# Telecoms & Media 2020

Contributing editors
**Alexander Brown and Peter Broadhurst**

LEXOLOGY
Getting The Deal Through

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**Alexander Brown and Peter Broadhurst**
Simmons & Simmons LLP

Lexology Getting The Deal Through is delighted to publish the 21st 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 new chapters on Egypt, Pakistan and Philippines.

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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.

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**Publisher**
Tom Barnes
tom.barnes@lbresearch.com

**Subscriptions**
Claire Bagnall
claire.bagnall@lbresearch.com

**Senior business development manager**
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Harris Wiltshire Grannis LLP



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# Introduction

**Alexander Brown and Peter Broadhurst**
Simmons & Simmons LLP

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, the chaos caused by the spread of covid-19 and the ensuing lockdown and social distancing measures introduced by governments across the world is having and will continue to have a significant impact on many businesses. That impact is being felt during the pandemic and will, undoubtedly, be felt for some time to come. Although many parts of the technology, media and telecom (TMT) sector are not as much exposed to the effects of the public health emergency as some more vulnerable sectors (like retail, leisure and hospitality), the TMT sector is not entirely immune to the negative consequences of the virus. The greatest losses are being suffered by the businesses relying on live entertainment or content. There are also challenges to telecoms networks' capacity or streaming services (albeit that comes through greater use or subscription to those services).

On the other hand, the switch to digital forced by the covid-19 crisis has given many TMT companies opportunities for growth in meeting demands of consumers seeking new solutions for home working, home schooling and indoor entertainment. The pandemic has also accelerated development of new technologies and the TMT sector continues to play a vital role in combating the spread of the virus through contact tracing and population movement tracking applications. These innovative uses of data may present interesting regulatory challenges in such fields as privacy and data protection, especially if those solutions are retained in the medium term or used for new purposes in the future.

There may also be longer-term legal and regulatory implications for the TMT sector. For instance, given the reliance that people in many countries have placed on fixed and mobile broadband connectivity it is possible that governments may revisit rollout obligations and universal service obligations associated with fixed and mobile broadband. However, that desire to improve connectivity may well have to be adjusted to take account of funding (both within the public and private sectors) being likely to be somewhat constrained in the aftermath of the covid-19 crisis.

On another topic, and more parochially, the UK left the EU on 31 January 2020 with a transition period in place ending on 31 December 2020 (unless extended) during which EU law will continue to apply to the UK. This enables the UK to continue participating in the customs union and single market, but also means that the UK will need to implement EU laws the transposition date of which falls within the transition period. Accordingly, the UK confirmed that it will implement the European Electronic Communications Code, which is of relevance for the telecoms sector, but indicated that it has no plans to implement the Digital Copyright Directive, the implementation deadline of which falls outside the currently agreed transition period.

The UK still faces a great deal of uncertainty surrounding Brexit implications. The unforeseen spread of covid-19, the resulting delays in talks on the UK–EU future relationship and implementation of the Withdrawal Agreement, combined with the UK's reluctance to extend the transition period, mean that the UK may struggle to agree the post-Brexit terms of trading with the EU before the end of the transition period. As a result, some sectors, including the TMT sector, may still be affected by a 'no-deal' scenario. The uncertainties contemplated in last year's edition of this publication, such as the European Commission's adequacy decision in relation to the UK's data protection regime, the ability of UK providers to broadcast in the EU and the resurgence of roaming charges for UK operators, are still relevant and remain unresolved.


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# Brazil

Mauricio Vedovato and Daniela Maria Rosa Nascimento
Huck Otranto Camargo

## 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 No. 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.

### 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


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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 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



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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) 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.



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### 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 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 General Telecommunications Law (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



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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.

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, the General Telecommunications Law (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.



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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.

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, 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.

**Maurício Vedovato**
mauricio.vedovato@lhoc.com.br

**Daniela Maria Rosa Nascimento**
daniela.nascimento@lhoc.com.br

Av. Brigadeiro Faria Lima, 1744
11th Floor, Jd. Paulistano
São Paulo, 01451-910
Brazil
Tel: +55 11 3038 1000
Fax: +55 11 3038 1100
www.lhoc.com.br



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# China

Jingyuan Shi, Ryo Lu and Jenny Liu
Simmons & Simmons LLP

## 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 2019. 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 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 the domestic telecoms business has been increasing. Consequently, the government further lifted restrictions on foreign investment in a number of VATS businesses.

Foreign investment restrictions on e-commerce were liberated as early as 2015. The 2019 Negative List further removed foreign investment restrictions on store-and-forward services, call-centre services and domestic multi-party communications services; this means that foreign investment may hold up to 100 per cent equity in these businesses.

Additionally, the following types of VAT were opened up to foreign investment in all Free Trade Zones in China since 2018.

| VATS business | Liberation for foreign investment restrictions in telecoms business in all Free Trade Zones in China |
|---|---|
| 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. |
| 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, comprise fixed telephone numbers, mobile phone numbers, radio frequencies and satellite trajectory positions used in mobile and satellite communications, and 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 applications for telecoms operational licences, in which case, 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 and 2019.


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### 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 categorise 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.



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**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-streaming platforms, the Administrative Rule on Internet Live-streaming Service (the Live-streaming Rule) issued by the Cyberspace Administration of China (CAC) and effective as of 2016 applies. The Live-streaming Rule provides for, among others, that the live streaming 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 the operation of P2P lending platforms, the Provisional Measure for Administration of Network Lending Information Intermediate Services (the 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.

From 2017 to 2019, the Chinese government and relevant regulatory authorities issued various regulations governing the P2P online lending industry. The main purpose was to regulate P2P industry behaviour and enhance supervision of the industry.

With respect to the operation of online education in the form of mobile app, the Administrative Measures for the Archival Filing of Mobile Internet Education Applications (the Measures for Education App) issued by Ministry of Education in November 2019 apply. The Measures for Education App requires education app service providers and institutional users to apply for registration on National Education



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Resource Public Service Portal (http://app.eduyun.cn/). The registration processes for educational app providers and institutional users are different. Educational app providers must complete an Internet Content Provider (ICP) filing and Cybersecurity Multi-level Protection (MLP) registration before applying for the registration of the educational app, while the institutional users of educational app do not need to apply for an ICP filing and Cybersecurity MLP registration, but can only register to use an educational app that has completed the provider registration process.

**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?

There is no single comprehensive law that specifically applies to the communications sector. Data protections applicable to the communications sector are distributed in different regulations and measures.

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 Guideline on Internet Personal Information Security Protection (the Guideline), promulgated by the Ministry of Public Security (MPS) in April 2019, applies to companies providing services via the internet. It sets out detailed requirements on how personal information holders should protect personal information throughout the information life cycle, covering the collection, retention, use, deletion, third-party processing, sharing, transfer and disclosure of personal information. While the Guideline is not a mandatory regulation, it sets out the best practice recommended by MPS and will likely serve as an important reference in the process of law enforcement.

In addition to the above, some non-mandatory national standards also provide detailed and practical guidance for market players on the best practice of data protection.

The Legal Committee of the National People's Congress Standing Committee announced in December 2019 that the enactment of the law on personal data protection and security is a priority in the next legislative year (2020). Specific details about the new laws are not available for the public yet, but it is anticipated that the new laws will consolidate pre-existing data protection principles in China into a single instrument.

**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, effective on 1 June 2017, remains the key piece of law regulating cybersecurity in China. 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.

**Cybersecurity obligations of network operators**

The Cybersecurity Law requires network operators (an operator is 'the owner or manager of a network or a network service provider') to implement the cybersecurity multi-level protection scheme and take the following measures to safeguard networks from interference, destruction or unauthorised access, and to prevent network data from being leaked, tampered with or stolen:

- to establish internal cybersecurity policies and procedures, appoint a cybersecurity officer and implement the cybersecurity obligations;
- to implement proper technical measures to prevent computer viruses and cyberattacks, network intrusions and other harmful acts of network security;
- to implement technical measures to monitor and record network operation status and network security incidents, and retain relevant network logs for at least six months; and
- to implement measures such as data classification, backup of important data, and encryption.

**Extra burdens on critical information infrastructure operators**

The Cybersecurity Law imposes the following extra security obligations on operators of critical information infrastructure (CII), which 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:

- to establish special security management institutions, designate persons in charge of security management and conduct security background checks on those persons in charge and personnel in key positions;


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- to conduct cybersecurity education, technical training and skill assessment for employees on a periodic basis;
- to perform disaster recovery backups of critical systems and databases;
- to formulate emergency response plans for cybersecurity incidents and organise periodic drills;
- to conduct security reviews for the procurement of products and services that may affect national security;
- to enter into confidentiality agreements with suppliers;
- to store personal information and important data collected and generated by CII operators during their operation in China; or, if necessary, conduct security assessment prior to transferring such data outside of China; and
- to conduct a network security assessment at least once a year, internally or using an entrusted cybersecurity service institution, and report the results and any improvement measures to competent authorities responsible for the security protection of such CII.

**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 CII collect in China must be stored in China. Some draft regulations and non-mandatory guidelines expand the applicability scope of data localisation and security assessment from CII operators to all network operators.

Additionally, several sector-specific regulations require certain types of data or facilities to be stored within China. For example:

- 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;
- data about personal creditworthiness that credit rating institutions collect in China;
- operational and financial data of insurance companies established in China;
- servers of online car-hailing service providers;
- servers of online publishing houses that operate in China;
- servers storing map data of internet map services providers; and
- servers of off-campus online training providers.

### Key trends and expected changes

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

Telecom operators in China were conservative in their approach to eSIMs a few years ago. However, as the internet of things (IoT) has developed rapidly, their attitudes have recently started to change. Currently, eSIMs have not been formally permitted nationwide in China, but have been permitted on a trial basis in several cities such as Shanghai, Shenzhen, Guangzhou and Tianjin by the three Chinese telecom operators (China Unicom, China Mobile and China Telecom) since 2018.

On 13 December 2019, China Unicom obtained an approval from the MIIT to expand its eSIM pilot adoption nationwide. However, the approval is subject to some restrictions; for example, the eSIMs shall be used in the IoT area, and the use of eSIMs should be limited to data business and related direct voice or direct text messaging services.

It is unclear when MIIT will approve the nationwide adoption of eSIMs. An MIIT response on its official website (Q&A webpage 21 October 2019) says MIIT is in the process of organising telecom operators to carry out local testing of eSIM equipment and related services. Subject to satisfactory testing results, it will approve broader scope of eSIM application.

## 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 regulators are the National Radio and Television Administration (NRTA) and the State Administration of Press and Publication (SAPP), which were established in 2018 and replaced the original State Administration for Press, Publication, Radio, Film and Television (GAPP), and the CAC. Some functions and powers of these authorities overlap.

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



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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 last amended in 2018;
- 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;
- examine 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.

The SAPP has the authority to:
- 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; and
- 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.

The CAC has the authority to regulate various forms of social media services and information services on the internet, such as microblogging, online news, online forums and communities.

### 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 types of 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.

### 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 Ministry of Industry and Information Technology (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 content review 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.



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### 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 GAPP (now NRTA and SAPP), 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?**

While China previously had a number of separate regulations governing the delivery of content on new media, the newly issued Provisions on the Governance of the Online Information Content Ecosystem (the Provisions) consolidate the previous rules into a more coherent system of comprehensive rules for the content on the internet. The Provisions were issued by the CAC in December 2019 and took effect on 1 March 2020.

The Provisions apply to content producers, content service platforms and content users, and online information is categorised into three types according to the content nature:

- encouraged information: refers to information reflecting Chinese culture, publicising the socialist theory, regime and values, responding effectively to social concerns, etc. Content producers are encouraged to produce and publish this information, and content service platforms are encouraged to actively display such information in prominent online locations such as home pages, pop-up windows, hot topic or default search lists and other key areas that can easily attract attention;
- illegal information: such as content vilifying national heroes, jeopardising national security and national honour, propagating terrorism and racialism. Content producers are prohibited from making, replicating and publishing any illegal information, and content service platforms must not disseminate any illegal information; and
- ill-natured information: such as contents involving sexual innuendos, violence, scandals. Content producers and content service platforms are required to prevent and resist the production, replication or publication of ill-natured information.

