restrictions.

The Act gives Ofcom the power to require local programming be included in the output of broadcasters where appropriate. An example of this is in Ofcom's inclusion in every Channel 3 licence of a condition requiring a regional channel with programmes targeted at persons living in the area.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Ofcom's role under the Act is to regulate advertising on broadcast media to ensure advertising rules and standards are met. These rules and standards can be found across a number of instruments. Primarily broadcast media must follow the UK Code of Broadcast Advertising (the BCAP Code) which covers misleading advertising, protection of children, harmful and offensive content, a ban on political advertising, and rules on environmental claims, to name but a few. Additional rules are contained in Ofcom's Broadcast Codes, which cover issues such as taste, decency and product placement. Enforcement of the aforementioned rules, while ultimately Ofcom's responsibility, has been largely contracted out to the Advertising Standards Authority and its associated bodies.

One of the key amendments to the Audiovisual Media Services Directive, which were approved by European Parliament in October 2018, was to introduce new rules concerning the proportion of daily broadcasting time that would be taken up by advertisements. Under the new rules, advertising can take up a maximum of 20 per cent of the daily broadcasting period between 6.00 am and 6.00 pm, but broadcasters can adjust their advertising slots within this time period so long as they do not exceed the total 20 per cent limit. The new rules also introduce a prime-time window between 6.00 pm and midnight, during which advertising will also only be allowed to take up a maximum of 20 per cent of broadcasting time.

Product placement, while allowed in films, series made for television, sports programmes and light entertainment programmes (both foreign and national), is prohibited in news and children's programmes. This was a change brought in during Ofcom's February 2011 change to the Broadcasting Code, and includes rules requiring special logos to be shown at the beginning and end of the programme, as well as at the end of each advertising break to signify the use of product placement.

There are strict rules on advertising and product placement in children's television programmes and content available on video-on-demand platforms introduced under the amendment to the Audiovisual Media Services Directive approved in November 2018.

Online advertising is subject to the CAP code which imposes similar standards and rules. The CAP code also contains the rules that apply to video-on-demand services. While there are some differences between the codes, the BCAP Code states that BCAP works closely with CAP to provide, as is practicable and desirable, a consistent and coordinated approach to standards setting across non-broadcast and broadcast media. The CAP code was amended in November 2018 to align with the GDPR and provide rules and guidance in respect of use of data for direct marketing generally and the rules on the transparency and control of data collected and used for the purpose of delivering ads based on web-users' browsing behaviour.

As of 14 June 2019, advertisements containing gender stereotypes will be banned in both broadcast and non-broadcast media (including online and social media).

On 13 March 2019, Phillip Hammond, chancellor of the exchequer, wrote to the CMA asking them to carry out a market study of the digital advertising market as soon as is possible. Such a market study would seek to explore: (i) the importance of data in digital advertising including in programmatic trading; (ii) whether the market is sufficiently transparent, including to advertisers and publishers as well as to consumers in how their data is used; and (iii) the extent to which digital platforms grant preferential treatment to their own businesses across the value chain or act in other ways which are likely to disadvantage third-party competitors. This market study was a recommendation of the Furman Report.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Under the Act, public service broadcasters, including (but not limited to) the BBC, ITV, Channel 4 and Channel 5, must provide public service broadcasting (PSB) channels to all the main distribution platforms. As a result, such channels have a right to be carried on all the main platforms on a 'free-to-air' basis. Ofcom has a responsibility under the Act to review and report on the extent to which the PSBs have fulfilled the purposes of PSB and make recommendations regarding how to maintain and strengthen the quality of PSB in the future, with reviews taking place every five years. The purposes of PSB in the UK are:

- to provide a variety of programmes on a wide range of subject matters;
- to provide television services that are likely to meet the needs and interest of as many different audiences as practicable (as well as those of the actual available audiences); and
- to maintain high standards in respect of programme content, development and skill, and editorial integrity.

In March 2018, Ofcom published a review of PSB. It concluded that PSB fulfils an important and valued role in broadcasting in the UK. However, it also noted the greatly increased choice of platforms and content available to viewers. It also commented on the 'rush to scale' through M&A activity, such as the Fox and Comcast bids for Sky and the Disney bid for Fox. Despite such challenges, Ofcom believes that PSB in the UK has fared well. PSB television channels still account for 50 per cent of viewing and revenue streams (advertising and the licence fee for the BBC) providing a consistent and reasonably resilient revenue stream.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is regulated under the same broadcast content rules and legislation as broadcast media, so, for example, internet protocol television services simply require the same licences as they would for the same content offline. Following the Audiovisual Media Services Directive, the UK must regulate VOD content and advertising. Ofcom brought regulation of VOD in-house in January 2016 to ensure the efficient and effective control of regulating VOD programme services. Rules include a number of minimum content standards, and on-demand services are subject to the UK Code of Non-Broadcast Advertising, Sales Promotion and Digital Marketing. The amendments made to the Audiovisual Media Services Directive in November 2018 extend its scope to video-sharing platforms in addition to VOD providers, such as Netflix and YouTube.

In February 2019, the Culture, Media and Sport Committee published its report into the dissemination of 'fake news' published predominantly in non-traditional news media outlets and via social media. The report calls for social media companies to be obligated to take down known sources of harmful content, including proven sources of disinformation and a Code of Ethics for tech companies overseen by an independent regulator.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The UK digital television switchover commenced in 2008 and was completed in 2012. The 600MHz band was auctioned in 2013 and the remaining freed analogue television channels have yet to be allocated.

Under the Digital Economy Act 2010, the Secretary of State is given the power to nominate the digital switchover for radio broadcasting. The UK government has set criteria to be met before the switchover can commence: digital listening must reach 50 per cent of all radio listening (including via television and DAB); national DAB coverage must be equal to analogue coverage and local DAB reaches 90 per cent of the population. Ofcom's Communications Market Report, published on 2 August 2018, indicates that DAB radio listening had reached 50.9 per cent.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

Although licences may set out certain restrictions in terms of information requirements and governing codes or guidance, broadcasting licences are not restrictive in terms of how the spectrum may be used.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

In its fifth report to the Secretary of State, dated 23 November 2018, Ofcom stated its statutory duty to review, at least every three years, the operation of Parliament's 'media ownership rules' as found under section 391 of the Communications Act 2003. Ofcom note that the aim of the rules is to protect the public interest by promoting plurality and preventing undue influence by any one, or certain types of, media owner.

There are currently four broad media ownership rules that Parliament has put in place in the UK (and which are set out in Ofcom's November 2018 report to the Secretary of State):

- the national cross-media ownership rule: preventing a newspaper operator with a 20 per cent or more market share of newspaper circulation from holding a Channel 3 licence or a stake in such a licence of more than 20 per cent; and preventing the holder of a Channel 3 licence from holding an interest of 20 per cent or more in a large national newspaper operator;
- the Channel 3 appointed new provider rule: requiring regional Channel 3 licensees to appoint a single news provider among them;
- the Media Public Interest Test: which allows the Secretary of State to intervene in a merger involving a broadcaster or newspaper enterprise, where that merger meets certain value or market share requirements. The Secretary of State may choose to issue an intervention notice triggering a review if a merger might result in harm to the public interest (see further below); and
- the Disqualified Persons Restrictions: where certain bodies or persons must first be approved by Ofcom prior to holding certain kinds of broadcast licence to prevent undue influence over broadcasting services.

Intervention by the Secretary of State on the grounds of public interest under the EA includes the need for accurate presentation of news and free expression of opinion in newspapers, the need for plurality of persons who control the media and the need for UK-wide broadcasting that is both of high quality and likely to appeal to a variety of tastes and interests. Where a public interest ground applies, it is not necessary for the Secretary of State to carry out an assessment as to whether there would be a substantial lessening of competition by the merger (as would otherwise be required).

Detailed guidelines from 2004, by the former Department for Trade and Industry, set out those situations where the Secretary of State may intervene in merger situations involving media organisations, including cross-media mergers (where there is a merger between a newspaper and a Channel 3 or 5 licence holder, for example). The Secretary of State may intervene where the merger involves entities from outside the EEA. The policy is not for the Secretary of State to intervene where the mergers are related to satellite and cable television and radio services.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

Brexit

As with telecoms, broadcasting regulation is founded on EU law. Although in the short to medium term there are unlikely to be any significant changes to these laws, the UK government may choose to take a more divergent approach in the future. For example, whereas television broadcasting is subject to greater levels of regulation than over-the-top services (such as VOD), the UK government would have the freedom to regulate more closely the laws on VOD services.

Brexit would also likely impact on the current 'country of origin' principle whereby broadcasters that are regulated in one member state do not need to apply for additional licences to transmit in another member state. As this is set out in the current Audiovisual Media Services Directive, the UK could lose this benefit going forward, increasing the regulatory burden on UK broadcasters and making it harder for UK broadcasters to sell their content in the EU. The UK government recently published the Broadcasting (Amendment) (EU Exit) Regulations 2019, which will come into force in the event of a no-deal Brexit and will make a number of changes to primary and secondary legislation to address certain deficiencies arising from the

UK's withdrawal from the EU. The Regulations will amend the UK's authorisation system to a 'country of destination' principle, whereby any television services available in the UK must be licensed and regulated by Ofcom. However, the Regulations also implement the European Convention on Transfrontier Television (ECTT) which, in effect, would mean the country-of-origin principle would be retained in relation to ECTT countries.

At the time of writing, the UK's future relationship with the EU remains uncertain. With the original date for the UK's departure of 29 March 2019 having passed, it is unclear whether the UK will now leave the EU on 12 April 2019, or whether a 'long' extension to Article 50 may be sought and granted by the EU to extend the period for the UK's exit.

The battle for Sky

As noted above, there is a rush to scale in the broadcasting sector and this was evidenced recently in the tussle between Fox and Comcast to acquire ownership of Sky. In a rare blind auction process set by the UK's Takeover Panel in September 2018, Comcast outbid Fox with a bid of £30.5 billion, which equated to £17.28 per share. This was £1.61 per share higher than Fox offered at £15.67 per share.

Taxation on social media

There has been some indication that new taxes will be introduced in the near future to target social media companies. In the UK Budget 2018, delivered on 29 October 2018, the Chancellor of the Exchequer, Philip Hammond, announced plans to introduce a digital services tax from April 2020 following a consultation. The proposed tax would be a 2 per cent tax rate against the sales that large digital companies make in the UK and would be levied against social media platforms, as well as internet marketplaces and search engines. The Chancellor emphasised that start-ups would be protected from the levy. The consultation ran from 7 November 2018 to 28 February 2019 and, at the time of writing, the UK government were reviewing public feedback. A similar proposal from the European Commission, which would tax revenues for some digital services at 3 per cent, has thus far not been agreed upon by the member states.

On 18 March 2019, the All-Party Parliamentary Group on Social Media and Young People's Mental Health and Wellbeing released its report on the effects of social media on mental health problems in young people. The report called for a tax of 0.5 per cent of social media companies' profits to create a Social Media Health Alliance. At the time of writing, the UK government has not yet published its own proposals.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

Ofcom and the CMA have been the bodies responsible for the regulation of the media and communications sectors in the UK since 1 April 2014.

Ofcom

Aside from its regulatory functions, Ofcom also has competition law enforcement powers, which it holds concurrently with the CMA. These concurrently held powers allow the CMA and sector-specific regulators in their respective areas to enforce the competition law prohibitions contained in the Competition Act 1998 (CA 1998) and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In Ofcom's case, these concurrency powers operate in 'activities concerned with communications matters'.

The Act sets out Ofcom's principal duty of furthering citizen and consumer interests by regulating communications, protecting consumers from harm and by promoting competition. The Secretary of State retains some powers in certain circumstances – for instance, where a merger may raise public interest questions relating to plurality of the media or national defence, or if the Secretary of State considers it is necessary to remove any concurrency functions.

Ofcom's competition law powers cover the prohibitions against anticompetitive agreements and abuse of a dominant position. These powers are derived from the CA 1998 and the corresponding provisions in the TFEU. Ofcom also has investigative powers over markets, with the ability to make references to the CMA for an in-depth market investigation under the EA.

One of Ofcom's competition law functions is to 'further the interests of consumers in relevant markets, where appropriate by promoting competition'. Both the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) and the Government's 2015 Strategic Steer encourage all the concurrent regulatory authorities to coordinate in the exercise of their general competition powers, rather than their purely sector-specific regulatory powers. To facilitate this, the ERRA 2013 encourages information-sharing between Ofcom, the CMA and the other regulatory bodies. The UK Competition Network and UK Regulator's Network provide the fora within which this improved coordination can take place such that cases may more effectively be resolved.

CMA

The CMA is the overarching UK competition regulatory body, coordinating competition policy and encouraging consistent enforcement between itself and the sector-specific regulators. The CMA was established by the ERRA 2013, which put together the Office of Fair Trading and the Competition Commission. ERRA 2013 grants the CMA stronger powers to coordinate competition cases with its main function being the promotion of 'competition, both within and outside the United Kingdom, for the benefit of consumers'. The CMA's powers include the ability to act on a case after a consultation with the sectoral regulators if the CMA believes that the case would be better tackled centrally and the ability to withdraw a competition case from a sectoral regulator and progress the case itself.