The Provisions also encourage content users to participate in governance of the network information ecological system and in oversight of illegal and ill-natured information by filing complaints and reports.

### 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 GAPP (now NRTA) is to install modems that switch digital signals to analogue signals in every home where traditional televisions are still used and the GAPP (now NRTA) ordered that, before that 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 to occupy the 700MHz radio frequency.



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### 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?**

The concept of media plurality is not directly and explicitly provided in Chinese laws. In general, media in China are encouraged to follow mainstream values and promote 'positive energy' (meaning merits).

In particular, media products and services specially designed for ethnic minorities are also encouraged. According to the State Council's Opinions for the Further Development and Prosperity of the Cultural Cause of the Minority Ethnic Groups that came out in 2009, the government shall provide greater support to news media for ethnic minorities, as well as radio, television and film production and broadcasting for ethnic minorities.

Besides this, China's Law on General Spoken and Written Language, which came into effect in 2001, provides that dialects may be used in television, films and broadcasting, subject to approval from state or provincial authorities of radio and television where applicable.

### Key trends and expected changes

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

With the implementation of the Provisions on the Governance of the Online Information Content Ecosystem, the government will strengthen oversight of online content, especially against content posted on social media platforms.

The CAC released a new set of draft privacy guidelines for app operators in May 2019, which outline seven situations that constitute the illegal collection and use of personal data by mobile apps. The government will continue to strengthen data protection on social media platforms.

## 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 Ministry of Industry and Information Technology (MIIT) regulates the telecoms business, including basic telecoms services and value-added telecoms services. The National Radio and Television Administration (NRTA), State Administration of Press and Publication and Cyberspace Administration of China regulate the media businesses, including press publication, audio and video products publication and online content services. The convergence of internet, mobile networks and cable TV networks created conflict in jurisdictions among the above-mentioned authorities. For example, both MIIT and NRTA 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 State Administration for Press, Publication, Radio, Film and Television (GAPP) (now NRTA) must focus on the regulation of the content itself.

Before China's government restructuring 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 the government restructuring in 2018, 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.

### 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 state-level authorities or their local counterparts: one is administrative review and the other is administrative litigation.

In brief, an administrative review is an internal procedure under which a decision of certain functional department of a government (provincial level or below) is reviewed by the government or by the relevant functional department of higher level. If the decision is made by a local government (municipal level or below) itself, it shall be reviewed by a government of higher level. If the decision is made by a provincial government or a ministry, it shall be reviewed by the same authority that makes it. 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.

An administrative litigation is a judicial proceeding against the authority that makes the administrative decision, or the authority that

simmons + simmons

**Jingyuan Shi**
jingyuan.shi@simmons-simmons.com

**Ryo Lu**
ryo.lu@simmons-simmons.com

**Jenny Liu**
jenny.liu@simmons-simmons.com

10/F
China Construction Steel Structure Building
3331 Zhongxin Rd
Nanshan, Shenzhen
518000
China
Tel +86 755 8656 7720
www.simmons-simmons.com



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carries out the administrative review, where applicable. The trial 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 filing an administrative litigation 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 file a lawsuit 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 unfair competition and antitrust issues in communication and media areas. On 2 January 2020, a drafted version of amended Antitrust Law was released by SAMR for public comments. The amendment is aimed at extending the Antitrust Law to internet businesses. It proposes factors to be considered when determining market dominance by internet operators. The proposed factors include network effects, economy of scale, lock-in effect, and capability of controlling and processing data. As such, the internet sector has become, and may continue to be for some period, one of the enforcement priorities in China.



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# Egypt

Mohamed Hashish
Soliman, Hashish & Partners

## COMMUNICATIONS POLICY

### Regulatory and institutional structure

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

Egypt is one of the three largest economies in Africa and is strategically positioned at a crossroads between the East and West, making the country a significant player in international trade in the Middle East and Africa region. Egypt is home to the Suez Canal, which connects the Mediterranean Sea with the Red Sea and is a key artery in global trade.

The total area of Egypt is 1,001,450 square kilometres, including 995,450 square kilometres of land and 6,000 square kilometres of water. According to the Egyptian Central Agency for Public Mobilisation and Statistics, the population reached more than 100 million people in 2020. Egypt is divided into 27 governorates, 217 cities and 4617 villages. The governorates with the highest population are Cairo (10.8 per cent), Giza (8.6 per cent) and Sharqiyya (7.4 per cent).

The Egyptian government has been working hard to attract more foreign direct investment (FDI) to the country, and these efforts resulted in recognition for Egypt as one of the top five destinations globally for greenfield FDI in 2016. Also, in 2016, Cairo was named as one of the top 10 cities in the world to found a tech-start-up.

According to the latest 'fDi Report 2020' issued by *fDi Intelligence*:

> *Egypt replaced South Africa as the second ranked destination by projects in the region, experiencing a 60 per cent increase from 85 to 136 projects.*

This ranking covers both Middle East and African regions. Software and IT services are the top project sectors.

Furthermore, Egypt also managed to top all ranked countries in Middle East and African regions for capital investment in 2019 by acquiring 12 per cent capital investment with a total value of $13.7 billion.

The telecom sector in Egypt is mainly governed by the Telecoms Law (10/2003). In addition, there are several other key laws and regulations related to the telecom sector, including the following (as amended to date):

- Penal Code (58/1937);
- Presidential Decree (236/1985) approving the International Telegraph (currently Telecommunication) (ITU) Convention, which ITU Convention entered into force in Egypt as of 10 October 1985;
- Presidential Decree (379/1999) regulating the Egyptian Ministry of Communication and Information Technology (MoCIT);
- E-signature Law (15/2004) and its Executive Regulation;
- Economic Court Law (120/2008); and
- Cybercrime Law (175/2018).

The National Telecommunication Regulatory Authority (NTRA) is mainly empowered by the Telecoms Law to regulate and enhance telecommunication services in Egypt. In addition to NTRA, other key entities are involved in the telecom sector:

- MoCIT is empowered by the Presidential Decree (379/1999) to, inter alia, expand, regularly develop and improve communication and information services as well as encourage investment in the telecoms sector based on the antitrust basis;
- the Information Technology Development Agency (ITDA) is empowered by the E-signature Law to, inter alia, promote and develop the information technology and communication industry, support small and medium-sized enterprises in using e-transaction and regulating e-signature services activities; and
- the Economic Court has executive jurisdiction over settling litigation related to the Telecoms Law.

### Authorisation/licensing regime

2 | Describe the authorisation or licensing regime.

By virtue of the Telecoms Law, no one is allowed to establish or operate any telecom network, provide any telecom service to third parties, transmit international calls or announce doing so unless a licence is obtained by NTRA.

The term telecom is defined by the Telecoms Law as 'any means of sending or receiving signs, signals, messages, texts, images or sounds of whatsoever nature and whether the communication is wired or wireless'.

The restriction above does distinguish between the different types of telecom services and includes one exception only for establishing or operating a private network that does not any use wireless system.

In practice, telecom services are generally classified as follows:

| Main service | Sub-service |
|---|---|
| Fixed services | Fixed telephony |
| | Virtual fixed telephony |
| | Access |
| International services | International gateway |
| | International submarine cable |
| Data services | Class A |
| | Class B |
| | Class C |
| | Global peering |
| | Registrar |


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| Main service | Sub-service |
|---|---|
| Cellular | Mobile services |
| | Bulk SMS (one to many) |
| | VAS |
| | Wireless trunk |
| Satellite services | Nilesat |
| | VSAT |
| | GMPCS |
| | Navigation services (aviation/maritime) |
| Infrastructure leasing | Infrastructure |
| | Towers |
| AVL | |
| Accounting authorities | |
| Wireless institutes | |

The licence of each telecom service allows the relevant licensees to provide such service within a very specific scope.

Generally, all licences are granted by virtue of a licence agreement with NTRA noting that all licences for major services (eg, fixed telephony and cellular) are granted by NTRA through a bidding process. However, the other licences may be granted by NTRA upon request. This request is required to be assessed from different perspective including, inter alia, the market demand and the financial and technical adequacy of the applicant.

Licences are granted for a period between one and 15 years, depending on the services that are the subject of such licences.

NTRA applies a different fee structure for issuing licences for each type of service as per the following examples:

| Service | Applicable fees and security |
|---|---|
| Wireless infrastructure leasing | • A one-time licensing fee of 50,000 Egyptian pounds;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 10,000 Egyptian pounds plus the inflation rate declared by the Central Bank of Egypt (CBE); and<br>• a performance bond of 500,000 Egyptian pounds. |
| Registrar | • A one-time licensing fee of 50,000 Egyptian pounds;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 10,000 Egyptian pounds plus the inflation rate declared by CBE; and<br>• a performance bond of 20,000 Egyptian pounds. |
| GMPCS | • No one-time licensing fee;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 1,000 Egyptian pounds plus the inflation rate declared by CBE;<br>• annual charges for the equipment of the licensee's subscribers; and<br>• a performance bond of 150,000 Egyptian pounds. |
| Access | • A one-time licensing fee of 1 million Egyptian pounds;<br>• 8% of the total annual revenues;<br>• a licence burden annual fee of 500,000 Egyptian pounds plus the inflation rate declared by CBE;<br>• annual charges for the equipment of the licensee's subscribers; and<br>• a performance bond of 50 million Egyptian pounds. |
| Class A | • No one-time licensing fee;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 10,000 Egyptian pounds plus the inflation rate declared by CBE; and<br>• a performance bond of 500,000 Egyptian pounds. |
| Class B | • No one-time licensing fee;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 10,000 Egyptian pounds plus the inflation rate declared by CBE; and<br>• a performance bond of 150,000 Egyptian pounds. |
| Global peering | • No one-time licensing fee;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 10,000 Egyptian pounds plus the inflation rate declared by CBE; and<br>• a performance bond of 200,000 Egyptian pounds. |
| Bulk SMS (one to many) | • A one-time licensing fee of 500,000 Egyptian pounds;<br>• 3% of the total annual revenues;<br>• a licence burden annual fee of 1,000 Egyptian pounds plus the inflation rate declared by CBE;<br>• annual charges for the equipment of the licensee's subscribers; and<br>• a performance bond of 500,000 Egyptian pounds. |
| VAS | • An upfront royalty fee of 3 million Egyptian pounds;<br>• 3% of the total annual revenues;<br>• a licence renewal fee of 1 million Egyptian pounds;<br>• a licences and liability fee of 20,000 Egyptian pounds; and<br>• a cash deposit guarantee of 500,000 Egyptian pounds. |
| VSAT | • No one-time licensing fee;<br>• 3% of the total annual revenues;<br>• frequency charges to be determined on a case by case basis;<br>• a licence burden annual fee of 1,000 Egyptian pounds plus the inflation rate declared by CBE; and<br>• a performance bond of 100,000 Egyptian pounds. |

### 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?**

All spectrum licences generally specify the permitted use and are not tradable or assignable, fully or partly, by virtue of the Telecom Law unless a prior approval is obtained from the NTRA. In addition, all licence agreements include a change of control restriction, so that the licensee may not even merge with any third party unless prior written approval is obtained from the NTRA.

### Ex-ante regulatory obligations

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

All licences are required, by virtue of the Telecoms Law, to include a number of ex-ante provisions with respect to transparency, price control, cost accounting, accounting separation, access to and use of specific network facilities and non-discrimination.

For example, the NTRA has the right to review any audited financial statement including, inter alia, appointing an auditor other than the licensee's auditor to review the said financial statement. Furthermore, each licensee is required to obtain an approval from the NTRA before applying tariffs or changing them.

### 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 the Telecoms Law, all licensed operators are required to not support one service in favour of another service. Furthermore, all licensed operators are required to comply with the ITU's recommendations and international standards. That being said, if for any reason a structural or functional separation is required as per the NTRA's instructions, the ITU's recommendation or international standards, then the relevant operator should comply with this requirement.


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The first time the NTRA introduced structural or functional separation was for Telecom Egypt to ensure its non-discriminatory behaviour.

### Universal service obligations and financing

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

According to the Telecoms Law, provision of any telecom service must be based on four principles, one of which is the availability of the universal service.