Details of the relationship between Ofcom and the CMA with regard to competition law can be found in the 'Memorandum of understanding between the [CMA] and [Ofcom] – concurrent competition powers' (published 2 February 2016). The memorandum sets out how the concurrency regulations are to be applied to the Ofcom–CMA relationship. Both will endeavour to reach an agreement as to which body will exercise its concurrent competition powers in any given case, which will include taking into consideration the relative expertise and circumstances of the bodies. On an occasion where a decision is not adequately reached within two months, the CMA 'must notify [Ofcom] that it intends to determine which [of the bodies] is to exercise' their concurrent powers. The concurrency regulations expressly prevent the possibility of 'double jeopardy' (where two regulatory bodies review the same case simultaneously) and also provide for rules regarding case transfers between concurrent regulatory bodies. According to the CMA's 2018 'Annual report on concurrency' (most recently published on 30 April 2018), there has been smooth cooperation between the two bodies, with regular discussions on best practices for procedural issues, frequent secondment opportunities between staff members, and significant cooperation in complex cases.

CMA Panel

If it is reasonably believed that certain characteristics or conduct within a communications market may be harmful to competition, either Ofcom

or the CMA can bring a 'cross-market reference' to the attention of an impartial CMA Panel – consisting of members not involved with the initial investigations. This Panel may then investigate (potentially through a Phase II enquiry under the EA) and can decide whether it should take action to mitigate, prevent or remedy any adverse competition effect or negative impact on consumers – including higher prices, lower quality, reduced variety of goods or services and stifled innovation. Alternatively, it may recommend another body take remedial action or can instead indicate what type of remedial action needs to take place to rectify any issues that are uncovered.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

The Act and the Digital Economy Act 2017 outline the appeal mechanisms for Ofcom and CMA decisions in relation to ECNs, ECSs and AFs. Additionally, the Act offers appeal mechanisms to those wishing to appeal decisions relating to television and radio broadcasting.

ECN, ECS and AF appeal regime

Certain Ofcom decisions may be appealed to the Competition Appeal Tribunal (CAT) on judicial review grounds, namely: illegality, irrationality and unfairness. Decisions taken by the Secretary of State can also be appealed, including decisions concerning networks and spectrum functions, any restrictions or conditions set by regulators on electronic communications, a direction of Ofcom regarding its powers to suspend or restrict electronic communications, or a specific direction under the Secretary of State's powers under the WTA 2006. Under the CAT Rules (2015), where an appeal is made with regard to price control matters, the CAT must refer the case to the CMA. The CMA will then deliberate and decide on an outcome in accordance with the Act.

Schedule 8 of the Act lists certain types of decisions by the CMA, Ofcom and Secretary of State that are not appealable, except by way of judicial review to the Administrative Court. These include, inter alia, the instigation of any criminal or civil proceedings, decisions relating to administrative charges orders, the publication of the UK Plan for Frequency Authorisation, recovery of sums payable to Ofcom, giving effect to regulations and imposing penalties.

Prior to the passage of the Digital Economy Act 2017, the appeal process for appealing Ofcom's decisions was on the merits. It was cumbersome, permitting considerable new evidence and new parties to an appeal. Ofcom potentially had no knowledge of these additional factors at the consultation phase and these could be introduced mid-process. The Digital Economy Act 2017 makes substantial alterations to the way an appeal is brought under the Act. The new regime attempts to streamline the process of gathering evidence, including for the cross-examination of witnesses and experts, and the general treatment of that evidence. The CAT must apply the same principles as would be applied by a court on an application for judicial review. The CAT may dismiss the appeal, or quash the whole or part of the decision to which the appeal relates, remitting the matter back to the decision-maker with a direction to reconsider and make a new decision.

The Digital Economy Act 2017 (Commencement No. 1) Regulations 2017 (SI 2017/675) state that the new standard of review will apply to all new appeals from 31 July 2017. The judgment of the first case to benefit from this new standard of review (*Viasat v Ofcom* [2018] CAT 18) was published in December 2018.

Television and radio broadcasting appeal regime

Owing to the changes enacted by the Digital Economy Act 2017, the appeals process for television and radio broadcasting-related decisions is similar to the ECN, ECS and AF appeal regime. Ofcom must have first complied with its powers under the Broadcasting Act 1990 (BA 1990) and have considered whether there is a more appropriate way of proceeding in relation to some or all of the matters in question. A party affected by an Ofcom decision may appeal to the CAT only that part of the decision relating to Ofcom's competition powers under the BA 1990. If a party wishes to appeal any other type of Ofcom decisions, this must be done in accordance with standard judicial review procedures.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

Mergers

Furman report

On 13 March 2019, the Government's Digital Competition Expert Panel, led by former chief economic adviser to president Barack Obama, Jason Furman, published a report setting out a number of recommendations to address competition issues across the digital economy. With respect to merger control, the panel has encouraged the CMA to intervene more frequently and with greater force in merger scenarios where threats to consumer welfare and innovation are at stake. It also recommends that firms holding a 'strategic market status' in the digital sector should be placed under an obligation to report all proposed acquisitions.

Experian / ClearScore merger prohibition

Following a Phase 2 investigation, on 28 November 2018 the CMA released its provisional findings in the merger between the UK's two largest free credit rating agencies. Experian agreed to purchase the three-year-old fintech group, ClearScore, for £275 million in March 2018. However, despite ClearScore's start-up status, the regulator identified that the transaction could result in a substantial lessening of competition and that the only effective remedy is to prohibit the merger. On 27 February 2019, Experian and ClearScore abandoned the transaction.

PayPal / iZettle

On 26 November 2018, the CMA found a number of potential competition concerns with Paypal's acquisition of iZettle, a Swedish payments start-up that was set to be the biggest FinTech company in Europe to list. The regulator determined that the £2.2 billion transaction between the UK's two largest suppliers of mobile point of sale devices could lead to a decline in innovation, higher prices or a reduction in the range of services for customers (namely small and medium-sized businesses).

Under the Enterprise Act 2002, the regulator may decide to accept undertakings in lieu of a reference to a Phase 2 investigation. However, as PayPal did not offer proposals to address the CMA's concerns, the merger has been be referred for a Phase 2 investigation by an independent group of CMA panel members. The CMA published its issues statement on 15 January 2019, with the deadline for the final decision being 21 May 2019.

Nielsen / Ebiquity merger inquiry

On 22 November 2018, the CMA published its final report on the acquisition by Nielsen Media Research Limited of the advertising intelligence division of Ebquity plc. The CMA found that, although both Nielsen and Ebiquity sell advertising intelligence products to UK and international customers, the design of the products, how they are used and the fact that very few customers switch between the companies meant that they do not closely compete. This finding was supported by the fact that the companies have not invested significant amounts of money or resources in competing for each other's customers and, according to internal documents, are unlikely to do so in the future.

Trinity Mirror / Northern & Shell Media Group

On 20 June 2018, the CMA cleared the acquisition by Trinity Mirror plc (owner of the *Daily Mirror*) of certain assets of Northern & Shell Media Group (including the *Daily Express*), which completed in February 2018. The CMA began the merger inquiry on 10 April 2018, notifying the Secretary of State of the potential public interest considerations, who subsequently issued an intervention notice on media plurality and free expression of opinion public interest grounds.

The CMA held that the newspapers published by the two parties target different demographic groups and differ in content and tone. In relation to advertising and online presence, the CMA found that the parties were not particularly close competitors (in that they did not compete more closely with each other than with other tabloids) and that they faced significant competitive constraints from other national print newspapers and other forms of newspaper media.

Sky / Fox / Comcast

On 5 June 2018, and following receipt of the CMA's final report on the proposed acquisition by 21st Century Fox of the shares of Sky plc that it does not already own, the Secretary of State for Digital, Culture, Media and Sport, Matt Hancock, accepted the CMA's recommendation that the anticipated acquisition was not in the public interest because of media plurality concerns, and accepted the CMA's recommendation that the most effective and proportionate remedy was for Sky News to be divested to a suitable third party.

Mr Hancock also confirmed that, having taken into consideration the need for a sufficient plurality of people with control of media enterprises, the need for a wide range of high-quality broadcasting, and the need for a genuine commitment to broadcasting standards, and concluding that it did not meet the threshold for intervention, the government would not intervene in Comcast's competing bid for the acquisition of Sky.

Antitrust

Furman report

The panel has called for the establishment of a Digital Markets Unit, an independent body tasked with designing and implementing pro-competition rules. Other recommendations outlined in the report include policies of data openness and 'aggregator services' that could allow users to switch between search engines and social media sites by transferring their data (such as search histories or friends lists). Where appropriate, the revised policy regime should be supported by legislative changes.

The panel calls on the government to engage with regulators internationally to coordinate and develop a consistent approach to the regulation of international digital markets.

Finally, the report addresses the potential anticompetitive and consumer welfare concerns raised by the development of machine learning algorithms and artificial intelligence, particularly through their use in the development of dynamic pricing models and the digital advertising market. The panel have recommended that these markets should be subject to ongoing monitoring to ensure that they do not create detriment to consumers or lead to anticompetitive activity.

ComparetheMarket home insurance

On 2 November 2018, the CMA issued to ComparetheMarket a 'statement of objections' in the context of its investigation into the company conducted under the Competition Act 1998, setting out its provisional view that clauses in many of the company's contracts with home insurers break competition law and could lead to higher premiums.

The CMA found that these 'most favoured nation' clauses prevent rival comparison sites and other channels from trying to win home insurance customers by offering cheaper prices than ComparetheMarket. It also means home insurance companies are more likely to pay higher commission rates to comparison sites with the extra costs potentially being passed on to customers.

The company will now have an opportunity to respond in detail and the CMA will consider the response and any further evidence before reaching a final decision.

This investigation continues the CMA's work following a market study into digital comparison tools. The study, which concluded in September 2017, showed that many people visit more than one comparison site as they shop around for the best deals. It also laid out clear guidelines for price comparison sites on how to use people's personal data and how to display important information such as price and product description.

Pricing algorithms

On 8 October 2018, the CMA published a study into pricing algorithms in the digital markets. The CMA's study identifies various ways in which pricing algorithms could be used to support anticompetitive practices, in particular:

- the enforcement of collusion within cartels: cartelists could use algorithms to automatically detect competitor pricing changes, identify instances in which their fellow cartel members deviate from an agreed pricing model, and 'punish' them accordingly; and
- personalised pricing (use of data relating to an individual consumer's behaviour to set prices for that consumer): while this can be used to ease market entry for new firms and increase competition (for example, by offering targeted discounts), it can also cause obvious consumer harm.

The study is another example of the CMA's efforts to increase its expertise in the digital sector.

Consumer protection

Social media influencers

On 16 August 2018, the CMA announced that it has launched an investigation under its consumer protection powers into concerns that social media stars are not properly declaring when they have been paid, or otherwise rewarded, to endorse goods or services. The CMA claims that if such social media 'influencers' do not label their posts properly, fans or followers may be led to believe that an endorsement represents the

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star's own view, rather than a paid-for promotion. They are then more likely to place trust in that product, as they think it has been recommended by someone they admire. They might not do so, however, if it was made clear that the brands featured have paid, or in some other way rewarded, the celebrity in return for endorsement.

The CMA investigation is considering the extent to which influencers are clearly and accurately identifying any commercial relationships, and whether people are being misled. If the CMA finds practices that break consumer protection law, it can take enforcement action.

On 23 January 2019, the CMA reported that it had secured formal commitments from 16 celebrities to ensure they will now say clearly if they have been paid or received any gifts or loans of products which they endorse, including singers Ellie Goulding and Rita Ora, models Alexa Chung and Rosie Huntington-Whiteley, former Coronation Street and Our Girl actress Michelle Keegan, and TV reality stars Millie Mackintosh and Megan McKenna. Warning letters have also been sent to a number of other celebrities, urging them to review their practices where some concerns have been identified.

Further investigation work will look at the role and responsibilities of social media platforms more broadly.

United States

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COMMUNICATIONS POLICY

Regulatory and institutional structure

1 Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

In the United States, regulatory requirements, and even the regulators with jurisdiction, vary by technology. Multiple national, state and local government agencies can be involved for a particular service or transaction. The Communications Act of 1934 (the Communications Act) establishes the basic sector-specific framework.

Telecoms and RF regulation

State and territorial public utilities commissions (PUCs) regulate intrastate telecommunications services (ie, where the endpoints of a communication fall within the borders of a single state or territory), but PUCs generally do not regulate mobile services, nomadic Voice over Internet Protocol (VoIP) or, in a majority of states, any other VoIP. The national regulator, the Federal Communications Commission (FCC), regulates interstate and international telecommunications (including, to some extent, VoIP), mobile services, non-US governmental uses of radio frequency (RF) spectrum, over-the-air broadcast television and radio, and certain aspects of cable television content. In the past, the FCC generally has not regulated internet access services, backbone networks or peering arrangements. In its 2015 Order 'Protecting and Promoting the Open Internet' (2015 Order), the FCC imposed open internet rules for both fixed and mobile broadband internet access services (BIAS) and asserted jurisdiction over the exchange of traffic between providers and 'connecting networks', such as content delivery networks. Reversing course under the new Republican Chairman and majority, in December 2017, the Commission adopted an order 'Restoring Internet Freedom' (2017 Order) that reversed – in nearly all respects – the 2015 Order. In particular, the 2017 Order retained a modified version of the requirement that BIAS providers disclose certain information about their service, but otherwise eliminated the 2015 net neutrality rules and disclaimed any statutory authority for oversight over interconnection practices.

The United States has not amended its telecommunications statutes specifically to take account of convergence. The Communications Act is divided into separate titles for common-carrier services, RF spectrum regulation and licensing (including over-the-air broadcast television and radio) and cable television regulation. As noted above, when the FCC imposed open internet rules on BIAS in 2015, it also classified that service as a 'telecommunications service', exposing BIAS providers to certain heightened FCC regulations as common-carriers under Title II of the Communications Act. In the 2017 Order, however, the FCC reclassified BIAS as an 'information service' under Title I of the Communications Act – returning to a classification the FCC had applied from 2005 to 2015. Under the statute, an information service cannot be treated as a common-carrier service – in other words, the FCC has limited authority to impose regulatory obligations on BIAS.