The NTRA is required by the Telecoms Law to transfer its budget's surplus, except for the amount allocated to the state by the Cabinet of Ministers, to the Universal Service Fund on an annual basis. Any amounts to be transferred to the Universal Service Fund must be utilised on, inter alia, infrastructure projects required for the universal service, reallocation for the spectrum, indemnifying telecom services operators and providers for the price difference between the approved economical price for the services and that which may be determined in favour of the telecom consumers.

### Number allocation and portability

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

There is a specific number allocation plan adopted by the NTRA, which is updated from time to time depending on the increase of telecom service subscribers in Egypt, whereby each operator has a dedicated first 2–3 digits. There are also dedicated numbers for emergency services (eg, ambulance, police, firefighting department).

There is also a mobile number portability regulation adopted by the NTRA whereby mobile subscribers may freely shift between operators without losing their numbers. This regulation includes a number of mandatory terms and conditions applied to both operators and subscribers.

### Customer terms and conditions

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

Yes, all telecom services providers are required to have written contracts with their customers in Egypt. These written contracts are required to follow the form approved by the NTRA and covering, inter alia:

- type of services that are subject to the customer agreement;
- confidentiality requirement for the customers' data and communications;
- terms of payments including interest, administrative fees, tax and any other burdens;
- duration and its renewal;
- rights in case of default or termination; and
- the agreement is personal and may not be assigned to any third party without the approval of the licensed telecoms provider.

Any violation to the requirements above will result in a penalty from the NTRA as per the Penalties Regulation. For example, in 2016, the NTRA imposed a penalty of 250,000 Egyptian pounds to Etisalat Misr for not complying with this mandatory requirement.

### 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?

Provision of telecom services in Egypt must always be based on transparency and, therefore, internet services providers may not control or prioritise the type or source of data they deliver.

The Administrative Courts rendered a judgment ordering the NTRA to block pornographic content; however, the NTRA challenged this judgment on the basis that the Telecoms Law does not grant this power to the NTRA.

However, the Cybercrime Law, which was issued in 2018, allows the competent authorities in Egypt to block any website that is broadcast from Egypt or abroad if that website contains any statements, digits, images, videos or any other advertising material that is deemed a crime under the Cybercrime Law. This blockage is subject to judicial review within 24 hours.

### 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 mainly regulated by the following:

- the Telecoms Law;
- Law (180/2018) regarding press, media and the Supreme Council of Media (SCoM) Regulation (the Media Law) and its Executive Regulation; and
- the SCoM Decree (26/2020), issuing the SCoM Licensing Regulation (the Media Licensing Regulation).

Digital platforms may not be created unless a licence is obtained from the SCoM and that licence also requires approval from the NTRA.

According to the Media Licensing Regulation, companies carrying out any business activity related to creating digital or satellite platforms must be owned by the state with a minimum authorised capital of 50 million Egyptian pounds.

### 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 well-developed regulation yet applicable to NGA networks. However, our law firm is proud of obtaining the first ever authorisation from NTRA for using WAN/MPLS in Egypt.

The main general regulatory requirement that is currently adopted by the NTRA is to have NGA networks implemented by a licensed provider of Class A services.

### Data protection

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

There is not yet a personal data protection law in Egypt. However, on 24 February 2020, the Egyptian House of Representatives approved Egypt's first Personal Data Protection Law (the Data Protection Law). This law is now subject to issuance by the Egyptian President, unless he has any concerns related to it, which is very unlikely.

The approved Data Protection Law prohibits any act of transfer, storage or sharing of personal data that was collected or prepared for



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processing, to any foreign state unless the following two main conditions are satisfied:
- application of a protection level that is not less than the one adopted by the draft Data Protection Law; and
- a licence has been obtained from the Personal Data Protection Centre.

The Executive Regulations to be issued for the approved Data Protection Law shall specify the policies, criteria, requirements and rules that shall be met for the transfer, storage, sharing, processing and protection of personal data across borders.

The licensing process is currently unclear; however, in our opinion, this process will depend on a number of factors including, inter alia, the country to which the personal data is transferred, national security concerns and whether or not the country allows the transferring of personal data to Egypt.

**Cybersecurity**

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

Yes, the Cybercrime Law concerns any person providing, directly or indirectly, users with any information technology and telecom service including, inter alia, processing or data storage. These providers are required to retain and store users' data continuously for at least 180 days, including identification, content of the services' system, communication traffic, terminals and any other data required by the NTRA.

**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?

Unfortunately, there is no special regulation yet for big data. However, it is within the NTRA's ongoing strategy to regulate it.

**Data localisation**

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

The Consumer Protection Law (181/2018) and its Executive Regulation require all providers of services and products in Egypt, except for the entities that are subject to the supervision of the Central Bank of Egypt (CBE) and the Egyptian Supervisory Authority, to have all advertising, data, information, documents, invoices, receipts, contracts including e-documents with the consumer to be in Arabic or in a bilingual or multilineage form, providing that the Arabic language must be one of these languages.

**Key trends and expected changes**

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

No one can deny the rapid international transmission into the fintech space. The banking sector in Egypt, being a country that witnessed two revolutions in 2011 and 2013, was definitely affected by such rapid transmission as well. This was more than enough for the Egyptian government, upon a request by the CBE, to propose a new entire draft for the Banking Law. This new draft Banking Law was prepared based on, inter alia, several advices rendered by international consultancy firms, a comparative study for other countries' laws, international standards, Basel Framework, recommendations of the Organization for Economic Co-operation and Development (OECD), the World Bank Group and the IMF as well as the recommendations made by the banks that are registered with the CBE.

As per the Egyptian Constitution, the new draft Banking Law was submitted to the Egyptian House of Representatives for review and approval. After an almost five-month review, the Egyptian House of Representatives introduced a number of amendments to the New Draft Banking Law that was approved in principle by the Egyptian House of Representatives on 5 May 2020.

No one is now allowed under the new draft Banking Law to carry out any activity of operating payment system or providing payment system unless a prior licence is obtained by the CBE. This new restriction is applied to all persons, whether natural or juristic persons, carrying out such activity inside Egypt or providing such services abroad to any residents in Egypt except for stock exchanges, futures exchanges, securities settlement systems, licensed central clearing, depository and registry systems, custodian banks, and internal systems of the Egyptian Ministry of Finance that do not include payment, collection, set off or clearance of payment.

## MEDIA

**Regulatory and institutional structure**

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

The media sector is governed by various laws and regulations, including the following:
- the Investment Law (72/2017) and its Executive Regulation;
- the Media Law;
- the Prime Minister Decree (411/2000) establishing the Media Public Free Zone (MPFZ); and
- the Media Licensing Regulation.

Most of the key media projects in Egypt operate inside the MPFZ, which is a public free zone governed by regulated by various directives of the Chairman of the General Authority for Investment (GAFI).

All projects operating under the Investment Law are qualified by a large number of investment incentives.

For any media project to be qualified for operation inside MPFZ, this project must, in general, take a specific legal form and must comply with the Arab Media Ethical Charter and MPFZ's Business Controls and Principles.

The services generally allowed to operate inside the MPFZ include, inter alia, radio, television, information broadcasting, e-content production and marketing. The MPFZ may also authorise hotels, banks, and malls to operate inside the MPFZ to provide their services to the licensed media projects.

According to the Media Law and the Media Licensing Regulation, which was published on 13 May 2020, the Supreme Council of Media (SCoM) is empowered, inter alia, to:
- receive notification for establishing Egyptian newspapers or non-Egyptian newspapers that are issued or distributed in Egypt;
- grant licences to visual, audio or digital channels that either registered in Egypt with GAFI or non-Egyptian channels that are being broadcast from Egypt;
- determine and apply the rules and requirements protecting the audience in Egypt;
- grant licences to broadcast relay stations, websites, digital and satellite platforms, fibre satellite distribution and content distribution;
- authorise the importation of satellite and internet broadcasting devices; and
- authorise the importation of non-Egyptian prints.



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### 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 Media Law and the Media Licensing Regulation, which was published on 13 May 2020, foreign ownership restrictions apply to holding the majority stake or any stake giving the right to manage any Egyptian satellite or terrestrial television, as well as any Egyptian digital, wired or wireless station. However, non-Egyptian satellite and terrestrial television as well as non-Egyptian digital, wired and wireless stations may be licensed to operate in Egypt providing an approval is obtained from the SCoM. This approval requires, inter alia, operating inside a specific media area, the ability to block any content involving, inter alia, violence, suicide, self-injury or nudity.

### Licensing requirements

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

According to the Media Law and the Media Licensing Regulation, which was published on 13 May 2020, a licence from the SCoM is required for any company to be in a position to operate a broadcast relay station in or to Egypt. This licence requires the following:

- payment of 250,000 Egyptian pounds to the SCoM;
- obtaining an approval from the NTRA; and
- incorporation of a company in a form of sole person company, limited liability company or joint stock company with a minimum authorised capital of 5,000,000 Egyptian pounds.

If the licence request is accepted, it should be valid for five years, renewable upon a request at least six months prior to the end of the said five years.

### 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 Media Law and the Media Licensing Regulation, which was published on 13 May 2020, a licence from the SCoM is required for any company to be in a position to operate and distribute recorded or live content in Egypt, whether through satellite or the internet. This licence requires the following:

- payment of 500,000 Egyptian pounds to the SCoM for the company and 50,000 Egyptian pounds for each website; and
- incorporation of a company in a form of sole person company, limited liability company or joint stock company with a minimum authorised capital of 50 million Egyptian pounds.

If the licence request is accepted, it should be valid for five years, renewable upon a request at least six months prior to the end of the said five years.

All content must, inter alia:

- be in compliance with the Egyptian Constitution, applicable laws, regulations and professional codes and ethics; and
- be stored for at least one year and hosted by a server that is located at a secure location in Egypt, which location may not be changed without prior approval from the SCoM.

### Advertising

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

The Media Law and the Media Licensing Regulation, which was published on 13 May 2020, differentiate between Egyptian and non-Egyptian media advertising companies as follows:

For Egyptian media advertising companies:

- a licence is required from the SCoM;
- non-Egyptians may not hold any majority stake or any other stake that allows them to manage the company;
- incorporation of a company in a form of sole person company, limited liability company or joint stock company with a minimum authorised capital of 100,000 Egyptian pounds for holding websites, 5 million Egyptian pounds for general or news television stations, 2 million Egyptian pounds for specialised television stations, 15 million Egyptian pounds for each broadcasting station and 2.5 million Egyptian pounds for each electronic, television station or channel; and
- shareholders must subscribe to at least 35 per cent of the company's capital.

For non-Egyptian media advertising companies:

- an approval is required from the SCoM;
- this approval requires, inter alia, operating inside a specific media area, the availability of blocking any content involving, inter alia, violence, suicide, self-injury or nudity; and
- payment of the licensing fee as per the following table.

| Fee (Egyptian pounds) | Type of media |
|---|---|
| 1 million | General and news media |
| 500,000 | Specialised media |
| 100,000 | general website |
| 3 million | • social networking or promoting individual's websites<br>• audio, video and text service on demand websites; and<br>• goods, products and services marketing websites. |
| 100,000 | Any other website |

### 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 Media Law and the Media Licensing Regulation, which was published on 13 May 2020, do not yet specify any must-carry obligations or a mechanism for financing the cost of such obligation.

### Regulation of new media content

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

New media contents are subject to the same regulation as advertising.



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### 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 switchover started in Egypt in 2013. The National Telecommunication Regulatory Authority is empowered under the Telecoms Law to reallocate and manage radio frequencies.

### 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 Media Law and the Media Licensing Regulation, which was published on 13 May 2020, do not yet specify any process of media plurality in Egypt.

### Key trends and expected changes

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

The Media Licensing Regulation entered into force in Egypt on 14 May 2020. It does not yet involve any practice in Egypt and includes a number of provisions that need clarification on how they will be applied in reality.

## 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?**

According to the Antitrust Law (3/2005), the Egyptian Competition Protection Authority (CPA) is the competent regulator for antitrust. However, there has been dispute between the CPA and the National Telecommunication Regulatory Authority (NTRA) regarding jurisdiction over any antitrust issue related to the telecoms sector.

The Media Law also grants the Supreme Council of Media (SCoM) the power to guarantee freedom of competition and to prevent dominance practices within the media sector. This is similar to the provisions included in the Telecoms Law and, given that the Media Law was just issued, we are not sure if there will be a dispute between the CPA and the SCoM as there has been between the CPA and the NTRA.