The FCC has not decided whether VoIP is regulated as a common-carrier service; nevertheless, it has imposed a number of common-carrier-like non-economic regulatory obligations on VoIP providers. Specifically, VoIP services, including one-way or non-interconnected VoIP services, must be accessible to individuals with disabilities, as must email and other text-based communications services. Some states have asserted regulatory authority over fixed line VoIP.

With respect to media, regulation of over-the-air broadcast services remains tied to the FCC's authority to grant licences for use of the RF spectrum, and is stricter than the regulation of cable television. The FCC has not asserted complete jurisdiction over 'over-the-top' (OTT) internet-based media services. Although it has begun to apply accessibility rules to some such services, efforts to apply additional rules to such services appear stalled for the time being.

Congress continues to consider an overhaul of federal telecommunications laws, but any sort of action would likely take several years and does not appear to be imminent.

Marketing regulation

The FCC sets rules under the Telephone Consumer Protection Act (TCPA) regarding companies' telemarketing activities that involve the use of automatic telephone dialing system ('autodialer') technology, telemarketing that involves an artificial or pre-recorded voice, and the sending of 'junk' faxes. The FCC's telemarketing regulations are detailed and nuanced, and so companies should consult these regulations before engaging in telemarketing in the United States. However, at a high level, companies need 'prior express written consent' (a term of art with very specific requirements) before placing an autodialled call or text message involving marketing, a pre-recorded call involving marketing, or a call that uses an artificial voice to a cell phone that involves marketing. Companies also need prior express written consent to place a pre-recorded call or a call involving an artificial voice to a land line if it involves marketing. Companies must honour all consumer requests to no longer receive autodialed or pre-recorded calls, as long as the consumer makes the request through a reasonable means. The FCC and state attorneys general can bring enforcement actions for violations of the TCPA, and these actions can result in large fines. The TCPA also gives call recipients the right to bring private lawsuits seeking damages of US$500 to US$1,500 per call that violates the TCPA. TCPA lawsuits are often brought as large class actions.

The state of TCPA law is currently in flux. In the high-profile case of *ACA International v FCC* (*ACA International*) the US Court of Appeals for the District of Columbia Circuit overturned FCC rules regarding what type of technology qualifies as an 'autodialer'. The ACA decision also struck down the FCC's rule that companies were liable for making more than one call to the wrong person, owing to the number in question being reassigned from one subscriber to another, when the caller

had no actual knowledge of the reassignment. The FCC chairman and two Republican commissioners have praised the DC Circuit's decision, which overturned rules that the FCC adopted under democratic control. In another high-profile case, *Marks v Crunch San Diego, LLC* (*Marks*), the US Court of Appeals for the Ninth Circuit noted that the District of Columbia Circuit has vacated the FCC's interpretation of what devices qualify as autodialers, leaving only the statutory definition as a starting point. Holding that the definition is 'ambiguous on its face', the Court examined the context and structure of the statutory scheme to reach its determination that an autodialer includes equipment that has the capacity to both store numbers and dial numbers automatically – an expansive interpretation that would include smartphones. In response to *ACA International* and *Marks*, the FCC has issued Public Notices seeking comment on what constitutes an autodialer. Final reply comments in this proceeding were due 24 October 2018, with further FCC action pending. In the reassigned number context, the FCC: (i) established a single, comprehensive database of reassigned number information from each provider that obtains North American Numbering Plan (NANP) US geographic numbers, including toll free numbers; and (ii) adopted a safe harbour from TCPA liability for those callers that choose to use the database to learn if a number has been reassigned. The FCC is also initiating a rulemaking to implement provisions of the RAY BAUM Act (Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018), which would include: (i) extending the reach of the FCC's 'truth in Caller ID' rules to include covered communications originating from outside the United States to recipients within the US; and (ii) expanding the scope of covered communications to include text messages and additional voice services. The FCC continues to consider other methods of blocking unlawful calls, including the use of Signature-based Handling of Asserted Information Using toKENs (SHAKEN) and Secure Telephone Identity revisited (STIR) standards.

The Federal Trade Commission (FTC) also has rules that it applies to a wide variety of industries, including the communications industry. (Indeed, recent litigation in the US Court of Appeals for the Ninth Circuit has reaffirmed the FTC's power to oversee certain practices of communications companies, even those that the FCC heavily regulates as common carriers.) For example, the FTC's Telemarketing Sales Rule, in broad strokes, requires companies to check the National Do Not Call registry before engaging in most telemarketing campaigns, requires companies to honour consumer requests to no longer receive telemarketing calls from the company, restricts telemarketing calls during certain times of day, restricts call abandonment, prohibits abusive callers, and requires the transmission of non-misleading caller ID information. The FTC's CAN-SPAM rules, among other things, require that senders of commercial email identify emails as an advertisement, provide information about the identity and location of the sender, and provide a functional opt-out mechanism. The FTC also requires disclosures regarding paid endorsements. Violations of these rules can result in costly monetary penalties. The FTC also has relatively broad power to enjoin and seek consumer redress for unfair or deceptive marketing practices, even if such a practice does not violate a specific FTC rule. In the wake of the 2017 Order, and consistent with a Memorandum of Understanding entered into with the FCC, the FTC has stated that it will monitor consumer complaints about ISPs and will take action against unfair or deceptive ISP practices. The agency has also indicated that it will continue to investigate complaints involving privacy practices and data breaches.

Many states also set limits on when and how companies can engage in telemarketing, with many requiring state registration before beginning to telemarket state residents, further limiting the times when telemarketing may occur, and requiring specific disclosures at the beginning of a call.

State and local rights-of-way and siting

State and local government franchising authorities regulate cable operators and some telecommunications services. Local governments regulate zoning, rights of way and wireless tower siting. In recent years, many states have adopted legislation limiting the authority of local and municipal governments over permitting and regulation of wireless facilities, with a particular focus on limiting the amount of fees that can be charged for placement of small wireless facilities in public rights-of-way.

The FCC has established pre-construction environmental and historic preservation review requirements for wireless antennas. The FCC works in conjunction with the Federal Aviation Administration to regulate antenna and tower heights and associated lighting and marking requirements. In March 2018, the FCC adopted new rules streamlining the processes for local and tribal wireless tower approvals, including excluding 'small wireless facilities' on non-tribal lands from environmental and historic preservation review. 'Small wireless facilities' encompasses structures that are either less than 50 feet in height or no more than 10 per cent taller than other nearby structures, and that support small antennas and related equipment.

National security and competition

'Team Telecom' – an informal grouping of the Departments of Defence, Homeland Security and Justice, and the Federal Bureau of Investigation – regulates national security issues with telecommunications service providers and network owners, while the Committee on Foreign Investment in the United States (CFIUS), a national inter-agency committee administered by the US Department of the Treasury, reviews transactions involving acquisitions of existing US businesses engaged in interstate commerce. The FTC and the US Department of Justice (DOJ) jointly regulate competition and merger control under US antitrust laws, as do state attorneys general, under state antitrust laws.

Policy changes

Federal, state or local authorities can initiate policy changes. When the FCC sets rules, it overrides any conflicting state or local laws or requirements. The FCC sets rules though a notice-and-comment process. All final FCC rules are subject to review in federal courts of appeal. State PUCs have similar processes for adopting rules, with the jurisdictional limits and processes varying from state to state. Judicial review is generally available in the state courts, although issues of federal law can also be reviewed by federal courts in many cases. The FTC can implement policy changes through rules as well as by prosecuting civil suits against unfair trade practices either before the FTC or in the federal courts. State attorneys general similarly can bring civil actions that may, in some instances, be creating new policies.

Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

Fixed providers of common-carrier services other than VoIP

Fixed providers of common-carrier services other than VoIP must register with the FCC and are authorised by a blanket FCC authorisation to provide interstate domestic services (ie, no prior authorisation is required) but must obtain affirmative prior authorisation from the FCC pursuant to section 214 of the Communications Act (international section 214 authorisation) to provide services between US and foreign points – whether facilities-based or resale, or whether using undersea cables, domestic or foreign satellites, or cross-border terrestrial facilities – regardless of whether the traffic originates or terminates in the United States or both. For intrastate services, a fixed provider must generally be licensed by the relevant state PUC. PUC processes and requirements vary, with procedures less strict for long-distance services and more rigorous for local services. The FCC does not limit

the number of licences for telecommunications service providers. Some state PUCs may refuse to grant operating authority to multiple intra-state local telecommunications providers in rural areas. A fixed provider of common-carrier services must obtain FCC consent prior to discontinuing interstate and international services and generally state PUC consent prior to discontinuing intrastate services.

Public mobile service providers

Public mobile service providers (commercial mobile radio service (CMRS)), including resellers, must register with the FCC but are not required to obtain prior authorisation for domestic service; however, they must obtain international section 214 authorisations to provide services between US and foreign points even by resale, and appropriate spectrum use authorisation. As discussed below, the FCC must grant terrestrial RF licences by auction if there are two or more competing, mutually exclusive applications. FCC rules do not require CMRS operators to deploy particular air interface technologies (eg, LTE). Accordingly, and unlike many other jurisdictions, the US authorisation and licensing regime does not distinguish among 'generations' of licensed wireless technologies (eg, 2/3/4G) used by operators. States cannot regulate the rates or entry of CMRS providers, but can regulate other terms and conditions. Facilities-based mobile service operators must obtain licences or leases to use RF spectrum, except where the FCC rules permit licence-exempt (ie, unlicensed) operation. Public mobile service providers are not required to obtain FCC consent to discontinue domestic services.

Public Wi-Fi

In the United States, Wi-Fi operates on an 'unlicensed' basis under the Commission's Part 15 rules. These rules set power levels, out-of-band emission limits and other technical limits. The FCC designates certain frequency bands where unlicensed devices may operate at higher power levels. The most important of these bands are the 900MHz, 2.4GHz and 5GHz bands. The rules for each of these bands, and sometimes their sub-bands, differ in terms of power and emission mask, and sometimes include special requirements. Special requirements include, but are not limited to, the use of dynamic frequency selection in the U-NII-2a and U-NII-2c sub-bands of the 5GHz band, and the availability of higher power with the use of a down-pointing antenna design in the U-NII-1 sub-band of the 5GHz band. But, importantly, as long as a Wi-Fi and other unlicensed device complies with these rules and operates within these designated bands, it does not require a licence to operate. Note that the FCC allows lower-power unlicensed operations on a co-channel 'underlay' basis in many other bands, but these low power levels make the bands inappropriate for Wi-Fi.

Wi-Fi continues to grow in importance in the United States. The FCC has stated that consumers receive more data over Wi-Fi than over licensed cellular networks, and soon Wi-Fi will deliver more data to consumers than even wired networks. Consequently, the FCC has undertaken to make additional spectrum bands available for Wi-Fi. For example, the FCC:

- opened the 'white spaces' between television broadcast channels for unlicensed operation, and is currently considering how and where such unlicensed devices would operate after the recent broadcast incentive auction in the 600MHz band;
- designated additional spectrum in millimetre wave bands for unlicensed use;
- adopted more liberal unlicensed rules in the U-NII-1 sub-band of the 5GHz band, thereby allowing traditional Wi-Fi services in these frequencies;
- is considering opening the U-NII-4 sub-band of the 5GHz band for Wi-Fi through a proceeding exploring how unlicensed services can share the band with incumbent Intelligent Transportation Services; and
- is considering opening the 6GHz band for Wi-Fi through a proceeding exploring how unlicensed services can share the band with fixed point-to-point links and other existing users of the band.

Notably, in 2016 the FCC decided not to open the U-NII-2b sub-band of the 5GHz band to Wi-Fi after analysing the potential of sharing with incumbent government operations. The FCC also recently opened the 3.5GHz band for a mix of light-licensed and 'licensed-by-rule' operations. While the licensed-by-rule operations are not unlicensed or governed by Part 15 rules, they are likely to share many characteristics with Wi-Fi deployments. Finally, in 2018 the FCC has issued a notice of proposed rulemaking to expand the flexible use of 'mid band' spectrum (ie, spectrum above 3.7GHz but below millimetre wave) for wireless broadband and has also issued a notice of proposed rulemaking to permit unlicensed use in the 6GHz band.

Interconnected VoIP

Interconnected VoIP (VoIP services that can place calls to and receive calls from the traditional telephone network as part of a single service) are not subject to prior authorisation. Some states have asserted the ability to require prior approval for fixed interconnected VoIP services, which is currently being challenged in the courts. Interconnected VoIP providers must seek prior authorisation from the FCC, however, before discontinuing service.

Non-interconnected VoIP

Non-interconnected VoIP (VoIP services that can only send or receive calls (but not both) from the traditional telephone network) are not subject to prior authorisation or discontinuance requirements.

Satellite service providers

Satellite service providers must obtain licences to use RF spectrum and must ensure that their handsets or antennae meet FCC interference requirements. If providing common-carrier services between US and foreign points, satellite service providers must also obtain international section 214 authorisations. They are not subject to state rate or market-entry regulation or to FCC price regulation.

Satellite space stations

Satellite space stations notified to the International Telecommunication Union by the United States or using US orbital slots, as well as transmit-receive earth stations, must be licensed by the FCC prior to launch or services commencement, respectively. Receive-only earth stations communicating with US-licensed space stations require only FCC registration. Earth stations in certain frequency bands are covered by blanket authorisations (ie, the FCC does not require individual licensing or registration). Foreign-licensed satellites may serve US earth stations on a streamlined basis if they appear on the FCC's Permitted Space Station List, but may also make an individualised market access showing in connection with transmissions to and from a specific earth station. After finalising new rules in 2017 for non-geostationary satellite orbit (NGSO) system, the FCC has granted licenses for several large proposed NGSO systems. The Commission is also currently considering a number of other changes to existing satellite regulations, including streamlining the space station application process for CubeSats and other small satellites, as well as considering new rules relating to orbital debris, earth stations in motion and other topics.

Undersea cable infrastructure

Before installing or operating undersea cable infrastructure in the United States or its territories, an operator must first receive a cable landing licence from the FCC, coordinated with the US Department of State, pursuant to the Cable Landing Licence Act of 1921. For an

undersea cable to be operated on a common-carrier basis, the operator must also apply for and receive an international section 214 authorisation from the FCC, as described above.

Internet services other than VoIP

The FCC does not require prior authorisations to provide service or to discontinue service for BIAS. The FCC does not regulate internet services other than VoIP and BIAS.

Foreign ownership restrictions – international wireline

The FCC applies a public interest analysis in determining whether to allow a foreign investor to enter the US telecommunications market. For international telecoms service authorisations (international section 214 authorisations), the FCC presumes that the public interest is served by direct and indirect foreign ownership (up to 100 per cent) in facilities-based and resale providers of interstate and international telecommunications services, where the investor's home country is a World Trade Organization (WTO) member, and in undersea cables landing in WTO member countries. For investors from non-WTO member countries – and undersea cables landing in non-WTO member countries – the FCC does not presume that the public interest is served by direct and indirect foreign ownership (up to 100 per cent). Instead, it will require such investors from non-WTO member countries to make a showing whether they have market power in non-WTO member markets and evaluate whether US carriers or submarine cable operators are experiencing problems in entering such non-WTO member markets. The FCC determines an investor's home market and consequent WTO status by applying a principal place-of-business test.

Foreign ownership restrictions – RF licences

The United States imposes limitations on both direct and indirect foreign ownership. US WTO commitments reflect these statutory restrictions on foreign ownership. Regardless of WTO status, section 310 of the Communications Act prohibits a foreign government, entity organised under foreign law, non-US citizen or representative of a foreign government, or non-US citizen from directly holding a common-carrier RF (for terrestrial wireless or microwave, mobile or satellite service) broadcast or aeronautical licence (collectively, 'RF license'). Section 310 does, however, permit direct and indirect foreign ownership in such licensees, subject to additional requirements:

- pursuant to Section 310(b)(3), parties to foreign investment that results in direct foreign ownership of an RF licence in excess of the 20 per cent statutory threshold must first obtain a declaratory ruling from the FCC finding that such foreign ownership would serve the public interest; and
- pursuant to Section 310(b)(4), parties to foreign investment that results in aggregate direct and indirect foreign ownership in a RF licence in excess of 25 per cent statutory threshold must first obtain a declaratory ruling finding that such foreign ownership would serve the public interest.

Regardless of whether the foreign investor would control or not control the common-carrier RF licence, the FCC presumes that aggregate foreign ownership of up to 100 per cent serves the public interest, a presumption that applied only to investors from WTO member countries prior to August 2013.

Interplay with national security and trade concerns

The FCC may nonetheless deny approval if the Executive Branch raises serious concerns regarding national security, law enforcement, foreign policy or trade issues, or if the entry of the foreign investor (or cable landing) into the US market presents a risk to competition. In practice, applications for carrier licences for facilities-based and resale international telecommunications services, common-carrier RF licences, and non-common-carrier licences used for mobile or wireless networking services are typically subject to national security reviews by the Team Telecom agencies (see question 1). These agencies (which also review mergers and acquisitions – see questions 28 and 30) often require negotiation of security agreements or assurances letters prior to licensing or transaction consummation.

Authorisation timescale

Although the FCC has adopted detailed licensing timelines (for example, a 14-day streamlined review for most international section 214 applications, a 45-day streamlined review for most cable landing licence applications, and a statutory 30-day review for applications involving common-carrier wireless, mobile and transmit-receive satellite earth station applications), these are typically suspended in cases involving aggregate foreign ownership exceeding 10 per cent, as Team Telecom (see question 1) generally asks the FCC to defer action on such applications pending sometimes lengthy national security reviews. See question 28 for a description of the timing of consents for mergers, stock and asset-based acquisitions, and joint ventures (JVs) for the telecommunications and broadcasting sectors.

Licence duration

Licence durations vary by service and infrastructure type. International section 214 authorisations have no set term or expiry date. Cable landing licences have a 25-year term. Commercial wireless licences, private microwave and industrial wireless licences, and transmit-receive satellite earth station authorisations generally have 10-year terms. Space stations are generally authorised for 15-year terms, but direct broadcast satellite authorisations are authorised only for 10 years. These licences are generally eligible for extension as long as the licensee has complied with the relevant FCC service rules. Cable systems are generally authorised by local franchising authorities for a set term, subject to renewal.

Fees

The FCC assesses application processing fees for new and modified-licence applications involving telecommunications and broadcasting services and infrastructure, and for applications seeking consent for transactions involving transfers or assignments of FCC licences. The FCC also assesses annual regulatory fees for the providers it regulates. All of these fees vary by licence and service type; the FCC revises application processing fees periodically and regulatory fees annually. The FCC also assesses fees for a variety of federal programmes involving providers of interstate telecommunications and interconnected VoIP, including: federal universal service (as discussed in question 6); relay services for the hearing-impaired; numbering administration; and number portability. Non-interconnected VoIP providers are required to pay fees to support relay services for the hearing-impaired. State and territorial fees and contributions vary by jurisdiction.

Modification or assignment of licences (including transfers of common-carrier authorisation or assets)

FCC procedures and requirements for licence modifications vary significantly by licence type and service, and, in some cases, by whether the modification is 'major' or 'minor'. The FCC permits assignments of many types of licences, including common-carrier authorisations, though it distinguishes between a pro forma assignment of a licence or transfer of control of a licensee (where ultimate control of the licence does not change, such as with an internal corporate reorganisation), and a substantial assignment or transfer of control to an unrelated third party. Substantial assignments and transfers of control generally require prior FCC consent, as do any transfers of non-mobile common-carrier assets.

Pro forma transfers of common-carrier authorisations and common-carrier RF licences do not require prior FCC consent, but the FCC must be notified within 30 days of consummation. Pro forma transfers of non-common-carrier RF licences require prior FCC consent. In general, prior FCC approval is required either when the licence or authorisation itself is transferred to another entity, or when control of the entity holding the licence of authorisation is changing (even if the licence or authorisation is staying within the same entity).

FCC licences and financial security interests

FCC licences may not be pledged as security for financing purposes. Nevertheless, a lender may take a security interest in the proceeds of the sale of an FCC licensee. Lenders are also permitted to take a pledge of the shares of a company holding an FCC licence, though FCC consent must be obtained prior to a lender consummating any post-default transfer of control of an FCC licensee or assignment of an FCC licence. In structuring arrangements for protection in the event of a borrower default or insolvency, lenders, security-interest holders, and FCC licensees need to be mindful of the FCC's rules on security interests and requirements for approval of transfers of control and assignments, whether voluntary or involuntary.

Flexibility in spectrum use

3 Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

In addition to any required telecoms services authorisations, facilities-based wireless service providers must have an RF licence, unless they operate exclusively in licence-exempt (ie, unlicensed) bands. In most circumstances, the FCC must grant terrestrial RF licences by auction if there are two or more competing, mutually exclusive applications. Before holding an auction, FCC rulemakings establish spectrum blocks to be auctioned, geographic areas covered, licence terms, service rules including technical and interference-related rules, and network build-out rules. In some cases, the FCC limits the entities eligible to participate in the auction. Some satellite services do not require an auction. In bands designated for licence-exempt use, users can operate under specific technical rules without an individual FCC licence. The FCC has also allotted some frequency bands for 'licensed-light' services, where entities can obtain permission to use set frequencies through less onerous processes, such as by registration with the FCC.

The FCC has the authority to reallocate (change the permitted use or permitted class of user) or reassign (change the entity authorised to use particular frequencies in a particular geography) RF spectrum. The FCC is more likely to consider such changes when changes in technology or the marketplace render its rules obsolete. The FCC may also revoke a licence for failure to meet licensee qualification or fitness requirements, or for violations of FCC build-out rules. FCC rules specify the permitted use of some licensed spectrum. However, over the past two decades, the FCC has made spectrum available without detailed use restrictions in most cases, instead setting technical rules, but permitting flexible use of the spectrum. This allows licensees to change the services they provide without seeking prior authorisation from the FCC in most cases. Similarly, FCC rules do not specifically limit the services provided over most unlicensed bands by an individual user as long as they are consistent with the technical operating rules and do not wilfully or maliciously interfere with other users. While individual users of an unlicensed band must accept harmful interference, the FCC has used its equipment authorisation and enforcement processes to investigate and address unlicensed technologies that it believes might undermine an unlicensed band as a whole. The core unlicensed bands are located within the 2.4GHz and 5GHz bands. In 2014, the FCC changed its rules to permit outdoor operations and operations with increased power in the 'U-NII-1' sub-band of the 5GHz band. In addition, the FCC permitted unlicensed operations in the television 'white spaces,' that is, the vacant frequencies between occupied over-the-air broadcast television channels, as well as in portions of the new 600MHz band that will be created as a result of the television broadcast incentive auction (see question 16). FCC rules require these white space devices to operate subject to a database that determines where and when they can transmit so as to protect licensed operations, including television broadcasters and certain wireless microphones. The FCC is currently considering designating additional frequencies for unlicensed use, including in portions of the 5GHz band on a shared basis with incumbents (see question 2 'Public Wi-Fi'). The FCC has also recently permitted new commercial uses of the 3.5GHz band on a shared basis with incumbents – including 'licensed-by-rule' uses that are functionally similar to unlicensed uses – using a spectrum database approach. In addition, the FCC has recently made additional frequencies available for licensed and unlicensed use in the 'millimetre wave' bands above 24GHz. Finally, in 2018, the FCC issued a notice of proposed rulemaking to expand the flexible use of 'mid band' spectrum (ie, spectrum above 3.7GHz but below millimetre wave) for wireless broadband and has also issued a notice of proposed rulemaking to permit unlicensed use in the 6GHz band.

The FCC permits spectrum licences to be transferred or assigned, subject to FCC consent (see question 2) as long as speculation is not the principal purpose of the transaction. In approving any transfer or assignment of spectrum, the FCC considers competition, spectrum aggregation and prior compliance issues. The FCC permits partitioning (assignments of the licence in part of the licensed areas) and disaggregation (assignments of some, but not all, frequencies in the licensed area) subject to FCC consent. The FCC also permits leasing of RF spectrum, with the nature of the FCC review depending on the nature and duration of the lease.

Ex-ante regulatory obligations

4 Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

With respect to ex-ante economic and competition regulation, although the FCC requires all interstate and international common carriers to offer just and reasonable rates, terms and conditions, and prohibits unreasonable discrimination, in practice these are not significant constraints except for incumbent local exchange carriers. The FCC also has the authority to eliminate, or 'forbear' from, any statutory common-carrier requirements that it finds unnecessary.

Incumbent local exchange carriers

Incumbent local exchange carriers (ILECs) generally remain subject to both state and federal tariffing, cost accounting, accounting separation, discounted mandatory resale, and unbundling requirements, although unbundling is primarily limited to copper networks. They generally face price controls on retail and wholesale rates, although the FCC has substantially deregulated rates, terms and conditions for non-switched 'special access' services in many areas and particularly for packet services such as Ethernet. Specifically, in 2017, the FCC adopted an order deregulating most business data services (BDS), also known as special access, that provide dedicated point-to-point connectivity at guaranteed levels of service. The order determined that all packet-based (typically Ethernet) BDS services are competitive, at low and high capacity levels, everywhere in the country. Based on this finding, the FCC declined to establish new rate regulations for Ethernet BDS. The order then broadly deregulated BDS provided over legacy, circuit-based time-division multiplexing (TDM) networks, which previously were subject to rate regulation in many parts of the country. With respect

to middle-mile TDM 'transport' services, the order determined that the market is generally competitive, and eliminated all existing price regulation nationwide. The order took the same approach to high-bandwidth (above 45Mbps) TDM 'channel termination' services (ie, the last-mile connections between the provider's network and the customer location). For lower-bandwidth (below 45Mbps) TDM channel terminations – commonly referred to as DS1 and DS3 services – the order adopted a new two-pronged 'competitive market test' to determine which US counties are sufficiently competitive to warrant deregulation. This test deems counties competitive if:

- 50 per cent of buildings or cell towers with BDS demand are located within a half a mile of a building or cell tower served by a competitive provider; or
- 75 per cent of the census blocks within the county are reported to have broadband availability (including for residential 'best-efforts' broadband service) from a cable operator.

The test produces positive findings of competition for more than 90 per cent of counties with BDS demand, resulting in wide-scale deregulation of DS1s and DS3s. Competitive carriers and other purchasers of BDS have challenged the order in federal court.

The FCC has also initiated a phased elimination of all inter-carrier compensation for call termination (excluding leases of fixed facilities to an interconnection point) and has issued a notice of proposed rule-making proposing a unified intercarrier compensation regime based on a 'bill and keep' model. In addition to economic regulation, ILECs are also subject to a variety of security and consumer protection requirements, including those for law enforcement access, emergency calling, universal service funding, disability access, funding of telecommunications services for the deaf, customer privacy, number portability service, discontinuance, anti-blocking, rural call completion, outage reporting and some other reporting requirements.

Non-incumbent local exchange carriers

Non-incumbent (called competitive) local exchange carriers (CLECs) are not required to file FCC tariffs, although most choose to do so, and generally are required to file state tariffs. The FCC limits the amounts that CLECs can charge for inter-carrier compensation on call origination and termination. They are not subject to cost accounting, separation, discounted mandatory resale or unbundling requirements. They are, however, subject to a variety of security and consumer protection requirements, including those for law enforcement access, emergency calling, universal service funding, disability access, funding of telecommunications services for the deaf, customer privacy, number portability service, discontinuance, anti-blocking, rural call completion, outage reporting and some other reporting requirements.