However, in all cases, the Egyptian administrative litigation courts have the jurisdiction to order which authority is the competent one.

SOLIMAN, HASHISH & PARTNERS
LAW FIRM

**Mohamed Hashish**
m.hashish@shandpartners.com

10th Floor
Degla Plaza Building (75/77)
199 St.
Degla
New Maadi
Cairo
Egypt
Tel: +201000470077
www.shandpartners.com

### Appeal procedure

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

All decisions of the regulator are subject to the review of the administrative litigation courts if these decisions are not in line with the applicable laws or reasonable. The administrative litigation courts have the jurisdiction to assess the validity or legality of each decision.

Furthermore, in case of a dispute between the NTRA and any licence, the licencee may resort to arbitration under most of the telecom licence agreements.

### 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 most famous ongoing dispute within the telecom sector is between Vodafone International, being the major shareholder holding 55 per cent of Vodafone Egypt's share capital, and Telecom Egypt, being a competitor to Vodafone Egypt as well as shareholder holding 45 per cent of the same company.

Vodafone International signed a formal memorandum of understanding for selling its shares in Vodafone Egypt to the Saudi operator STC in January 2020. However, Telecom Egypt claims that it has the right of first refusal over the shares that are subject of this contemplated sale, which claim was official raised to both the ECA and the NTRA based on a number of antitrust concerns. The ECA and the NTRA are still in the process of looking into this dispute.


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# European Union

**Anne Baudequin, Christopher Götz and Martin Gramsch**

Simmons & Simmons LLP

## 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;
- 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: increase competition and predictability for investments; reduce regulation for co-investment of rival operators in very high-capacity networks; improve coordination and use of spectrum across the EU; strengthen consumer protection; and create a safer online environment. Member 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:



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- 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) 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; and
- 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: internet access services; 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 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. On 7 March 2020, BEREC published guidelines for intra-EU communications. These guidelines aim at clarifying the provisions for regulating intra-EU communications services to ensure a common regulatory approach and assist member states in their consistent implementation. These Guidelines are complementary to the provisions set out in the Regulation and are not presented as an official legal interpretation of those provisions. A public consultation was open from 10 March 2020 to 10 April 2020.

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, 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 on December 2020, 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.

On December 2019, pursuant to article 12 of the EECC, in order to approximate notification requirements and to harmonise accordingly the notification forms currently in use at national level, BEREC published guidelines for the notification template. These guidelines define a template of the notification form to be filled up at the beginning of the activities by electronic communications network (ECN) or electronic communications service (ECS) providers. 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:



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- operate electronic communications networks and provide electronic communications services;
- apply for rights of way;
- negotiate interconnection with and where applicable obtain access to or interconnection from other operators;
- be given an opportunity to be designated to provide different elements of a universal service; and
- 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 right holder 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 NRA's 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 submit transfers and leases to the least onerous procedure possible; 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; and 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.


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### 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: wholesale local access provided at a fixed location and 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:

- provision of access at a fixed location and provision of telephone services;
- provision of directories and directories enquiry services;
- provision of public payphones; and
- measures for disabled users.



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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.

On 6 March 2020, BEREC published guidelines on a common criteria for assessing non-ECN/ECS undertakings, and the assessment of the ability to manage numbering resources by undertakings other than ECN/ECS. These guidelines also set out rules to avoid the risk of exhaustion of numbering resources if numbering resources are assigned to such an undertaking. 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 the 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.



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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. 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.

On 17 December 2019, the Commission adopted Implementing Regulation (EU) 2019/2243, establishing a template for the contract summary to be used by providers of publicly available electronic communications services.

This Implementing Regulation also sets out (i) the length of the contract; (ii) the presentation of the information (headings, font size, pagination); and (iii) the language requirements. This Implementing Regulation shall apply from 21 December 2020.

**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. At the end of 2019, BEREC announced that it had worked on an update to the BEREC Net Neutrality Guidelines, which have been renamed the BEREC Guidelines on the Implementation of the Open Internet Regulation. These Guidelines are designed to provide guidance on the implementation of the obligations of NRAs. Specifically, this includes the obligation to closely monitor and ensure compliance with the rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-user rights. On 10 October 2019, BEREC launched a public consultation that ran until 28 November 2019. The guidelines have not been finalised as of the time of writing.

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.



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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, 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, Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services was adopted on 20 June 2019. This Regulation 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). Online service providers will need to change their T&Cs to include these new requirements. The Regulation will have direct effect in EU member states from 12 July 2020.

**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.

On 10 March 2010, BEREC launched a public consultation on draft BEREC guidelines on very high capacity networks. The deadline for responses was 24 April 2020. The Guidelines set out the criteria that a network has to fulfil in order to be considered a very high capacity network, in particular in terms of down and uplink bandwidth, resilience, error-related parameters, latency and variation. The Guidelines shall contribute to the harmonisation of the definition of the term 'very high capacity network' in the EU.

**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



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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.

On 6 March 2020, the EU Council Presidency released a new version of the draft proposal, which will be discussed in the upcoming weeks by the telecoms working party, representing all member states, with the aim of agreeing on a common position.

**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 (the Cybersecurity Act). The Cybersecurity Act was adopted on 17 April 2019. This Regulation foresees a permanent mandate for ENISA and the creation of an EU certification framework for ICT products and services. The certifications will be recognised in all member states, making it easier for business 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



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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 Defence: Building Strong Cybersecurity for the EU. This wide-ranging cybersecurity 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. It has not been adopted yet.

**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



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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. 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.

On 19 February 2020, the Commission published a Communication 'European strategy for data' (COM/2020/66), which outlines a strategy for policy measures and investments to enable the data economy for the coming five years. This Communication announces the creation of nine European common spaces and the continuation of work on the European Open Science Cloud. This data strategy is presented at the same time as the Commission's Communication on 'Shaping Europe's digital future' and a White Paper on artificial intelligence. The same day, the Commission launched a public online consultation regarding the European strategy for data.

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 started 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, in the long run, 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.

Implementation of the new EECC continues to be the key topic. BEREC has announced that in 2020 it will also tackle new topics such as digital platforms and security issues, especially in relation to 5G networks. BEREC announced that in 2020 it will focus on the following five strategic priorities:

- responding to connectivity challenges and to new conditions for access to high-capacity networks;
- monitoring potential bottlenecks in the distribution of digital services;
- enabling 5G and promoting innovation in network technologies;
- fostering the consistent application of the open internet principles; and
- exploring new ways to boost consumer empowerment.

## MEDIA

**Regulatory and institutional structure**

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

Articles 167 and 173 of the Treaty on the Functioning of the European Union (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 European Commission (the Commission) is responsible for any media policy.

Within the EU, audiovisual media services (including broadcasting and on-demand services) are to a broad extent regulated under the Audiovisual Media Services Directive 2010/13/EC (the 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



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editorial responsibility of a media service provider and the principal purpose of providing programmes, to inform, entertain or educate, to the general public by electronic communications network' (see article 1, paragraph 1a, AVMS Directive). On 6 November 2018, the Commission adopted a revised version of the AVMS Directive, Directive 2018/1808 (AVMS Directive 2.0). Member states must transpose the new rules into their national legislation by 19 September 2020. AVMS Directive 2.0 shall ensure that European regulation is adapted to the advanced convergence of audiovisual media services and current technological developments.

AVMS Directive 2.0 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), as well as video-sharing platforms (which, without bearing editorial responsibility, provide programmes and user-generated videos, or both). Under AVMS Directive 2.0, all three services are subject to tight regulations.

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 in particular aimed to harmonise national rules on:

- regulation of television broadcasts, including satellite broadcasts, under the 'country of origin', 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).

AVMS Directive 2.0 added in particular the following new elements:

- providing broadcasting companies with more flexibility on the time frame of television advertising;
- the general permission of product placement;
- 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.

In February 2018, a new Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination ('Geoblocking Regulation') was adopted, which entered into force on 22 March 2018. The regulation took effect on 3 December 2018. It shall prevent geoblocking, i.e. businesses from discriminating (private or commercial) end customers in obtaining goods or certain services being offered within the EU. To this end, the following measures are prohibited:

- electronic measures blocking or restricting the access of end customers to online offers of goods or (non-finance, -gambling, -healthcare, and -transportation) services based on the nationality, residence or place of establishment of the customer, and
- indirect restrictions on cross-border online trade, including discriminatory use of general terms and conditions (including prices, conditions and acceptance of payment methods).

The Regulation generally covers audiovisual copyright content, but not audiovisual content (such as e-books, online music, software and videogames). It remains to be seen whether the Commission will include audiovisual services in the scope of the Geoblocking Regulation when it is revised for 2020.

**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 (2.0).

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 any of 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. AVMS Directive 2.0 includes new provisions on the transparency of media ownership (recitals 15 and 16, article 5). According to the Commission, these provisions will have positive spillover effects on media pluralism. The revised Directive particularly allows member states to adopt legislative measures, obligating service providers under their jurisdiction to make accessible information concerning their ownership structure, including the beneficial owners. As far as Germany is concerned, the final proposal of the State Media Treaty implementing the revised AVMS Directive – currently under review by the Commission – does not make use of such legislative permission.



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### 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 that 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.

AVMS Directive 2.0 further introduced, among other things:

- prohibition of incitement to violence or hatred directed against any groups or members of such groups because of an affiliation to one of the categories that are subject to equal treatment principles (eg, race, religion or nationality), article 21 of the EU Charter of Fundamental Rights;
- prohibition of public provocation to commit a terrorist offence; and
- even stronger rules on commercial communications for alcoholic beverages.

Member states are not entitled to apply less stringent rules to broadcasters but may impose stricter rules on audiovisual media service providers under their jurisdiction, provided that these do not violate fundamental 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. 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.

AVMS Directive 2.0 introduced a content quota according to which providers of non-linear services must secure at least a 30 per cent share of European works in their catalogues and ensure prominence of those works. However, this quota shall not apply to media service providers with a low turnover or a low audience.

### 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 or as video-sharing platform.

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. Under the AVMS Directive, the proportion of television advertising and teleshopping spots within a given clock hour was not permitted to exceed a total of 20 per cent. Under the AVMS Directive 2.0, broadcasting companies are provided with more flexibility on the time frame of television advertising, changing the limit for advertising from 20 per cent per hour to 20 per cent per day (between 6am and 6pm and between 6pm and 12pm).

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. AVMS Directive 2.0 also widely waived the ban on product placement.

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.


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### 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.

AVMS Directive 2.0 introduced a content quota of 30 per cent share of European works. Where member states require media service providers under their jurisdiction to contribute financially to the production of European works, including via direct investment in content and contribution to national funds, they may also require media service providers targeting audiences in their territories, but established in other member states to make such financial contributions, which shall be proportionate and non-discriminatory.

Such financial contribution shall be based only on the revenues earned in the targeted member states. If the member state where the provider is established imposes such a financial contribution, it shall take into account any financial contributions imposed by targeted member states. However, the obligation to contribute financially on the production of European works shall not apply to media service providers with a low turnover or a low audience.

### 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.

Regulation (EU) 2017/1128 on cross-border portability of online content services (the Portability Regulation) obliges providers of online content, including audiovisual media services, to enable paying subscribers to access and use such service under terms equal to the offering at each subscriber's residence, within all EU member states.

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 (the 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 (i) the supply of digital content and services and (ii) online and other distance sales of goods. These initiatives were followed by two new Directives:

Directive (EU) 2019/770 'on certain aspects concerning contracts for the supply of digital content and digital services' was enacted on 10 June 2019. It will be transposed into member states' national law by 11 June 2021. This Directive creates a holistic framework for business-to-consumer transactions regarding digital content and digital services. 'Digital content' means data created and made available in digital form (eg, audio and video contents, video games and other software). Digital services are such that enable (i) processing of or access to digital data; or (ii) interaction with data uploaded by any user of the service (eg, OTT-communications services). Member states are free to adopt this framework to business-to-business transactions as well. The Directive stipulates criteria for defects in digital content and services, and minimum standards for sellers' warranty obligations (eg, provision of updates). Guidance on the relation between (IT/cybersecurity) vulnerabilities and defectiveness in such products, however, is not included. Warranty obligations for digital content and services might also be imposed on sellers of hardware with pre-installed software (apart from those according to Directive (EU) 2019/771).