Interconnected VoIP providers

Like non-incumbent local exchange carriers, interconnected VoIP providers are not subject to economic regulations; however, they must comply with significant regulatory requirements, including those for law enforcement access, emergency calling, universal service funding, disability access, funding of telecommunications services for the deaf, customer privacy, number portability service, discontinuance, anti-blocking, rural call completion, outage reporting and some other reporting requirements. The FCC, however, pre-empted state PUC regulation of nomadic interconnected VoIP services (those that can be used at more than one site). Some PUCs assert authority to regulate fixed interconnected VoIP services, but a majority of states do not.

Non-interconnected VoIP providers

Non-interconnected VoIP providers must comply with anti-blocking, rural call completion, and disability access requirements and pay FCC-assessed fees to support telecommunications services for the deaf, but are not yet subject to the other regulatory requirements for interconnected VoIP or common carriers. The FCC is considering whether to extend additional regulatory obligations to non-interconnected VoIP, including the obligation to contribute to the support of universal service programmes and for automatic routing and location identification for emergency access (ie, 911) calls.

Broadband internet access service rules

In its 2015 Order, the FCC forbore from exercising its full authority to impose ex-ante rate regulation on providers of broadband internet access services. However, the FCC imposed three bright-line rules on BIAS providers as common carriers, prohibiting them from placing burdens or restrictions on subscriber access to lawful internet content. First, BIAS providers may not block subscribers from lawful internet content, applications, services or non-harmful devices; second, BIAS providers may also not impair or degrade subscribers' internet access to lawful content, applications, services or use of non-harmful devices; and finally, BIAS providers may not engage in 'paid prioritisation' – that is, they may not accept payment of any kind in exchange for 'fast lane' access to specified internet content, applications, services or devices. The agency has also imposed a prophylactic catch-all standard preventing broadband providers from 'unreasonably interfering' with subscriber access to lawful internet content in ways unforeseen by the Order's bright-line rules. The 2015 Order also affirmed and expanded on the transparency requirements the FCC originally imposed on providers in 2010.

As noted above, however, in December 2017, the Commission adopted the 2017 Order, which modified the transparency requirements, but otherwise eliminated the three bright-line rules against blocking, throttling and paid prioritisation, as well as the catch-all standard preventing unreasonable interference.

The FCC adopted privacy regulations for BIAS in the autumn of 2016. However, in April 2017, President Trump signed a Joint Resolution passed by Congress to rescind those rules, at which time BIAS providers became subject only to a statutory provision that required them to protect customers' proprietary network information. As a result of the 2017 Order, this statutory provision no longer applies and BIAS providers are now subject to FTC privacy oversight.

BIAS providers have obligations to prepare their networks for lawful intercept requests under the Communications Assistance for Law Enforcement Act, described below in response to question 12.

Wireline long distance

For wireline long-distance service providers, the FCC generally prohibits filing of tariffs for almost all retail domestic interstate and international telecommunications services, except for certain specialised situations, and for providers of international telecommunications services regulated as dominant (ie, having market power) on particular routes to particular foreign countries. Long-distance service providers remain subject to customer protection requirements similar to those applicable to competitive local exchange carriers. State PUCs typically require tariffing of intrastate long-distance services. The US Congress recently passed the Improving Rural Call Quality and Reliability Act of 2017 to address the persistent problems associated with terminating long-distance calls to rural areas. Pursuant to this legislation, the FCC adopted an order requiring all 'intermediate' service providers to register with a newly established intermediate provider registry and 'covered providers' (ie, the provider serving the end user) to use only registered intermediate providers in the call routing process. These rules apply to all carriers providing voice services to and from a NANP telephone number.

Public mobile services

Public mobile service providers (ie, CMRS) are not subject to ex-ante economic regulation by either the FCC or state PUCs. They are not subject to price controls, tariffing, cost accounting, separations, resale or domestic discontinuance requirements. Voice roaming rates and conditions must be just, reasonable and non-discriminatory, and CMRS providers must negotiate commercially reasonable data roaming agreements with other carriers, subject to certain limitations regarding technical compatibility and feasibility. Mobile service providers must also ensure that their handsets and base stations meet FCC rules on topics such as maximum power, interference and spectral masks, antenna design and directionality, human radiation exposure and disabilities access, including technical hearing aid compatibility requirements. FCC rules require testing and certification of RF equipment. Moreover, as discussed above with regard to broadband internet access services, in December 2017, the Commission revised, but did not eliminate, BIAS transparency obligations. These revised rules will apply to mobile as well as fixed BIAS.

Structural or functional separation

5 Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

No, the United States does not require carriers to maintain separate wholesale network and retail-service subsidiaries. In some cases, the FCC or state PUCs require separation among service activities (eg, a US carrier affiliated with a carrier with market power in a foreign market must provide US-originating or terminating services to that foreign market through a subsidiary separate from the foreign carrier).

Universal service obligations and financing

6 Outline any universal service obligations. How is provision of these services financed?

Incumbent local exchange carriers generally have state-imposed universal service obligations to meet all reasonable requests for service within their service area (called 'carrier of last resort' obligations). Some cable companies also have requirements in franchise agreements with local or state governments to build out their network.

The federal Universal Service Fund (USF) supports the provision of telecommunications services in high-cost areas, to low-income consumers, to rural healthcare providers, and to schools and libraries. The FCC sets voice and broadband performance and service requirements for carriers that choose to receive explicit universal service funding for high-cost areas. The FCC is beginning to use reverse auctions to distribute universal service support to eligible carriers; it is currently processing initial applications to participate in a reverse auction to bring fixed voice and broadband services to areas that lack broadband of at least 10Mbps/1Mbps, and it is in the process of confirming which areas will be available for a reverse auction to provide mobile broadband services to underserved areas. Carriers that are eligible to receive high-cost universal service support must also provide services to low-income consumers, although some carriers receive subsidies only for serving low-income consumers.

The federal USF is financed by an assessment on all end-user interstate and international telecommunications revenues earned by telecommunications carriers and interconnected VoIP providers. The FCC recalculates the assessment rate quarterly; for the first quarter of 2019 the assessment rate is at 20 per cent of interstate and international telecommunications revenues. From 2015 to the present, the rate has fluctuated from a low of 16.7 per cent for the fourth quarter of 2015 and the first quarter of 2017 to an all-time high of 20.1 per cent for the fourth quarter of 2018. Internet access revenues currently are not subject to USF assessments. Determining which services are required to contribute directly and when is extremely complex.

In early 2019, the FCC established a new Fraud Division within its Enforcement Bureau to combat waste, fraud and abuse within the supported programs.

Many states also require providers of intrastate telecommunications to contribute to state universal service programmes, and some states require interconnected VoIP providers to contribute. Nearly all states assess contribution requirements based on provider revenue, but a few states have recently adopted connection-based revenue requirements. These new rules are being challenged in court.

Number allocation and portability

7 Describe the number allocation scheme and number portability regime in your jurisdiction.

The United States is one of 20 countries that participate in the North American Numbering Plan, which uses the +1 country code. Within the United States, the FCC has exclusive authority over numbers; it has delegated certain management functions to the states. The FCC contracts out the day-to-day management of the US portion of the North American Numbering Plan; Neustar, Inc currently serves as the North American Numbering Plan administrator. Providers of local telecommunications services, including mobile wireless providers, that are authorised to provide service in a particular geographic area apply to the Administrator for numbers associated with that area, typically in contiguous blocks of 1,000 (eg, NPA-NXX-3000 through NPA-NXX-3999). Providers of interconnected VoIP service may also apply for numbers after obtaining authorisation from the FCC. Fixed and mobile common carriers and interconnected VoIP providers pay fees to support numbering administration.

Numbers for toll-free calling are managed separately by Somos, Inc, a private company, on designation by the FCC.

The FCC requires fixed and mobile common carriers and interconnected VoIP providers to permit number porting within the same geographic area. All providers of telecommunications services and interconnected VoIP must pay fees to support number portability administration. These fees vary by region. The US number portability system does not currently permit nationwide number portability, although a provider that operates in all seven number portability regions can effectively create the ability for its customers to port numbers anywhere in the US.

Customer terms and conditions

8 Are customer terms and conditions in the communications sector subject to specific rules?

States regulate customer terms and conditions for intrastate, including local, services, frequently with advance filing or approval requirements through tariffs. The FCC does not require advance filing of customer terms and conditions for any interstate services, other than for local services provided by incumbent local exchange carriers. All wireline local carriers can advance file, through tariffs, customer terms and conditions for interstate services, although CLECs are not required to do so. Long-distance carriers are not permitted to tariff customer terms and conditions. Both the FCC and state PUCs generally require terms and conditions that are reasonable and non-misleading.

For non-common-carrier services and prepaid phone cards, sold and distributed by non-carriers, the FTC has taken the position that it has jurisdiction to regulate misleading or unfair terms and conditions. The states' attorneys general also police false, misleading or unfair

terms and conditions. Neither the FTC nor state attorneys general require advance filing or approval.

Net neutrality

9 Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

In 2010, the FCC imposed three net neutrality obligations on mass-market broadband ISPs: transparency; a prohibition on blocking; and a prohibition on unreasonable discrimination. A reviewing court vacated the prohibitions on blocking and unreasonable discrimination in January 2014. However, in 2015, the FCC reinstituted and expanded on the vacated rules, which it accomplished by classifying broadband internet access carriers as 'telecommunications providers'. The 2015 Order established prohibitions on blocking, throttling and paid prioritisation, as detailed above; enhanced carriers' existing transparency obligations; and made all rules governing the openness of the internet apply uniformly to both fixed and mobile broadband internet access devices. The rules were challenged in court and upheld in their entirety by the DC Circuit in June 2016.

As mentioned above, however, in December 2017, the Commission adopted a new order reversing, in nearly all respects, the 2015 Order. In particular, the FCC reclassified broadband ISPs as 'information service' providers rather than 'telecommunications providers' and eliminated the net neutrality rules against blocking, throttling, paid prioritisation and unreasonable interference. BIAS providers are now subject only to a modified version of the FCC's transparency rule. Under that rule, broadband ISPs must publicly disclose accurate information regarding network management practices, including whether they are engaging in blocking, throttling or paid prioritisation practices. They must also disclose certain network performance and commercial terms governing their broadband internet access services. Beyond that, broadband provider ISP will be governed by existing general antitrust and consumer protection law.

In the 2017 Order, the FCC stated that it was preempting any state or local measures inconsistent with its net neutrality approach (ie, precluding states or localities from adopting net neutrality rules). Notwithstanding that language, in the wake of the 2017 Order's adoption, many states have sought to put state net neutrality regulations in place. The governors of six states – Montana, Hawaii, New Jersey, New York, Rhode Island and Vermont – have signed executive orders stating that a broadband provider that has a government contract with the state must not block, throttle or degrade internet content and must not engage in paid prioritisation, including in some cases a prohibition on requiring consumers to pay different rates to access specific kinds of content or applications online. In addition, over 30 states have introduced legislation to support some form of net neutrality protection for consumers in their state. On 7 March 2018, Washington state enacted the first of these bills into law, providing that broadband providers that block content, impair or degrade traffic, or engage in paid prioritisation violate the state's law against unfair or deception acts in trade or commerce or unfair methods of competition. California, New Jersey, New York, Oregon and Vermont have all passed some form of net neutrality legislation (although California has agreed not to enforce its legislation pending the outcome of litigation discussed below) and similar legislation in other states and state bills remain pending.

Over 20 state attorneys general offices, several online companies and a number of public interest groups have challenged the 2017 Order in court. Those lawsuits have been consolidated in the DC Circuit. Oral arguments were heard on 1 February 2019.

Platform regulation

10 Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

The FCC does not regulate internet-based services such as search, social media and news services. Those services may be subject to other generally applicable laws, such as laws against unfair or deceptive marketing.

Next-Generation-Access (NGA) networks

11 Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

Pursuant to its 2015 Order, the FCC treated BIAS, including traffic exchange arrangements, as 'telecommunications service' subject to its regulatory authority over common carriers. The FCC did not impose specific rules governing internet backbone or traffic exchange, but asserted authority to hear complaints of unjust, unreasonable or unreasonably discriminatory traffic exchange practices by BIAS providers. As mentioned above, however, in December 2017, it reversed itself and the FCC adopted the 2017 Order, which among other things, disclaimed FCC jurisdiction over internet traffic exchange practices. The FCC also requires internet access networks to comply with surveillance and law-enforcement assistance requirements, as described in question 12.

The FCC has adopted some measures to address the transition from copper-based phone networks to fibre, intended to encourage incumbent carriers in upgrading their networks. For example, the FCC eliminated prohibitions that previously prohibited incumbent carriers from disclosing planned network changes to their affiliates before informing the public. The FCC also eased requirements on incumbent carriers to provide prior notice before retiring copper facilities.

The FCC has also modernised all of its universal service support programmes to support broadband services (the high-cost support programme, the schools and libraries programme, the rural healthcare programme and the low-income programme). Its programmes in total disburse approximately US$9 billion annually.

Data protection

12 Is there a specific data protection regime applicable to the communications sector?

Limits on communications companies' use and disclosure of personally identifiable information to non-law-enforcement entities

Under the Electronic Communications Privacy Act (ECPA) and the Communications Assistance for Law Enforcement Act (CALEA), communications companies cannot as a general rule disclose the contents of communications to anyone other than a party to the communication and are limited in their ability to regularly monitor the contents of communications occurring on the carrier's network. Third parties who are not law enforcement or vendors working for the carrier typically cannot be given access to communications contents.