Directive (EU) 2019/771 'on certain aspects concerning contracts for the sale of goods' entered into force on 11 June 2019. It will be transposed into member states' national law by 1 July 2021 and enforced no later than 1 January 2022. The initial proposal envisages the regulation of online and other distance sales of goods. However, the enacted version aims to ensure proper functioning of the internal market, while providing consumers with a high level of protection. It does so by laying down certain common rules on sales contracts between sellers and consumers. These cover conformity of goods with the contract; remedies if there is no conformity; ways to exercise these remedies; and commercial guarantees.

### 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.



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### 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 of the AVMS Directive assumed the independence of audiovisual media regulators. However, under the AVMS Directive, there were 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 (the 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.

AVMS Directive 2.0 includes new provisions on the independence of regulators (recital 53 and article 30) and transparency of media ownership (recitals 15 and 16, article 5). According to the Commission, these provisions will have positive spillover effects on media pluralism (European Commission, 8 November 2018, answering parliamentary question on concentration of media ownership). AVMS Directive 2.0 particularly allows member states to adopt legislative measures, obligating service providers under their jurisdiction to make accessible information concerning their ownership structure, including the beneficial owners. As far as Germany is concerned, the final proposal of the State Media Treaty implementing AVMS Directive 2.0 – currently under review by the Commission – does not make use of such legislative permission.

### 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, the Commission adopted a revised version of the AVMS Directive, Directive 2018/1808 (AVMS Directive 2.0) on 6 November 2018. Member states must transpose the new rules into their national legislation by 19 September 2020. The new rules 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 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. Based on the results of its public consultation, the Commission identified core issues and proposed several measures to tackle disinformation campaigns spread via the internet in its communication COM (2018) 236, published in April 2018. One of the suggested measures, a Code of Practise on Disinformation, was implemented on a self-regulatory basis by online platforms and the advertising industry in September 2018. Regulations thereunder include terms of depriving advertising revenues from disinformative websites, ensuring transparency about sponsored content and trustworthiness of contents in general, and establishing clear rules for bots.

Considering the advent of elections in 2019 (inter alia for European Parliament), however, the Commission identified the need for further action. In September 2018, it published a communication on securing free and fair European elections (COM (2018) 637). Member states are called to implement adequate measures, involving different sectors, stakeholders and (technical) means, to safeguard election processes against targeted disinformation campaigns and other undue interference (eg, cybersecurity threats, illegal funding).

In December 2018, the Commission published an action plan against disinformation (JOIN (2018) 36), introducing a concept for the protection of the EU's core democratic values. This involves establishing specialised institutions for identified disinformation campaigns and threat sources, uniform mechanisms for coordinated countermeasures, whereas both civil society and private-sector companies form integral parts in these plans.



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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 responsible administrative body for telecoms and media policy at EU level is the European Commission (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:

- Body of European Regulators for Electronic Communications: 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;
- European Network and Information Security Agency: assists the Commission and the EU member states in meeting the requirements of network and information security;
- 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; and
- European Regulators Group for Audiovisual Media Services (ERGA): while cooperation between EU national supervisory authorities in the broadcasting sector has constantly increased since 2000, the resulting structures were formalised by the AVMS Directive 2.0. ERGA essentially operates as a consulting organ of the Commission.

As far as regulatory supervision of the broadcasting sector is concerned, AVMS Directive 2.0 introduced requirements on the independence of national regulatory authorities. These obliged member states to ensure that such authorities are legally distinct, functionally independent and remain free from any undue instructions of their governments and any other public or private body. Member states shall also oblige their national regulatory authorities to exercise their powers impartially, transparently and in a manner fostering media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, as well as fair competition and functioning of the internal market. Finally, national regulatory authorities must be adequately funded to carry out their functions (including contribution to the work of ERGA) effectively.

To ensure EU-wide consistent application of its regulations, the AVMS Directive provides for information obligations of its member states (towards each other as well as the Commission) regarding any information required for the application of this Directive. AVMS Directive 2.0 has concretised these obligations as follows: any media services to be wholly or mostly directed at the audience of another member state shall be notified between informed and concerned national regulatory authorities, and the former shall assist the latter on information gathering on such service providers' activities.

### 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 Treaty on the Functioning of the European Union (TFEU). A further appeal on points of law can be made to the Court of Justice of the European Union. 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. According to AVMS Directive 2.0, however, any such appeal shall normally not suspend enforceability of the contested regulatory decision; such effect shall only be granted if the plaintiff also seeks interim measures according to applicable national laws.

### 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 2015, the Commission launched, as part of its Digital Single Market Strategy, a sector inquiry into the electronic commerce of consumer



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goods and digital content. The final report of the sector inquiry was published in 2017, and one main point of the sector inquiry is e-commerce of digital content or the online provision of audiovisual and music products. The Commission 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. These concerns identified by the Commission have been mirrored in the enforcement actions taken by the Commission.

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 December 2018, a new geo-blocking regulation took effect (EU 2018/302) 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. It generally applies to companies offering products or services online to (private or commercial) end customers within the EU. It prevents providers from blocking or restricting cross-border access by end customers to country-specific content of web shops, apps or other commercial online offerings. To this end, the following measures are prohibited:

- The European Parliament and Council enacted Regulation (EU) 2019/115 on promoting fairness and transparency for business users of online intermediation services, which shall apply from 12 July 2020. The Regulation concerns online platforms like Google, Airbnb or Amazon, which have gained major importance for the market. Their position of strength as 'gatekeepers', particularly with regard to commercial users, triggered many questions regarding the applicable legal framework and the need for further regulatory oversight. The Regulation establishes rules, for example, transparency requirements for terms and conditions and limits on commercial terms including best price clauses for online intermediation services, electronic measures blocking or restricting the access of final customers to online offers of goods or services based on the nationality, residence or place of establishment of the customer, and indirect restrictions on cross-border online trade, including discriminatory use of general terms and conditions (including prices, conditions and acceptance of payment methods). The regulation covers audiovisual copyright content, but generally excludes audiovisual content such as e-books, online music, software and videogames. It remains to be seen whether the Commission will include audiovisual services in the scope of the Geoblocking Regulation when it is revised for 2020.
- 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.

**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 18 July 2019, the Commission imposed a fine of €242 million on Qualcomm for abusing its dominant position in 3G baseband chipsets through predatory pricing. According to the Commission, Qualcomm sold, between 2009 and 2011, its baseband chipset below cost to two strategic customers to exclude Icera, a new market participant, from the market and to strengthen its dominance. This is the fifth time that the Commission has imposed fines on Qualcomm for exclusionary practices. In 2018, Qualcomm was fined €997 million for making payments to Apple to exclusively use Qualcomm's 4G baseband chipset between 2011 and 2016.

On 30 January 2020, the Commission fined several companies belonging to Comcast Corporation, including NBCUniversal LLC, about €14 million for restricting the ability of traders to sell licensed merchandise for movies within the European Economic Area to territories and customers other than those specifically allocated to them. The decision concerns practices that aim to limit cross-border sales which the Commission identified as an issue in the e-commerce sector inquiry. Similarly, fines were imposed against Nike and Sanrio in March and July 2019, who also used territorial restrictions in their licence and sale agreements.

The Commission opened a formal investigation against Broadcom in June 2019. The investigation concerns various issues including practices such as exclusivity dealings, tying, bundling, interoperability degradation and abusive use of intellectual property rights. In the course of the proceedings, the Commission used its powers to impose interim measures and ordered Broadcom to stop applying exclusivity terms and to withhold discounts and other advantages given to six customers that sourced almost all of their needs with the US chipmaker. Substantive investigations on the merits of all parts of the case are ongoing.

**Merger decisions**

In 2017, the Commission followed up on one of its earlier big merger decisions – the *Facebook/WhatsApp* case – and imposed a fine of €110 million for providing incorrect or misleading information during the Commission's 2014 investigation of Facebook's acquisition of WhatsApp relating to Facebook's ability to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. The Commission fined Altice, the Dutch cable and telecommunications company, for implementing its acquisition o

f the Portuguese telecommunications operator PT Portugal before a notification or approval by the Commission.

Both decisions highlight the Commission's increased scrutiny of more formal aspects of the merger control procedures.

In July 2019, the European Commission approved the proposed acquisition of Liberty Global's cable business in Czechia, Germany, Hungary and Romania by Vodafone under the condition of full compliance with a commitments package offered by Vodafone. Vodafone offered, inter alia, to provide access to the merged entity's cable network in Germany, to refrain from contractually restricting the possibility for



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broadcasters to also distribute their content via an OTT service and not to increase the feed-in fees paid by Free-to-Air broadcasters for the transmission of the linear TV channels via Vodafone's cable network in Germany. These measures addressed the Commission's concerns with regard to a reduction of competition on the market for the lease of mast capacity and the exclusion of telecommunications operators from the market

On 6 March 2020, the Commission similarly approved the acquisition of joint control over INWIT by Telecom Italia and Vodafone with commitments. The Commission's concerns included that the merger would reduce competition in the market for renting space on towers to telecommunication operators; and foreclose telecommunication operators from the market. The commitments offered to address these concerns comprised, inter alia, that INWIT will make available free space on towers for third parties to use and give appropriate publicity to the towers made available.

These proceedings show that the consolidation in the industry continues and that one of the Commission's concerns is access to infrastructure by third parties that the Commission would like to see addressed through commitments by the parties.

**Anne Baudequin**
anne.baudequin@simmons-simmons.com

**Christopher Götz**
christopher.goetz@simmons-simmons.com

**Martin Gramsch**
martin.gramsch@simmons-simmons.com

Lehel Carré, Thierschplatz 6
Munich
80538
Germany
Tel: +49 89-20 80 77 63-00
Fax: +49 89-20 80 77 63-01

5 boulevard de la Madeleine
Paris
75001
France
Tel +33 1 53 29 16 29
Fax: +33 1 53 29 16 30

www.simmons-simmons.com



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# Greece

**Dina Th Kouvelou, Nikos Th Nikolinakos and Alexis N Spyropoulos**
Nikolinakos & Partners Law Firm

## 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.

To prepare for Europe's digital future, a new European Electronic Communications Code (Directive 2018/1972) was enacted by the European Commission. The Code, which entered into force on 21 December 2018, modernises the current EU telecoms rules, inter alia, by expanding the definition of 'electronic communications service' to include any interpersonal communications services provided over the internet, including VoIP services, messaging apps and email services that do not use telephone numbers. It must be transposed to national legislation by the end of December 2020.

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. It specifies the extent of the investment, financial reliability, experience and existing position in the market in order to avoid concentration, as well as the kind of programmes that will be transmitted.

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 they can substantially influence the decision-making process or 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 also provides for complementary application of Competition Law No. 3959/2011. The Competition Commission is the competent authority to consider competition law issues in the media sector, including issues of concentration. 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.

Nevertheless, Law No. 4339/2015 (as amended by Law No. 4487/2017) sets the following restrictions on shareholders holding more than 1 per cent of the 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.

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


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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.

The general EU framework provisions on radio and television content apply to Greece, meaning that the programme must adhere to the general principles of the Constitution and there are further obligations concerning minors, rating of 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. The EU's current Audiovisual Media Services Directive 2010/13/EU (the AMS Directive), as transposed in Greece by PD 109/2010 governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. That framework has already been amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 (Audiovisual Media Services Directive) in view of changing market realities. The new directive that is in force should be transposed by all member states by 19 September 2020. In Greece the relevant law will be issued in the course of 2020.

**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.

Law No. 4367/2016 amended Law No. 4339/2015 by adding a new article 2, which gave 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 (the 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 July 2017, the ESR issued a decision defining that the number of TV licences to be awarded through the tender will be seven. On 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, Star Channel, Alpha, Antenna TV (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 a tender, prompting employees to air a televised protest. A new TV licence competition was held in 2018 for the seventh licence. Finally, five channels submitted requests for annulment of tender No. 1/2017 before the Council of State. The hearing took place on 4 May 2018. In January 2019, ESR announced an auction for the granting of two licences for the provision of terrestrial content digital TV broadcasting of free-of-charge national general information programmes. Only one of these two licences was finally awarded, in October 2019, to applicant 'ALTER EGO media services company SA'.