The FCC requires companies offering telephone or interconnected VoIP services to offer special protections to a category of customer data known as customer proprietary network information (CPNI). CPNI includes information about a customer's use of telecommunications services, such as the numbers the customer called, how long each conversation lasted and certain billing information. A customer's name, address, social security number, birth date and many other types of personal information are not CPNI. In January 2019, allegations that AT&T, Sprint and T-Mobile were selling customers' location data prompted congressional calls for an FCC investigation – calls with were

met with apparent FCC indifference. It is unclear at this time whether the FCC will undertake such an investigation or take other action.

Providers must take all reasonable measures to discover and protect against attempts to gain unauthorised access to CPNI and properly authenticate a customer's identity before complying with a request that would give the customer access to his or her own CPNI. Telecommunications carriers must also provide customers with notice related to the company's CPNI practices, seek customer consent before using CPNI to engage in certain activities, retain records related to CPNI access and report certain information related to CPNI to the FCC.

Federal oversight of phone and iVoIP companies' treatment of personally identifiable information that does not qualify as CPNI is unclear. Under the prior administration, the FCC took the position (announced in October 2014) that a telecommunications provider's failure to protect data falling outside the definition of CPNI can violate the Communications Act. Specifically, the FCC stated that a customer's name, address, social security number, date of birth and other types of personally identifiable information that a carrier collects when providing service qualify as customer proprietary information (CPI). The FCC stated that it expects telecommunications carriers to employ adequate data security to protect CPI, avoid implicit and explicit misrepresentations regarding the level of data security provided, and notify customers potentially affected by a data security breach. Whether the FCC intends to take the same approach under its new leadership – and whether it has the continued power to do so after Congressional action overturning an FCC order that touched on the FCC's treatment of CPI – remains unclear at the time of writing.

The FTC oversees the treatment of personally identifiable information by companies, except in their provision of common carrier services. For example, in the wake of the reclassification of broadband internet access service as an information service, the FTC oversees companies' data protection practices with regard to data collected from providing broadband, whereas the FCC continues to oversee companies' data protection practices with regard to data collected from providing telephone service (pursuant to the CPNI and possibly CPI rules discussed above). The FTC does not have set rules regarding data protection. Instead, it takes a case-by-case approach, evaluating whether a company's treatment or protection of personally identifiable information is unfair (eg, if the company retroactively applies new data protection practices to data the company previously collected, without obtaining opt-in customer consent) or deceptive (eg, if it materially conflicts with implicit or explicit statements the company made about its data protection practices).

A small number of states and municipalities have laws that specifically address the data protection practices of communications providers. After Congress's rescission of the FCC's broadband privacy rules, many state legislatures have considered legislation requiring broadband providers to obtain customer consent to use or disclose personally identifiable information to third parties for non-service-related purposes. States and municipalities also have generally applicable data protection rules that may apply to communications providers. In particular, California has extensive regulations dealing with privacy notices for online services and the ability for California residents to obtain information about whether their information is provided to third parties for direct marketing purposes.

Law enforcement access to data

The United States has specific data protection regulations dealing with the content of communications, including emails, text messages and calls. Under ECPA and CALEA, communications companies cannot turn over the content of communications to a law enforcement entity without a valid court order, absent an emergency or other special circumstance. The type of court order necessary depends on a number of different factors, including whether the communications will be intercepted in real-time or whether law enforcement will access the contents of a previously stored communication. Statutes differ on whether consumers must be notified and given an opportunity to challenge the disclosure. ECPA gives law enforcement the ability to require communications providers to retain communications in their possession pending a court order. The Cybersecurity Information Sharing Act (CISA) also allows companies to voluntarily share certain information with the government regarding cybersecurity threats.

Federal regulations require each telecommunications common carrier that offers or bills toll telephone service to retain billing-record data for a period of 18 months.

Although the circumstances in which disclosure is allowed are somewhat limited, CALEA requires telecommunications providers (including interconnected VoIP providers), fixed broadband service providers, manufacturers of telecommunications transmission and switching equipment, and providers of support services (ie, products, software, or services used by a telecommunications carrier for the internal signalling or switching functions of its telecommunications network) to provide the capacity to allow properly authorised law enforcement officials to intercept communications and obtain call-identifying information from their customers, as well as the capacity to meet the surveillance needs of properly authorised law enforcement officials. Pursuant to a court order or other lawful authorisation, carriers must be able to:

- expeditiously isolate all wire and electronic communications of a target transmitted by the carrier within its service area;
- expeditiously isolate call-identifying information of a target;
- provide intercepted communications and call-identifying information to law enforcement; and
- carry out intercepts unobtrusively, so targets are not made aware of the electronic surveillance, and in a manner that does not compromise the privacy and security of other communications.

CALEA does not require telecommunications providers to decrypt communications, unless the carrier provided the encryption and has the information necessary to perform the decryption.

Failure to comply with CALEA obligations can result in civil penalties. The attorney general may enforce these obligations by seeking an order from a federal district court. Violations of ECPA can result in criminal penalties.

Cybersecurity

13 | Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

In February 2014, the National Telecommunications and Information Administration (NTIA) and the National Institute of Standards and Technology (NIST) released their Framework for Improving Critical Infrastructure Cybersecurity, a set of industry best practices to reduce cyber risks to critical infrastructure, including telecommunications services; as of this writing, NTIA and NIST are engaging with key stakeholders to update the Framework. The FCC-convened Communications Security, Reliability, and Interoperability Council (CISRC) provides guidance on how the NIST framework applies in the telecommunications context and offers recommendations. Compliance with the Framework and CISRC best practices is voluntary.

Under CALEA, telecommunications providers (including interconnected VoIP providers) must maintain and file with the FCC System Security and Integrity plans, detailing how the provider ensures proper government access to communications content and call identifying information, and protects such information from unauthorised disclosure. Neither CALEA nor the FCC mandate the use of any particular

technical standard to ensure law enforcement access or communications security.

CISA limits liability of companies for sharing information with other private entities and with government related to cybersecurity threats. CISA does not impose a sharing mandate and instead establishes a voluntary sharing framework; in addition, it explicitly authorises private entities to monitor their networks for cybersecurity threats, to operate defensive measures to protect their networks from cybersecurity threats, and to share and receive cybersecurity threat information.

The Team Telecom agencies also often impose cybersecurity-related conditions in security agreements and assurances letters as conditions for the grant of FCC licences or consents for mergers and acquisitions.

Big data

14 Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

In the United States, the Fair Credit Reporting Act (FCRA) is the main law dealing specifically with amassing and using high-volume datasets of personally identifiable information (PII), but the law has limited reach. The FCRA only applies to 'consumer reporting agencies' (CRAs) and entities that obtain information from or furnish information to CRAs. Credit reporting bureaux, such as Transunion, Equifax and Experian, and employment and tenant background screening companies are the main CRAs. However, a 2016 report from the FTC and a number of commentators have suggested that the definition of a CRA is sufficiently broad to cover data brokers who: compile PII that bears 'on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living'; and provide these compilations (known as consumer reports) to buyers who use them (or can be expected to use them) in making credit determinations or for employment, insurance, licensing and other business purposes. Importantly, the FCRA does not generally apply to reports that are used or can be expected to be used only for marketing and general risk management purposes. As of this writing, President Trump's nominees to the Federal Trade Commission have not publicly expressed a position on their view of FCRA's scope in the big data context.

There have been few big data-related cases alleging violations of the FCRA, so the precise reach of the FCRA in this context remains unknown. Litigation related to the Equifax data breach may shed light on this issue in the near future. In one high-profile case, LexisNexis settled a class action FCRA lawsuit – which alleged that identity reports it sold for locating people and assets, authenticating identities and verifying credentials in the debt collection context were subject to the FCRA – for US$13.5 million in damages, US$5.5 million in fees and an agreement to restructure the identity report programme at issue so that it would comply with the FCRA. And in a January 2016 staff report on big data, the FTC took the position that data brokers who advertise their services 'for eligibility purposes' and companies that use non-traditional predictors (such as a consumer's zip code, social media usage or shopping history) to create reports of consumers' creditworthiness are particularly likely to fall under the FCRA (as are companies that use such reports).

When a company involved in big data qualifies as a CRA, it must:

- only include accurate, current and complete data in consumer reports, including in most cases deleting information on account data after seven years and bankruptcies after 10 years;
- provide consumers with access to and the opportunity to dispute or correct any errors in a consumer report, as well as general consumer assistance in accordance with FTC rules;
- provide consumer reports only to entities that have a permissible purpose under the FCRA, including for the extension of credit applied for by a consumer, the review or collection of a consumer's account, insurance underwriting, employment purposes where consumer permission is obtained pursuant to stringent rules, where there is a legitimate business need in connection with a business transaction initiated by the consumer, and in certain legal actions; and
- keep records regarding the release of consumer reports.

Users of consumer reports must:

- provide notice to consumers when most types of third-party data are used to make adverse decisions about them;
- only use consumer reports for a permissible purpose and so certify; and
- provide certain consumer disclosures and keep records related to making offers to a list of pre-screened consumers obtained from a CRA.

Companies that provide information to CRAs for use in consumer reports must take certain steps to ensure the information provided is accurate and complete.

Additionally, some companies have faced questions about whether their use of data has a discriminatory impact on protected classes of people. Under Title VII of the Civil Rights Act of 1965 and other statutes, companies could face a civil action when their facially neutral policies or practices have a disproportionate adverse effect on a protected class. The Equal Credit Opportunity Act (ECOA) bans companies that regularly extend credit from using information about consumers' race, colour, religion, national origin, sex, marital status, age or receipt of public assistance when making credit decisions. The 2016 FTC big data report indicated that targeting credit advertisements in a way that had an 'unjustified' disparate impact on a protected class could potentially violate the ECOA. Whether courts would take a similar view of the ECOA's application to big data remains to be seen. The 2016 FTC big data report also indicated that selling analytics products knowing that they would be used for a fraudulent or discriminatory purpose may also constitute a violation of the FTC Act. In May 2016, the Obama Administration issued 'Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights', which noted some concerns with the use of big data. Some of the companies faced with allegations of discrimination have voluntarily addressed these issues in a way that has helped them avoid litigation.

Generally applicable privacy and data security rules will also apply to most companies involved in big data. The FTC Act bans unfair or deceptive acts in interstate commerce by non-common carriers, including misrepresenting how PII will be collected and used, misrepresenting how PII will be protected, and failing to maintain reasonable security over PII. A number of states have additional requirements regarding privacy disclosures, cybersecurity, and notification to consumers in the event of a data breach. Companies must comply with myriad requirements under the Children's Online Privacy Protection Act before knowingly collecting personally identifiable information from children under 13 via an online service or collecting personally identifiable information from an online service targeted at children under 13. The United States also has a number of sector-specific privacy laws that can impact companies compiling information from certain healthcare-related companies, financial institutions and communications companies.

US law does not require online companies to honour consumers' 'do not track' settings. However, California law typically requires entities operating online to state how the entity treats 'do not track' requests.

California also recently passed the California Consumer Privacy Act of 2018. Like the GDPR, the new law gives Californians the right to know what personal information a business has collected about them, the source of the information, how the business uses the information, and to whom the business sells the information. Beginning in 2010,

Californians also will be able to demand the deletion of their data and to opt out of the sale of their data to third parties. It is expected that this new law will spur other states to take similar action, and to increase pressure for action at the federal level.

Data localisation

15 | Are there any laws or regulations that require data to be stored locally in the jurisdiction?

The United States has not adopted laws or regulations requiring that data be stored locally in the United States. Nevertheless, in some cases, Team Telecom imposes data localisation requirements in security agreements and assurances letters as a condition for the grant of a licence or consent for a merger or acquisition. In such cases, Team Telecom may require that such data be stored only in the United States, or that copies of such data be made available in the United States. Such requirements are controversial, as they extend extraterritorially the reach of US law enforcement jurisdiction.

The United States' lack of data localisation requirements has driven US law enforcement to take an aggressive approach to their ability to access data that allegedly relates to unlawful activity occurring in the United States but is stored in a different country. The Supreme Court heard an argument earlier this year from Microsoft, challenging the federal government's position on the extraterritorial reach of US warrants. That case was dismissed as moot following passage of the Clarifying Lawful Overseas Use of Data (CLOUD) Act. The CLOUD Act amends the Stored Communications Act of 1986 to allow US law enforcement to compel (via warrant or subpoena) US-based technology companies to provide data stored on servers regardless of whether the data are stored in the US or on foreign soil.

Key trends and expected changes

16 | Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

IP transition/convergence

Both Congress and the FCC continue to tackle how best to update US telecommunications laws in light of the technological changes and service convergence brought about by digitisation and IP networks. As described above, the FCC has modernised all of its universal service support programmes to support broadband services (the high-cost support programme, the schools and libraries programme, the rural healthcare programme and the low-income programme). The Republican-led Congress continues to consider a fundamental update of underlying telecommunications laws. At the time of writing, there has been little movement on such an update.

Spectrum/wireless

The FCC and US government continue to attempt to find spectrum to make available for both licensed and licence-exempt services, particularly mobile broadband. There are several important ongoing proceedings on this topic.

The FCC recently concluded an incentive auction that allowed television broadcasters to relinquish spectrum rights in the 600MHz band in exchange for auction revenues (the reverse auction) and assign the returned spectrum for flexible use (the forward auction) by licensed and unlicensed networks. Because there is little other opportunity for commercial access to spectrum below 1GHz, the FCC has also adopted spectrum-aggregation rules to address the amount of such spectrum that any single provider can hold. This auction produced 84MHz of spectrum for licensed mobile broadband services. The process of 'repacking' the remaining broadcasters and opening this band for auction winners will be a major endeavour of the FCC over the next several years.