Regarding digital radio free broadcasting (DAB), in January 2018, following the issuing of Ministerial Decisions 169-171/2018, an auction was launched by EETT for the awarding of rights to use radio frequencies of terrestrial 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 EETT in May 2018. Analogue radio FM stations in Greece still operate under a temporary licensing regime



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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.

A second public consultation was launched on February 2020 by EETT (still open), regarding the process of granting Radio Frequency Rights for terrestrial systems capable of providing wireless broadband electronic communications services in the 700MHz, 2GHz, 3400–3800MHz and 26GHz bands, which have been pointed out as pioneering frequency bands to be used for the introduction and development of 5G networks in the European Union by 2025.

**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, soon to be deregulated according to recent notification of EETT

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 in December 2016, whereas in June 2017 EETT issued a Decision on the Fourth Round of Analysis of wholesale market definition for termination of calls to individual mobile networks, designation of operators with significant power and regulatory obligations thereof. Moreover, in December 2019, the updated bottom-up pure LRIC techno-economic model for the aforementioned markets, as implemented by EETT Decision 815/002/22.06.2017, was adopted.

**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 public consultation, the currently regulated retail leased lines market with capacity up to 2Mbps is proposed to be deregulated.The draft measure was finally notified following further national consultations in November 2019, and EETT's final decision is expected shortly. According to the draft measure that was notified, the currently


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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.

Those 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 assesses the relevant application and decides based on specific criteria defined by law.

A recent development is the new antenna construction licensing legal framework established by Law 4635/2019, according to which EETT's issuance of antenna construction licence is carried out through the Antenna Electronic Application System (SILYA), as in the previous legislative framework, but without requirement for planning permission to be granted. The planning approval is issued following EETT's antenna construction permit, through the electronic system e-Licensing already used for buildings and intended to interoperate with SILYA, automatically at the request of an authorised engineer and followed by a building autopsy. The new law greatly simplifies the process of modifying antenna constructions, whereas a recent joint ministerial decision exempts from the licensing process low electromagnetic environmental nuisance antenna facilities resulting in a significant number of antennas, mainly within the urban centres, now requiring a simple declaration procedure also implemented through SILYA.

A general obligation to provide access to mobile virtual network operator (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 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. In June 2019, the European Court of Justice (ECJ) made a preliminary ruling in Case C-142/18, *Skype Communications Sàrl*, on whether VoIP calling apps fit within the definition of an ECS under EU law. In its decision, the ECJ found that SkypeOut was a regulated communications service because Skype assumes responsibility for transmitting calls to telephone numbers: it charges customers for making calls and enters into agreements with telecom service providers to terminate calls. Telephone calling apps, such as Skype, Viber and Google Hangouts, are therefore subject to European telecom regulation and may now be required to comply with EU obligations that apply to traditional telephone services, such as registration, privacy, consumer protection and law enforcement access to user communications. Nevertheless, in the EU's new telecom code (Directive 2018/1972), the definition of 'electronic communications service' has been expanded to include any interpersonal communications services provided over the internet, including VoIP services, messaging apps and email services that do not use telephone numbers.

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 on Open Internet Access, namely Regulation 2015/2120 is fully implemented. The Regulation prohibits operators from blocking, slowing down or prioritising traffic. Traffic management measures are authorised if they are reasonable, meaning that the measures shall be transparent, non-discriminatory and proportionate and based on objectively technical differences of traffic (article 3(3)). Such measures cannot monitor specific content and cannot be maintained longer than necessary. The EETT issued the Decision on National Open Regulation Issues – implementing of Regulation (EU) 2015/2120 in 2018.

**Addititonal issues regarding access and 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, in August 2018, the EETT issued its new Regulation on Collocation and common use of facilities.



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**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 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 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. Those 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.



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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 in December 2017. 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. It addresses issues such as: speed definitions, methodological framework for speed assessment, user information, definition of continuous or repeated deviation, definition of significant deviation and 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 are 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.

**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 national legislation or regulation specifically addressing digital platforms. Nevertheless, Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services is directly applicable to national legislation and must be applied by 17 July 2020. The Regulation sets out rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities. It applies to online intermediation services and online search engines provided, or offered to be provided, to business users and corporate website users, respectively, that have their place of establishment or residence in the EU and that, through those online intermediation services or online search engines, offer goods or services to consumers located in the EU, irrespective of the place of establishment or residence of the providers of those services and irrespective of the law otherwise applicable. The Commission encourages the drawing up of codes of conduct by providers of online intermediation services and by organisations and associations representing them, together with business users, including SMEs and their representative organisations, that are intended to contribute to the proper application of this Regulation, taking account of the specific features of the various sectors in which online intermediation services are provided, as well as of the specific characteristics of SMEs.

**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.

The Greek data protection regime is primarily set out in the General Data Protection Regulation 2016/679 (EU) (GDPR) and Law 4624/2019 on the Protection of Personal Data, incorporating Regulation 2016/679 (EU) (GDPR) and Directive 2016/680. Moreover, while the e-Privacy Law (Law 3471/2006) applies mainly to the electronic communications sector, certain provisions are not sector-specific, such as the provisions on unsolicited communications.

**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).

Law 4577/2018 (GG 199 / '/ 03-12-2018) transposed NIS Directive 2016/1148 /EU. According to the NIS Directive, certain additional obligations are imposed to a list of operators and providers. Businesses falling within the scope of Law 4577/2018 have the following basic obligations:

- adopt technical and organisational measures for the security of networks and information systems;


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- adopt measures to prevent and minimise the impact of incidents affecting the security of networks and information systems;
- notify the National Cybersecurity Authority and the Hellenic Data Protection Authority of incidents with a serious impact on business continuity. The notification must be made without undue delay and be accompanied by additional information to the Authority regarding the severity of the relevant incident; and
- cooperate with the competent authorities.

**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. Businesses planning to run big data projects processing personal data in Greece need to consider the General Data Protection Regulation and Law No 4624/2019. As regards the use of non-personal data, businesses should take note of Regulation 2018/1807 on the free movement of non-personal data, which entered into force on 28 May 2019 and is applicable in Greece.

**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.

Following 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, EETT launched in February 2020 a second public consultation (still open) regarding the process of granting radio frequency rights for terrestrial systems capable of providing wireless broadband electronic communications services in the 700MHz, 2GHz, 3400–3800MHz and 26GHz bands. These bands have been pointed out as pioneering frequency bands to be used for the introduction and development of 5G networks in the European Union by 2025.

Also, EETT's Decision on Leased Lines market regulation, notified in November 2019 and accepted by Commission's relevant decision, is shortly expected, following which no retail market will be subject to ex-ante regulation in the Greek territory.

## MEDIA

**Regulatory and institutional structure**

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

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 National Commission for Telecommunications and Post (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 National Council of Radio and Television (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.

**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.



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**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. 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 in January 2019 the ESR announced an auction for the granting of the two remaining licences. Only one of these two licences was finally awarded in October 2019, to applicant 'ALTER EGO media services company SA'.

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 legal framework according to the EU has been transposed into national legislation; currently,, 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 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.

The EU's current Audiovisual Media Services Directive 2010/13/EU (the AMS Directive), as transposed in Greece by PD 109/2010, governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services. The aforementioned framework has already been amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 (Audiovisual Media Services Directive (AVMSD)) in view of changing market realities. It introduces the following significant changes to current EU framework.

- the Country of Origin Principle (which states that providers only need to abide by the rules of a member state rather than in multiple countries) is strengthened, with more clarity on which member state's rules apply, aligned derogation procedures for both TV broadcasters and on-demand service providers as well as possibilities for derogations in the event of public security concerns and serious risks to public health;
- for the first time, a number of audiovisual rules extend to video sharing platforms: services such as You Tube as well as audiovisual content shared on social media services, such as Facebook, are covered by the revised Directive;
- there is better protection of minors against harmful content in the online world: the new rules enhance protection of video-on-demand services and also extend the obligation to protect minors on video-sharing platforms, which need now to put in place appropriate measures;
- there are new provisions to protect children from inappropriate audiovisual commercial communications for foods high in fat, salt and sodium and sugars, including by encouraging codes of conduct at EU level, where necessary. Video-sharing platforms also have to respect certain obligations for the commercial communications they are responsible for and be transparent about commercial communications that are declared by the users when uploading content that contains such commercial communications;
- there is reinforced protection on TV and video-on-demand against incitement to violence or hatred and public provocation to commit terrorist offences;
- video-sharing platforms are also required to take appropriate measures to protect people from incitement to violence or hatred and content constituting criminal offences;
- there are increased obligations to promote European works for on-demand services, who need to have at least a 30 per cent share of European content in their catalogue and to ensure the prominence of this content.


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- the independence of audio-visual regulators is reinforced in EU law by ensuring that they are legally distinct from their government and functionally independent from the government and any other public or private body; and
- there is increased flexibility in television advertising. Instead of the current 12 minutes per hour, broadcasters can choose more freely when to show ads throughout the day. An overall limit of 20 per cent of broadcasting time is maintained between 6am and 6pm, and the same share allowed during prime time (from 6pm to midnight).

The new directive that is in force should be transposed to all member states by 19 September 2020. In Greece, the relevant Law is expected to be issued in the course of 2020.

**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. In Greek legislation as in force, there is an obligation for radio and television content providers to broadcast free of charge 'social content' spots (messages) for a specific period of time, calculated on a daily basis. These are considered to be messages that inform the public on: public health, protection, welfare and facilitation of people with disabilities and the population groups in need of social protection, promoting genuine gender equality, of equal treatment, the fight against violence against women, eliminating gender stereotypes and generally removing all forms discrimination on the grounds of sex, racial or ethnic origin, religion or other beliefs, disability, illness, age, family or social status, sexual orientation, identity or gender characteristics, or the transmission of messages referring to educational or other programmes organised by the Hellenic Parliament, as well as to all its national, political, cultural and social activities.

**Regulation of new media content**

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

According to 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 mobile network operators 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



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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 tender No. 1/2017 before the Council of State. The hearing took place on 4 May 2018 and their request was rejected. In January 2019, the ESR announced an auction for the granting of two licences for the provision of terrestrial content digital TV broadcasting of free-of-charge national general information programmes. Only one of these two licences was finally awarded on October 2019 to applicant 'ALTER EGO media services company SA'.

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.

Within 2020, the national law transposing the AVMSD is highly anticipated, as the transposition deadline expires on September 2019.

## 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 National Commission for Telecommunications and Post (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. It is also the Dispute Resolution Body for disputes arising from the application of cost reduction Directive and rights of way under Law Nos 4463/2017 and 4070/2012.
- the National Council of Radio and Television: an independent administrative authority that supervises and regulates the radio and television market;
- the Hellenic Competition Commission, which is responsible for application of competition law in all sectors, except the electronic communication and postal services sector;
- the Hellenic Authority for Communication Security and Privacy: an independent authority responsible for the protection of security and privacy of communications; and
- the Data Protection Authority: 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.

### 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 operators. The Decision was recently (in February 2020) upheld by the Greek Administrative Court of Appeal, which rejected all legal arguments invoked by OTE, but reduced – for proportionality reasons – the imposed fine in €4 million (the court initially reduced the fine in €3.5 million for violating competition law and €1.5 million for breach of regulatory obligations, and then the overall fine of €5 million was further reduced to €4 million).

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



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€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 in Phase II the merger of Vodafone Company with the fixed, and only at that time, mobile virtual network operator operator in Greece, Cyta Hellas (EETT Decision 857/7/28-6-2018). The merger was concluded with the absorption of Cyta Hellas by Vodafone in 2019.

In July 2019 the EETT issued a Decision (903/15/19-7-2019) on a complaint of mobile network operator Vodafone against mobile network operator Cosmote for alleged price squeeze and other exclusionary practices in the national market for prepaid mobile telephony for the years 2008 until 2012. The EETT rejected the complaint. Although the EETT accepted that Cosmote had a dominant position in the mobile telephony market in general (both prepaid and post paid) for a part of the under investigation period, it concluded that price squeeze did not occur, based on Deutsche Telecom case law test.