The FCC recently allowed commercial users to share the 3.5GHz band with government and non-government incumbents, on a secondary basis. The FCC adopted an innovative three-tier approach that would make incumbents primary, a set of licensees that acquire licences secondary exclusive and a tertiary tier of licensed-by-rule users (similar to traditional unlicensed operations). FCC proceedings are also under way to put in place a database system to govern use and interference.

The FCC is considering permitting unlicensed devices to operate in the UNII-4 sub-band of the 5GHz band, where Intelligent Transportation Services is the incumbent licensee.

The FCC recently permitted additional terrestrial licensed and unlicensed wireless operation in the 'millimetre wave' bands above 24GHz. It auctioned spectrum in the 28GHz band and 24GHz band in November 2018, and has proposed to auction spectrum in the 37, 39 and 47GHz bands in the second half of 2019. Standardisation of the new unlicensed millimetre wave band is already well under way in private standards bodies.

In 2018, the FCC initiated proceedings seeking comment on: (i) transitioning some or all of the 3.7–4.2GHz band (currently used for FSS earth stations and fixed microwave stations) to terrestrial fixed and mobile broadband service and examining various proposals for expanding flexible use of the band; (ii) opening up the 6GHz band (allocated to point-to-point microwave links, fixed satellite system uplinks and mobile services) to unlicensed use; (iii) developing GHz bands that currently impose limited educational use requirements and restrict licence uplinks and mobile services) to unlicensed use; and (iv) developing rules for spectrum above 95GHz. It has also issued a notice of inquiry seeking input on potential uses of 'mid band' spectrum for licensed and unlicensed wireless broadband deployments and has sought comment on making 2.75GHz of additional spectrum in the 26 and 42GHz bands available.

Finally, the US Congress recently passed legislation requiring the FCC and the National Telecommunications and Information Administration to identify 255MHz of additional spectrum for mobile and fixed wireless broadband use, including not less than 100MHz of spectrum below 6GHz for exclusively licensed commercial mobile use (subject to potential continued use by federal entities) and not less than 100MHz of spectrum below 8GHz for unlicensed operations.

Public mobile service competition

When the US DOJ challenged the AT&T/T-Mobile merger, it strongly suggested that it was necessary to maintain at least four national public mobile service providers. Whether this is true, and, if so, what regulatory steps are necessary to secure it, will remain issues, before both the FCC and the DOJ antitrust division. The FCC, however, has taken steps to strengthen its rules limiting data roaming rates, and has conditionally reserved some spectrum below 1GHz for providers other than the two largest nationwide mobile wireless carriers.

Delayed market entry owing to national security reviews; prospect of reform

In 2016, the FCC initiated a proceeding to reform the Team Telecom review process to provide greater transparency and timing certainty for national security reviews of foreign ownership for new FCC licences and mergers and acquisitions involving FCC licensees. That proceeding remains pending, having been suspended by the FCC at the end of 2016 owing to concerns about the propriety of a lame-duck FCC initiating major reforms in advance of the presidential transition. The US national security reviews by Team Telecom and CFIUS have long generated considerable anxiety among foreign investors and equipment and software suppliers considering US entry. Continuing disclosures about US government spying have exacerbated concerns both about the purpose of those reviews and about delays in future reviews as the agencies

adjust. Notwithstanding US WTO commitments to make publicly available the licensing criteria and 'the period of time normally required to reach a decision concerning an application for a license', there remains little predictability in the process or timing for obtaining a new licence or transaction approval involving foreign investment in a telecommunications provider. Reviews and conditions can affect corporate governance, personnel and other operational matters, with investments from particular countries (eg, China and the Gulf states) and by sovereign wealth funds subject to considerable scrutiny. Although the supply arrangements do not require direct US government approval, the US government can nevertheless foreclose supply opportunities indirectly by imposing market-entry conditions on investors. In rare circumstances, the US government has sought to pressure US carriers in procurements unrelated to foreign-investment transactions, particularly where US government agencies are customers of the carriers. As discussed further in response to question 28, in 2018, the US Congress passed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to expand further the CFIUS review process over transactions involving real estate, critical infrastructure, critical technology, or sensitive information of US persons and to reform US export controls. In contrast to earlier versions of the legislation, FIRRMA does not expressly address countries 'of special concern'; however, (i) FIRRMA tasks CFIUS with defining 'foreign person' in terms of connections to a foreign country or government and potential effects on US national security; and (ii) CFIUS may consider whether a covered transaction involves a country of special concern that has demonstrated or declared the strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US leadership in areas related to national security.

Disabilities access

Following a major expansion in 2010 of disabilities access requirements to non-interconnected as well as interconnected VoIP, electronic messaging and interactive video conferencing, and software and equipment (including internet browsers) used to access such services, the FCC has begun to receive, investigate and adjudicate complaints. In December 2016, the FCC approved rules to enable carriers and device manufacturers to satisfy certain disabilities access requirements through the use of IP-based real-time text technology rather than traditional teletypewriter equipment. Companies have also faced growing pressure, including consumer lawsuits brought under the Americans with Disabilities Act, to make their websites and mobile applications compatible with screen reader technology and meet other accessibility-related requirements. Courts have taken differing views on the application of the Americans with Disabilities Act to websites and apps.

Initiatives to prevent illegal calls

In the past two years, the FCC has focused heavily on the prevention of illegal calls, such as calls that are abusive or fraudulent, autodialled or pre-recorded calls made without the necessary level of consent and calls made to consumers who are on a legally mandated 'do not call' list. The FCC has adopted limited changes to its rules about call blocking to encourage providers to block presumptively illegal calls, to share information necessary to identify illegal calls and to take other measures to prevent illegal calls from reaching consumers. In particular, in the reassigned number context, the FCC has (i) established a single, comprehensive database of reassigned number information from each provider that obtains North American Numbering Plan (NANP) US geographic numbers, including toll free numbers; and (ii) adopted a safe harbour from TCPA liability for those callers that choose to use the database to learn if a number has been reassigned. The FCC also continues to consider other methods of blocking unlawful calls, including the use of Signature-based Handling of Asserted Information Using toKENs (SHAKEN) and Secure Telephone Identity revisited (STIR) standards.

MEDIA

Regulatory and institutional structure

17 Summarise the regulatory framework for the media sector in your jurisdiction.

The United States regulates the delivery of television and audio radio signals differently depending on how those signals reach the end user. Broadcast television in the United States refers only to the delivery of signals over the air directly to a television. Cable television refers to the delivery of signals to a television through a terrestrial 'cable system' with distinct rules from those governing over-the-air television. Direct-to-home satellite refers to the delivery of signals to a television through the use of a satellite antenna and is subject to yet another set of rules. The FCC also classifies cable, satellite and similar providers as 'multichannel video programming distributors' (MVPDs) and subjects them as such to additional rules. Over-the-top, or OTT, delivery refers to the delivery of video programming over the internet. On the audio side, broadcast radio refers to the delivery of audio signals over the air, while satellite digital audio radio service refers to the delivery of audio signals over satellite. Our responses to questions about 'broadcasting' in this chapter refer to all of these types of delivery.

Television stations now transmit in a digital format called ATSC 1.0. The FCC recently granted them authority to transmit in a new digital format, ATSC 3.0, which will permit them much greater flexibility in the content and services they provide. Television stations will thus have considerable leeway to offer additional services subject to little or no regulation.

OTT video and audio delivery has not been definitively addressed by the FCC, and efforts for it to do so appear stalled. The FCC previously proposed to classify such providers as MVPDs, subjecting them to some (but not all) rules that now apply to cable and satellite providers. Action on this item, however, is unlikely, leaving OTT services largely unregulated for the time being. OTT delivery is also subject to copyright rules, with disputes pending or recently resolved before several courts. Congress may address this issue when it considers reauthorisation of expiring satellite television legislation at the end of this year.

The FCC does not regulate the delivery of audio or video services to mobile devices as broadcasting, although US copyright laws apply. As such delivery becomes more common, however, the FCC is likely to increase its regulation of such services. For example, the FCC now requires programming delivered to most mobile devices to be close-captioned and has begun to require such devices to decode and render such captioning.

Ownership restrictions

18 Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

Media ownership is subject to restrictions on:

- ownership of multiple broadcast television stations in a single market;
- ownership of broadcast television stations reaching a certain percentage of the population (known as the 'national ownership cap');
- ownership of broadcast radio stations within a local market;
- service to a certain percentage of the population by a single cable operator;
- ownership by a cable operator of a certain percentage of the channels it carries; and

- ownership of two or more of the 'top four' television networks (ABC, CBS, FOX and NBC).

In November 2017, the FCC eliminated several ownership rules, including one that had prohibited cross-ownership of broadcast and radio stations within a local market and another that had prohibited cross-ownership of television and radio stations in the same geographic area. It also substantially relaxed the limitation on ownership of multiple television stations in a single market – in some cases, permitting applicants to request such combinations on a case-by-case basis. The FCC is considering further relaxation of local television ownership rules, as well as potential relaxation or elimination of the national ownership cap.

Neither the FCC nor state or local franchising authorities impose foreign-ownership or other ownership restrictions on cable networks, though the transfer and assignment of cable franchises almost always requires prior consent of the franchising authority (but not the FCC). The FCC restricts acquisition of local exchange carriers by cable operators in the same area, and vice versa.

US WTO commitments in basic telecommunications reflect US statutory restrictions on foreign ownership of broadcast licensees. In its commitments, the United States also took article II (most-favoured nation) exemptions for one-way satellite transmissions of direct-to-home and direct-broadcast satellite services and digital audio radio services. Regardless of WTO status, section 310 of the Communications Act prohibits a foreign government, corporation organised under foreign law, non-US citizen or representative of a foreign government or non-US citizen from directly holding a broadcast licence. Section 310(b)(3) limits direct foreign ownership in a US corporation holding a broadcast licence to 20 per cent, a limitation the Communications Act does not permit the FCC to waive. Section 310(b)(4) prohibits indirect foreign ownership in a broadcast or aeronautical licensee in excess of 25 per cent, unless the FCC finds that greater foreign ownership would serve the public interest. Historically, the FCC did not knowingly authorise indirect foreign ownership of a broadcast licensee in excess of 25 per cent. In November 2013, however, the FCC announced that it will review applications for approval of foreign investment in the parent company of a US broadcast licensee above the statutory 25 per cent benchmark on a 'fact-specific, individual case-by-case' basis. In May 2015, the FCC granted an application involving Pandora Radio for greater than 25 per cent indirect foreign ownership of a radio station. In September 2016, the FCC amended its foreign ownership rules for broadcast licensees, including changes to: (i) permit indirect foreign ownership up to 100 per cent upon a public interest finding; (ii) permit a previously authorised non-controlling foreign investor to increase its interest to 49.9 per cent without additional approval; and (iii) permit a previously authorised controlling foreign investor to increase its interest to 100 per cent without additional approval.

In enforcing all of these ownership rules, the FCC applies a complicated set of 'attribution' rules that include a broad range of financial or other interests denoting ownership, control and influence.

Licensing requirements

19 What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

Television and radio stations are licensed individually. Cable systems are not 'licensed' by the FCC, but instead are 'franchised' by state and local governments. Cable systems, however, often use satellite or wireless infrastructure licensed by the FCC. Direct-to-home satellites and certain satellite earth stations are licensed by the FCC. Licence applicants must pay an application fee that depends on the asset to be licensed. OTT internet video services are not licensed by any federal or state regulator.

As new licences are often unavailable or difficult to obtain, entities typically obtain broadcast and satellite assets through an assignment of the licence or a transfer of control of the entity controlling the RF licence, subject to the consent requirements described in questions 1 and 3. Assignment or transfer of control of cable franchises are usually subject to franchising authority consent.

OTT services are not licensed and will not be licensed even if the FCC classifies them as MVPDs.

Foreign programmes and local content requirements

20 Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

The United States does not regulate the carriage of foreign-produced programmes or impose local content requirements (except for low-power over-the-air television broadcasters). Cable operators must often carry public, educational and governmental programming chosen by the local franchising authority. Satellite carriers are subject to a similar public interest allocation. Over-the-air television broadcasters must air certain amounts of children's programming. Over-the-air television and radio broadcasters (but not cable and satellite carriers) are also subject to certain restrictions on indecent programming.

Advertising

21 How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

The FTC (among other entities) prohibits all entities from engaging in false and misleading advertising, regardless of the medium used. Advertisements covering topics that are heavily regulated may be subject to additional regulations, regardless of whether the ads appear on television, online or elsewhere. For example, advertisements for political candidates must include disclosures required by the Federal Election Commission and, in some instances, state law; advertisements for pharmaceuticals must meet stringent Food and Drug Administration requirements related to drug advertising.

Over-the-air television, cable and satellite providers are subject to FCC restrictions on advertising in children's programming and advertising of tobacco products. Over-the-air and cable television providers are further subject to FCC restrictions on the advertising of lotteries and certain games of chance, although this rule does not apply to truthful advertisements regarding casinos where casinos are legal. These restrictions do not currently apply to streaming online video. In 2013, the FCC adopted rules implementing the CALM Act, prohibiting commercial advertisements from being louder than the programming that surrounds them. These rules apply to broadcast television stations, pay-television programmers, and cable and satellite carriers, but not (yet) to internet video services. The FCC also requires broadcast stations to make public certain information about spots they sell for political advertisements.

Online advertisements are subject to a few additional restrictions beyond those that apply to advertisements generally. Under the Children's Online Privacy Protection Act (COPPA) and the FTC's COPPA rules, advertisers cannot use online ads to knowingly gather personally identifiable information from children under 13, to gather personal information through an online ad directed toward children, or to gather personal information through an online ad placed on a site directed toward children. Additionally, for advertising via email, the FTC's CAN-SPAM rules require that senders of commercial email identify emails as an advertisement, provide information about the identity and location of the sender, and provide a functional opt-out mechanism, among other requirements.

Must-carry obligations

22 Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Cable operators and direct-to-home satellite providers are subject to must-carry obligations with respect to the signals of over-the-air television broadcasters in their operating area. OTT internet providers are not, although the FCC's classification of OTT providers as MVPDs could result in them having comparable obligations.

Full-power, commercial broadcast television stations must submit an election to each cable or satellite carrier serving the station's 'local market' every three years. Those that elect 'must-carry' receive automatic carriage (with some exceptions) but cannot demand compensation. Those that elect 'retransmission consent' have no right to carriage, but also cannot be carried by distributors in the absence of a written agreement. In many cases distributors must pay such carriage rights, particularly for popular network affiliates. Neither the must-carry nor the retransmission consent regimes cover copyright issues, which are handled under separate, highly complex statutory licences. The FCC's recent order permitting television stations to transmit in ATSC 3.0 specified that cable and satellite operators need not carry signals in these new formats.

Regulation of new media content

23 Is new media content and its delivery regulated differently from traditional broadcast media? How?

New media content is very lightly regulated compared to content delivered by over-the-air broadcasting, cable and satellite. That said, as new media delivery begins to compete with and replace more traditional modes of delivery, the government will likely increasingly apply regulations. For example, disabilities access rules now require full-length video programming delivered using internet protocol (IP) to be closed-captioned if that programming is also delivered with captions via over-the-air broadcasting, cable or satellite. These rules also require a wide range of devices that are capable of playing video delivered over IP networks to display closed captions. In addition, new rules covering the accessibility of user interfaces for devices used to access video programming, which will take effect in less than two years, impose similar obligations on devices that receive content via IP networks and devices that receive content via more traditional delivery modes. FCC classification of OTT providers as MVPDs would add to this regulation by applying retransmission consent, programme access and other rules to such entities.

In addition, in 2014, the US Supreme Court determined that an entity that picks up free, over-the-air broadcast signals cannot send those signals to its customers over the internet without receiving copyright authorisation. Subsequent decisions have clarified that such entities cannot employ the statutory copyright licence reserved for cable systems.

Digital switchover

24 When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The switchover for most broadcast television stations occurred in 2009. The FCC reallocated that spectrum to commercial mobile services, some of which will be auctioned and some of which has been allocated to a nationwide public safety network. The switchover for low-power stations, however, remains ongoing, and some such stations still transmit in analogue. Television stations have sought authority to 'voluntarily' transmit in a new format, ATSC 3.0. Any such transmissions will involve issues similar to those raised by the switchover of analogue to digital. Low-power stations must complete the transition to digital broadcasting 12 months after the completion of the post-incentive auction transition described in question 16.

Digital formats

25 Does regulation restrict how broadcasters can use their spectrum?

No, but broadcasters must retain at least one channel of free, over-the-air broadcast programming, and remit 5 per cent of any income derived from ancillary services. As a practical matter, broadcasters transmitting in the current format, ATSC 1.0, have found it difficult to offer non-broadcast services. The new proposed format, ATSC 3.0, promises to give broadcasters more flexibility to offer such services.

Media plurality

26 Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

The United States does not expressly regulate media plurality, viewpoint diversity or similar concepts. As discussed in question 18, US ownership restrictions (eg, cross-ownership prohibitions) for particular media sectors serve to protect viewpoint diversity indirectly.

Key trends and expected changes

27 Provide a summary of key emerging trends and hot topics in media regulation in your country.

Ownership

The FCC recently relaxed or eliminated certain ownership restrictions, as described in question 18. It intends to consider further relaxation later in 2019.

Mergers and acquisitions

Numerous television broadcast ownership groups have sought permission to combine. We expect many additional such requests in the coming months.

REGULATORY AGENCIES AND COMPETITION LAW

Regulatory agencies

28 Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

General

The DOJ and the FTC regulate vertical and horizontal anticompetitive effects in the telecoms, broadcasting and new media sectors pursuant to general US antitrust laws, particularly the Sherman and Clayton Acts. The FTC also regulates unfair and deceptive trade practices in these and other sectors pursuant to the Federal Trade Commission Act. The FCC regulates competition-related issues in the telecommunications and broadcasting sectors under the Communications Act's public interest standard. State attorneys general enforce state-level competition and consumer protection laws, and private litigants enforce federal

and state competition laws through damages claims. While there is no single mechanism to ensure the consistent treatment of competition-related issues, the DOJ, the FTC and the FCC regularly coordinate their reviews in an attempt to avoid conflicting results and undue delay. Anticompetitive practices are controlled both through ex-ante and ex-post, sector-specific regulation and by general competition law. Jurisdiction among all regulators is concurrent. State and local authorities generally operate independently of the DOJ, the FTC and the FCC.

Merger control – antitrust agencies

All mergers, acquisitions and joint ventures that involve the transfer or assignment of FCC licences (including service under the blanket domestic common-carrier authorisation) require prior approval under the Communications Act, regardless of whether such transactions involve the telecoms, broadcasting or new media sectors. While the antitrust laws generally do not have a minimum jurisdictional threshold, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) requires that the DOJ and the FTC receive pre-merger notification if the transaction meets the 'size of transaction' or 'size of persons' thresholds. On 15 February 2019, the FTC released its annual changes to the HSR notification thresholds, which changes will be effective 30 days after publication in the Federal Register. Under the new thresholds, a transaction must be notified if: the voting securities and assets of the acquired person are valued at more than US$90 million and if one of the parties has sales or assets of at least US$180 million and the other party has sales or assets of at least US$18 million; or if the voting securities and assets of the acquired person are valued at more than US$359.9 million. DOJ and FTC reviews are generally subject to a minimum 30-day initial review period. In transactions subject to a 'second request' of the parties, the review can take significantly longer. Pursuant to the HSR Act, the DOJ and the FTC share jurisdiction for reviewing all mergers, acquisitions and JVs involving providers of telecommunications, broadcasting and new media, with the lead reviewing agency determined by sector or by transaction.

Merger control – FCC and state and local authorities

The FCC, PUCs and state or local franchising authorities also review mergers, acquisitions (including asset sales and licence transfers) and JVs that involve authorisations or franchises that they issue. Each of these processes is separate. For 'major transactions' involving significant competition or public-interest issues, the FCC reviews transactions pursuant to a suggested 180-day time frame, though it often stops and later restarts the clock, resulting in a lengthier review. For routine transactions, the specific procedures and timescales for approving licence transfers and assignments vary by licence type and by FCC bureau. The procedures and associated timescales for state and local reviews of transactions involving intrastate telecommunications providers and cable operators vary greatly from jurisdiction to jurisdiction; these state or local reviews, however, can take longer than the FCC's review.

Team Telecom

The Team Telecom agencies (see question 2) conduct national-security reviews of mergers and acquisitions in the telecoms and broadcasting sectors (and the new media sector, if there are FCC licences to be transferred or assigned in the transaction) and often require negotiation of security agreements or assurances letters prior to consummation. There are no formal procedures or established timescales for Team Telecom reviews, which can last from a few weeks to 18 months. The Team Telecom agencies do not act pursuant to any particular law. As noted in question 16, the FCC is driving reform of Team Telecom reviews.

CFIUS

Pursuant to section 721 of the Defence Production Act of 1950, the CFIUS reviews acquisitions of control (including mergers, acquisitions of stock or assets and JVs) by foreign persons of existing US businesses engaged in interstate commerce in any economic sector (known as 'covered transactions'). The CFIUS does not review 'greenfield' investments, whereby a foreign investor creates a new US business. The CFIUS scrutinises the impact of a transaction on national security and gives particular attention to foreign (and foreign-government) ownership of the acquirer and the US business's contracts benefiting US government agencies. CFIUS reviews are initiated by parties to a transaction or the CFIUS itself. Failure to obtain CFIUS clearance for a covered transaction gives the President the power to unwind the transaction at any point in the future. Unlike the FCC, which defines 'control' as majority equity ownership, voting control or management control, the CFIUS may consider as 'control' any prospective investment other than the acquisition of an outstanding voting interest of 10 per cent or less acquired solely for the purpose of passive investment. For a transaction involving CFIUS or Team Telecom review, the FCC will generally not grant consent without prior clearance by Team Telecom and the CFIUS. The CFIUS conducts an initial 45-day review of a covered transaction. It may subsequently conduct a 45-day investigation for a transaction involving more significant national security issues (and must do so for transactions that would result in foreign government control of a US business). If CFIUS cannot clear a transaction with the 45-day investigation period, it may extend the investigation for an additional 15 days, with a further 15 days for presidential action to block a transaction. In total, the CFIUS process should not last more than 120 days, although parties sometimes withdraw and refile transactions to provide the CFIUS with additional time for review.

Driven largely by concerns about China's strategic objectives with investments and critical technology acquisition, increasing complexity of transactions, globalised supply chains, US military dependence on commercial technology developments, new (particularly cyber- and data-related) national security vulnerabilities, and the inadequacy of other authorities (such as export controls) to mitigate national security risks, the US Congress passed FIRRMA, which became law on 13 August 2018. The Treasury Department is still working to fully implement FIRMMA. Among other things, FIRRMA:

- expands covered transactions to include other minority, non-controlling investments in US critical technology and critical infrastructure businesses or businesses that maintain sensitive person data that, if exploited, could threaten national security (with critical technology including not only items covered by existing export control regimes and already subject to CFIUS scrutiny, but also emerging and foundational technologies controlled pursuant to a new interagency process established by FIRRMA);
- expands covered transactions to include the purchase, lease or concession by or to a foreign person of private or public real estate in the US that is part of an air or maritime port, or that is in close proximity to a US military installation or another national security-related sensitive US government property;
- provides for special rules for investment funds, allowing such funds to avoid a review if they invest through a fund controlled exclusively by a US general partner, managing member, or equivalent, so long as the foreign investors' rights are consistent with a passive limited partner (pursuant to FIRRMA criteria);
- does not define 'country of special concern' but instead tasks CFIUS with defining 'foreign person' in terms of connections to a foreign country or government and potential effects on US national security and permits CFIUS to consider whether a covered transaction involves a country of special concern that has demonstrated or declared the strategic goal of acquiring a type of critical technology

or critical infrastructure that would affect US leadership in areas related to national security;

- creates a two-track system of filings – the current option of notices plus a new, more abbreviated system of declarations, which are mandatory for certain transactions, including many that involve foreign governments with a 'substantial interest' in the foreign investor (a term to be defined by CFIUS, although FIRRMA states that an interest of less than 10 per cent is not substantial) with the CFIUS to respond to a declaration within 30 days by:
  - clearing the transaction;
  - notifying the parties that it is unable to clear the transaction (giving the parties the option to file a notice to obtain such clearance);
  - inviting the parties to file a full-blown notice; or
  - self-initiating a review.

Appeal procedure

29 How can decisions of the regulators be challenged and on what bases?

Final FCC decisions (including new or revised FCC rules) are subject to judicial review. In reviewing licensing and rule-making decisions, courts evaluate whether the FCC acted arbitrarily, capriciously or otherwise not in accordance with the law. Courts defer to the FCC's reasonable interpretation of ambiguous statutory provisions. Decisions by FCC bureaux are subject to review by the FCC's commissioners; such review must be completed prior to any judicial review. Enforcement actions are subject to de novo review in federal trial courts, unless the FCC held an evidentiary hearing.

The DOJ antitrust division is a prosecutorial agency that must prove a case in federal district court, subject to appellate review. The FTC can either bring cases in the federal district court or adjudicate them before the full FTC, subject to judicial review.

State PUC decisions are subject to judicial review under state or federal law, depending on the subject matter.

In 2014, the US Court of Appeals for the District of Columbia ruled in *Ralls v Obama* that a presidential decision to suspend or block a transaction under section 721 of the Defence Production Act following CFIUS review must comply with constitutional due-process protections and provide an investor with access to non-classified evidence used in making a determination about whether to block a particular investment. The question of whether Team Telecom action or inaction is subject to judicial review has never been tested.

Competition law developments

30 Describe the main competition law trends and key merger and antitrust decisions in the communications and media sectors in your jurisdiction over the past year.

In 2018, the Department of Justice sued to enjoin AT&T's proposed take-over of Time Warner. AT&T (including its DIRECTV satellite television subsidiary) is the country's largest distributor of television programming. Time Warner is one of the most important content providers. The DOJ claimed that, post-merger, AT&T will be able to charge its rivals higher prices for Time Warner programming. The DOJ also claimed that AT&T will be able to use Time Warner programming to harm emerging online-only distribution rivals, such as DISH's 'Sling' product. In a departure from past practice, the DOJ argued that behavioural remedies (such as conditions) will not suffice to address these harms, and that the court must reject the proposed transaction altogether. AT&T responded, among other things, that it will lack the incentive and ability to engage in the conduct described by the DOJ, that the state of the current media market makes its proposed purchase both desirable and necessary, and that the consumer benefits of the transaction greatly outweigh what it describes as 'speculative' harms. In a unanimous decision in March 2019 dismissing the case and permitting the merger to move forward with no conditions, the US Court of Appeals for the District of Columbia Circuit found the government's claims unpersuasive and favourably noted the rapidly changing and dynamic industry, referencing the rise of new competitors. DOJ says it will not appeal the decision. This decision may pave the way for more vertical mergers going forward.

T-Mobile USA and Sprint, the third and fourth largest national wireless carriers in the US, are currently seeking FCC consent to merge. The DOJ is also reviewing the transaction in the second-request stage. If approved, Deutsche Telecom will be the single largest shareholder and will control the new company.

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