NIKOLINAKOS & PARTNERS
LAW FIRM

**Dina Th Kouvelou**
kouvelou@nllaw.gr

**Nikos Th Nikolinakos**
nikolinakos@nllaw.gr

**Alexis N Spyropoulos**
spyropoulos@nllaw.gr

182, Mesogeion Avenue
15561
Athens
Greece
Tel: +30 213 00 200 20
Fax: +30 213 00 200 29
www.nllaw.gr


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# Ireland

Helen Kelly and Simon Shinkwin

Matheson

## 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).

The European Commission launched a review of the regulatory framework for electronic communications and the directive establishing the European Electronic Communications Code (EECC) 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. We understand that the DCCAE is currently working on revised Irish legislation to implement the EECC. It is worth noting that the DCCAE has a good track record of implementing such legislation on time.

No foreign ownership restrictions apply to communications service at this time, although there is an ongoing consultation in relation to FDI screening which may apply restrictions to the communications sector (pan EU framework).

**Authorisation/licensing regime**

2 | Describe the authorisation or licensing 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 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 relevant turnover (ie, relating to the service or network) 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. 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.



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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 has also published its 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.

ComReg is currently in the middle of a consultation process 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. We are currently waiting for the final decision from ComReg on how it will structure this auction process. Due to covid-19, ComReg temporarily released some of this spectrum (on a short-term basis) to a number of operators to deal with the crisis.

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.

**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.

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



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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.

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.

**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). 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. There is currently litigation before the Irish courts following ComReg's rejection of eir's application for funding. On 7 April 2017, ComReg published the outcome of its assessment of eir's 2015 compliance with the annual performance targets set out in Performance Improvement Plan 3. Eir 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 eir's force majeure claim as being the 'exceptional weather events in January, November and December 2015'. In addition, eir 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). Eir 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 eir 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



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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. In February 2020, ComReg published an update on the progress of the commitments under its settlement agreement with eir. The set of commitments, when fully implemented, will result in the establishment and operation of an enhanced Regulatory Governance Model in eir. Completion of the commitments is underpinned by €9 million held in escrow that is partially released to eir on completion of commitments 'milestones'.

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 both the telecommunications framework (the Universal Service Regulations) and the European Union (Consumer Information, Cancellation and Other Rights) Regulations (following the EU Consumer Rights Directive). Consumer contract compliance continues to be a core focus of ComReg, and it has engaged in a number of enforcement actions against operators in recent years including the following examples.

In 2016, ComReg imposed a €255,000 fixed penalty notice on Virgin Media 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 (and has since been served with restraining orders to prevent it from doing so). 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

In 2019, the District Court heard a prosecution taken by ComReg against Pure Telecom Limited in relation to Pure Telecom failing to provide full pricing information in its customer contracts. Pure Telecom



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pleaded guilty to the counts brought against it and in lieu of a conviction was required to make a charitable donation of €10,000. ComReg also found Vodafone Ireland was non-compliant because it did not provide customers of its 'Extra' Pay as You Go product with their contract on a durable medium, in contravention with the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013. ComReg reached a settlement agreement with Vodafone that included an undertaking by Vodafone to refund 72,774 customers the sum of €416,972.

The High Court also implemented a restraining order on behalf of ComReg against Yourtel in relation to services charged to consumers, and the Dublin District Court found in favour of ComReg in its case against Pure Telecom for failing to provide pricing information to its customers.

ComReg has brought cases in the Dublin District Court against eir, Vodafone and Yourtel in recent years. In June 2018, eir plead guilty to 10 offences in relation to overcharging customers and paid a total of €23,500. 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 overcharging of customers (as Yourtel had 89 prior convictions for such an offence). ComReg has recently issued a number of notifications of non-compliance; some examples are given below.

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. These measures entered into force in September 2019. Formal Dispute Resolution Procedures apply to issues for end users of mobile phone, home phone and broadband whose complaints have been unresolved for 40 working days or more after lodging a complaint with your service provider. ComReg will adjudicate on the dispute once the end user has applied for the service. The application procedure is set out in greater detail in Annex 2 of ComReg document 18/104.

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.

**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.

ComReg has published its 2019 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 previously was concerned that the lack of enforcement powers and the lack of Irish legislation on penalties for breaches hindered its progress in enforcing net neutrality under the TSM Regulation. However, in July 2019, SI 343/2019 – European Union (Open Internet Access) Regulations 2019 was introduced giving enforcement powers toComReg in relation to net neutrality. ComReg may give a direction to an undertaking requiring the undertaking to take a measure under article 5(1) of the EU Regulation. Where ComReg finds an undertaking has not complied with its direction or with the obligations under Regulation (EU) 2015/2120, and that undertaking has not corrected its behaviour following a notification from ComReg, ComReg can seek an order from the High Court, which can include an order for payment of a financial penalty to ComReg.

In December 2019, ComReg issued notifications of non-compliance for breaches of net neutrality regulations to seven telecommunications companies operating in Ireland. The notifications were issued to internet access service providers regarding transparency breaches in their consumer contracts. With the recent expansion of its powers, ComReg has taken formal enforcement action against providers who appeared to have not been providing the required information in their customer contracts in relation to net neutrality.

**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 and there have been no enforcement initiatives 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 eir 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 eir'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.

Previously, 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


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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. Most recently, one bidder, National Broadband Ireland was selected as the preferred bidder to deliver the NBP project.

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, and the Supreme Court recently referred this issue to the ECJ. 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:

- accessing an information system without lawful authority;
- interfering with an information system without lawful authority so as to intentionally hinder or interrupt its functioning;
- interfering with data without lawful authority;
- intercepting the transmission of data without lawful authority; and
- use of a computer, password, code or data for the purpose of the commission of any of the above offences.

The DCCAE published an updated National Cybersecurity Strategy in December 2019. The new strategy is broader in scope and operation than its predecessor from 2015. Objectives of the strategy include:

- to continue to improve the ability of the state to respond to and manage cybersecurity incidents;
- to identify and protect critical national infrastructure by ensuring that essential services have appropriate cybersecurity incident response plans;
- to improve the resilience and security of public sector IT systems;
- to invest in educational initiatives to prepare the workforce for advanced IT and cybersecurity careers;
- to raise awareness of the responsibilities of businesses around securing their networks, devices and information; and
- to invest in research and development in cyber security in Ireland.

In common with similar bodies in other EU member states, the National Cyber Security Centre has also steadily moved towards a more proactive approach across a range of areas. The provisions of the EU Network and Information Security Directive have been used to develop a quasi-regulatory approach for critical infrastructureproviders, an approach that operates in tandem with the existing and ongoing work of the National Cyber Security Centre.

**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



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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.

Many of the big data companies have important locations for their businesses in Ireland. The Data Protection Commissioner (DPC) is tasked with investigating breaches of data regulation by these companies where such breaches occur in this jurisdiction. The DPC opened an inquiry into Facebook in 2019 on how it stored user login data, and in 2018 the DPC investigated Facebook for non-compliance with its obligation under the GDPR to implement technical and organisational measures to ensure the security and safeguarding of the personal data it processes. In 2020, the DPC opened an inquiry into Google's processing of location data and transparency surrounding that processing, and in the previous year it investigated Google's use of personal data in relation to online advertising. The DPC has also recently inquired into Twitter's compliance with GDPR.

**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 2019–2021, 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.

The implementation of the EECC will be the biggest change to the Irish telecommunications framework in 2020.


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## 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.

### 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.

Media mergers must be notified to both the the Irish Competition and Consumer Protection Commission (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 Department of Communications, Climate Action and Environment (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, no competitive licensing process and one-off application fees (these depend on the licence being acquired but are typically less than €2,000).

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. Draft legislation has been prepared by the DCCAE (implementing the revised directive and including 'online harm' additions) and this is being reviewed through the normal Irish legislative process. One fundamental change being proposed is the creation of a new regulator, the Media Commission, to regulate both linear and non-linear broadcasting.

The AVMS Regulations outline that, 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 currently 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



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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 came 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 will change following 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 electronic communications network (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.

The regulation of new media content will change following the implementation of the revised Audiovisual Media Services Directive and the creation of the new regulator, the Media Commission.

**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 electronic communications services (ECSs).

**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.

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).



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### 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.

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. 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.

In June 2019, BAI published two new documents:

- policy on media plurality setting out how the BAI will support media plurality in the future. It sets out a definition for media plurality, outlines why media plurality is important, details policy objectives and outlines the measures the BAI takes and will take to promote and support media plurality in Ireland; and
- the Ownership and Control Policy, which will be used by the BAI to assess requests for changes to the ownership and control of existing broadcasting services. The policy provides guidance and rules for the BAI when considering the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue number of media services in the Irish State.

### 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 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. The BAI has not published a strategy for the subsequent period.

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 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 Broadcasting Authority of Ireland (BAI) is responsible for the regulation of the broadcasting and audiovisual content sector.

The Irish Competition and Consumer Protection Commission (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.



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### 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.**

There has been a marked increase in the number of media mergers notified since the 2014 media merger regime was implemented. Twenty-seven 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.

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.

**Helen Kelly**
helen.kelly@matheson.com

**Simon Shinkwin**
simon.shinkwin@matheson.com

70 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com



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# Italy


Edoardo Tedeschi and Alessandra Bianchi

Simmons & Simmons LLP


## 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 (the 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 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.

The operator shall, in addition, be registered with the Register for Communications Operators (ROC) kept by the Authority.

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.

Moreover, the registration to the ROC also requires an annual communication to the done to the Authority on the numbering used and on the company's details.

### 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.




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### 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). 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 (the 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 9 of Directive 2011/83/EU; the final term is raised to one year, if the mandatory information has not been fulfilled.

### 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 in January 2019.



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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. On the other hand, the advent of 5G connectivity may be a game-changer as it will be necessary to understand if the innovative capacity of the network is inextricably linked to its free accessibility or not.

**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 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 (the Data Protection Code).

Finally, EU Regulation No. 1150/2019, which will enter into force in July 2020, sets forth the relationship between business users of online intermediation services (marketplaces) and search engines. The purpose of this Regulation is to guarantee greater transparency in the contractual terms applied to business users by, among others, the 'Bigs' of the network. As a matter of fact, the target of the Regulation is the relationship of dependence that business users have towards these huge online players to offer their goods and services to consumers, that indirectly affects consumers who may not be able to enjoy balanced offers. The Regulation will be directly applicable in Italy; however, the member states may issue specific rules to implement the Regulation in the course of 2020.

**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/.

**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?

In Italy, a relevant step ahead in the cybersecurity sector has already been made with the issuance of the Gentiloni Decree (Prime Minister's decree – DPCM, 17 February 2017), with the creation of an institutional



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structure endorsing the implementation of cybernetic security, all responsibilities being traced back to the Prime Minister. One of the key institutions in this scenario was the Interministerial Committee for the security of the Republic, formed by different ministries (eg, Defence, Foreign Affairs, Economic development) and politically dependent on the Prime Minister's office. This institution, assisted by its own tech department, still plays a central role in the current setting, providing for the political guidelines pertaining the subject.

An essential moment in the evolution of cyber-security regulation in Italy was the implementation of the NIS Directive, European Directive on Network and Information Systems Security (UE/2016/1148), through the issuing of Legislative Decree 65/2018. Besides the GDPR regulation, entrusted to the government, other relevant innovations were introduced.

The peak position of the Prime Minister's office was confirmed, as well as his leading role. A new centralised cyber incident collection system was set, through the computer security incident response team. Along with this, on 19 September 2019, the Italian Council of Ministers approved the new Decree-law (No. 105 21/09/2019). The Decree-law was then converted into a full enforceable law by the parliament with Law No. 133/2019.

The aim of the above-mentioned Law is to guarantee a high level of safety for the networks, the information systems and the informatic services of the public administration, the institutions and private entities that rely on the implementation of an essential function or the provision of an essential service for the country.

Moreover, one of the relevant goals of the newly approved Law, was set by the NIS Directive itself, which provided for the competent authorities to identify essential services operators and to define minimum security measures, later set by the Agency for Digital Italy. The purpose, fully implemented by the present Law, with the creation of the 'Cyber security Perimeter', leading to the identification and protection of those essential services and functions providers, was to create an armour around such operators, both private and public entities, in order to shield the Republic from possible attacks and subsequent national crisis (preventing them and setting the ground to solve them as easily as feasible).

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 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 and the Italian Telecommunication Authority of its negative opinion about the extension of any such licence without the implementation of new competitive procedures, as that 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.



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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.

Finally, during the emergency of covid-19, and in order to fight pandemic effect, the government has drafted and issued a series of legislative provisions that also impact the telecommunications sector. For the most part, the legal provisions have a limited time of efficacy (see article 82 of the DPCM dated 11 March 2020 on electronic communications, broadband access, etc), mainly until 30 June 2020. The Authority immediately implemented the measures and opened working groups.

## 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.

### 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 (the 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.



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### 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 the 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.

### 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



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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.

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.

For this new organisation, a complex national compliance calendar of the television frequency bands was provided within the 2019 Budget Law, which identifies the deadlines and provides for a transitional phase of implementation, by geographical area, from 1 January 2020 to 30 June 2022. Only at the end of this period will the definitive transition to the new broadcasting standards occur (the TV 4.0). The process, which was largely modified by the provisions of the 2019 Budget Law (in paragraphs 1103 to 1109), involves both national and local broadcasters, as well as providing for the restructuring of the multiplex containing regional information from the public service broadcaster.

### 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 Law 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.

### 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; 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


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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?**

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 Data Protection Code.

### 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 Italian Competition Authority (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.

A 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.

Finally, in January 2020, the ICA issued a huge fine for a total amount of €228 million to four big Italian telecommunication providers (including Tim, Vodafone, Fastweb and WIND-Tre), since these companies forced almost 12 million clients to pay 13 monthly instalments in order to access the Wi-Fi services at their homes without informing them of such an increase.

For sake of completeness, under the covid-19 emergency, the ICA issued a provision that has extended all the payment terms and the penalty payments due to this unforeseen emergency. For consumer protection sanctions, the payment of which, according to the provisions of article 27, paragraph 13, of the Consumer Code, must be made within 30 days of the notification of the judgment, the enforcement period is suspended and will start to run again at the end of the suspension.

simmons + simmons

**Edoardo Tedeschi**
edoardo.tedeschi@simmons-simmons.com

**Alessandra Bianchi**
alessandra.bianchi@simmons-simmons.com

Via Tommaso Grossi 2
Milan
20121
Italy
Tel: +39 02 7250 51
Fax: +39 02 7250 5505
www.simmons-simmons.com



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# Japan

Chie Kasahara

Atsumi & Sakai

## 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.

Except in cases where refusing a registration as below, the Minister shall 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 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;



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- 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 was partly used in 2019 and will be used widely in 2020, although it could be delayed owing to the spread of covid-19.

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 which have been postponed until 2021.

### 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 he or she 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 |



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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 fifthgeneration 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 of 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


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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 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.

**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 PPC (effectively countries with sophisticated data protection regimes) or to a transferee satisfying criteria to be issued by the PPC, 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 on 23 January 2019, 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.

The Telecom Act was partially amended on 10 May 2019, and has made a great impact on the mobile communication fields. In those fields, competition has been affected by three major telecommunication service providers, and the amendment aimed to introduce a comprehensive system to promote competition. Previously, a large discount was offered on the condition that a mobile phone contract was concluded for a certain period of time, and the communication charge and the terminal charge were integrated. However, since it was required that the communication charge and the price of the terminal (eg, mobile phone) be completely separated, the discount of the communication charge accompanying the purchase of the terminal



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was prohibited. It is intended to promote competition by allowing consumers to make a choice of communication charges and terminals, while completely separating communication charges and the purchase of terminal, which have been obscured by integration.

## 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 Ministry of Internal Affairs and Communications.

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.



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### 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 Broadcast Act was partially amended on 29 May 2019 to expand the use of the internet by NHK and to improve proper management of the NHK.

NHK is now able to conduct the continuous simultaneous distribution of all broadcast programmes of the core domestic television broadcasting. At the same time, necessary measures are taken to ensure that proper internet usage services are implemented in line with NHK's objectives and the purpose of the subscription fee system.

Systems for ensuring compliance such as internal control of the NHK, the system for information disclosure to ensure transparency, and the system for formulation and publication of the medium-term management plan were added.

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 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.



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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 Ministry of Internal Affairs and Communications (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.

**Chie Kasahara**
chie.kasahara@aplaw.jp

Fukoku Seimei Building, 16th Floor (Reception)
2-2-2 Uchisaiwaicho
Chiyoda-ku
Tokyo 100-0011
Japan
Tel: +81 3 5501 2111
Fax: +81 3 5501 2211
www.aplaw.jp/en/



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# Mexico

**Julián J Garza C and Paulina Bracamontes B**

Nader Hayaux & Goebel

## 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



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- 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, 20,083.90 Mexican pesos, and for its renewal, 8,885.67 pesos;
- licence to use, enjoy or exploit the radio spectrum for a determined use or for the occupation and exploitation of orbital resources, 35,132.47 pesos, and for its renewal, 14,870.01 pesos;
- authorisation to exploit landing rights, 10,778.46 pesos, and for its renewal, 6,109.76 pesos;
- authorisation to incorporate and operate or exploit a telecommunications service provider without licensee status, 6,947.91 pesos, and for its renewal, 3,818.58 pesos;
- authorisation to install, operate or exploit earth stations to transmit satellite signals, 4,151.25 pesos, and for its renewal, 3,181.33 pesos;
- migrating to a sole licence, 13,365.02 pesos; and
- authorisation to provide an additional service to those indicated in the original licence that use the radio spectrum, 22,192.29 pesos, and that do not use the radio spectrum, 8,114.13 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?

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


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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.

In connection with the above, the productive subsidiary of the Federal Electricity Commission, named CFE Telecommunications and Internet for All, was incorporated on 2 August 2018 with the purpose of providing telecommunications services, on a non-profit basis, to guarantee the right of access to information and communication technologies, including broadband and internet. The service provided by CFE Telecommunications and Internet for All will be non-profit and its objective is to reach remote and marginalised communities.

**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. In order 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 Guidelines for Networks Operations, with respect to the neutrality



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principles provided under article 145 of the Federal Telecommunications and Broadcasting Law, include provisions in connection with the zero rating practice. These guidelines were submitted to public consultation from 18 December 2019 to 13 April 2020.

**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 productive subsidiary incorporated by the federal government, named CFE Telecommunications and Internet for All, has reached the goal of 50 per cent coverage three months earlier than as expected.

**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 efforts of 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.

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. This network already provides 50 per cent coverage of Mexican territory. 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, in June 2018, the guidelines of the public bidding for the expansion and modernisation of the public network known as 'Red Troncal' were issued, but on 15 August 2019, President Andrés Manuel López Obrador cancelled the public bidding on the basis that it had to be modified to guarantee the constitutional right of access and use of information and knowledge technologies to the entire population, and specifically to those in a situation of poverty and living in marginalised communities. Instead of the public bidding for Red Troncal, the federal government promoted a public bidding for the implementation of 50,000 kilometres of optical fibre.

To provide the services that should have been provided by Red Troncal, the federal government created the productive subsidiary corporation CFE Telecommunications and Internet for All, which is in charge of providing a non-profit internet service to approximately 40 million people who currently do not have access to broadband.


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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 (USMCA), which will replace the North American Free Trade Agreement. The Agreement was ratified by the Mexican Congress on 19 June 2019. President Andrés Manuel López Obrador announced that the USMCA will become effective on 1 July 2020. Chapter 18 of the USMCA includes several provisions to promote the offer of telecommunications services in the US, Mexico and Canada markets, the latter by means of accomplishing better conditions through an enhanced and effective competition. On 17 April 2019, the Federal Telecommunications Institute issued a public bidding for the concession of the use, development and commercial exploitation of 40MHz of radio electric spectrum available in the frequency band 2000–2020/2180–2200MHz for the provision of the Complementary Land Service of the Mobile Satellite Service.

Mexico is preparing to deploy 5G. It is expected that this spectrum will give us greater capacity, massive connectivity and an ultra-high reliability.

## MEDIA

### Regulatory and institutional structure

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

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.

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?**

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.


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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 multichannelling 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,


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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.

Furthermore, 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.

On 6 May 2019, the Federal Telecommunications Institute initiated an investigation on Telmex, for incurring relative antitrust practices in the telecommunications sector. 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.

The shared public telecommunications network known as Red Compartida, which started operations on 21 March 2018, already provides 50 per cent coverage of Mexican territory. It is expected that by the end of 2021 it will achieve a coverage of 85 per cent of the country. The project should be completed before January 2024 with 92.2 per cent of coverage.

On 15 August 2019, President Andrés Manuel López Obrador cancelled the public bidding for the expansion and modernisation of the public network known as Red Troncal and promoted a public bidding for the implementation of 50,000 kilometres of optical fibre to guarantee the constitutional right of access and use of information and knowledge technologies to the entire population, and specifically to those in a situation of poverty and living in marginalised communities.

To provide the services that should have been provided by Red Troncal, the federal government created the productive subsidiary corporation CFE Telecommunications and Internet for All, which is in charge of providing a non-profit internet service to approximately 40 million people who currently do not have access to broadband.

With respect to the international market of telecommunications, the USMCA (signed in 2018 by US President Donald Trump, Canadian Prime Minister Justin Trudeau and former Mexican President Enrique Peña Nieto) will become effective on 1 July 2020. Chapter 18 of the USMCA includes several provisions to promote the offer of telecommunications services in the US, Mexico and Canada markets, 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 the case of Mexico, the Federal Telecommunications Institute) shall be vested with the authority to require interconnection at reasonable rates.

Mexico is preparing to deploy 5G. This spectrum will give us greater capacity, massive connectivity and an ultra-high reliability. This will allow an autonomous driving of vehicles, smart cities, real time industrial applications and massive connectivity. In addition, there will be safer networks that will consume less energy and facilitate the financial technology. The 5G internet network will take three to four years to take off in Mexico, but work is already underway to achieve it.

Currently, no tax amendments or regulations are expected for this specific sector.

**Julián J Garza C**
jgarza@nhg.com.mx

**Paulina Bracamontes B**
pbracamontes@nhg.com.mx

Torre Arcos, Paseo de los Tamarindos 400-B
7th Floor
Bosques de las Lomas
05120 Mexico City
Mexico
Tel: +52 55 4170 3000
Fax: +52 55 2167 3099
www.nhg.com.mx

## 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.



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# Nigeria

**Chukwuyere E Izuogu, Otome Okolo and Tamuno Atekebo**
Streamsowers & Köhn

## 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 and Digital Economy (the Minister) under the NCA is responsible for the formulation, determination and monitoring of the general policy for the communications sector 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 to give effect to the full provisions of the NCA, among other things.

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. A company with foreign ownership, as long as it is incorporated in Nigeria, is eligible to 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. None of the communications services authorised in Nigeria are 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 an authorisation in which the terms, conditions, obligations, scope and limitations are specific to the service being provided. Some of the authorised activities 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 general authorisation in which the terms and conditions and 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 administrative fee (usually 5 per cent of the licence fee) and the licence fee. A person intending to operate under a class licence is to submit a registration notice in the prescribed form and pay 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 submission. 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 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. An internet service, paging, prepaid calling card and special numbering services licence are valid for a term of five years. The licence fees payable depends 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. 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 based on 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. 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


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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.

For broadband internet services, 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.

Commercial satellite services including the operation of space segments and earth stations, satellite gateway services, sales and installation of satellite terminal equipment and the operation of private network links employing satellite (VSAT) in Nigeria are authorised by either a global mobile personal communications by satellite (GMPCS) licence or a domestic VSAT network licence. In addition to the general conditions applicable to fixed, mobile and satellite services, a GMPCS licence requires 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. A domestic VSAT network licence authorises the holder to provide and operate VSAT services, whether one-way or two-way, point-to-point or point-to-multipoint, including voice, data, vision or any other kind of message for reception within Nigeria or any overseas country; operate VSAT services using space segment provided by any satellite organisation approved by the NCC; and provide a hub or gateway within Nigeria and shall provide hub satellite service to other licensed VSAT operators.

Public Wi-Fi services are authorised pursuant to the Regulatory Guidelines for the Use of 2.GHz 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, an applicant for a commercial frequency licence must also hold a commercial operating licence and thecommercial operating licence authorises the provision of a specific service for which the spectrum is intended to be used.

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?

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<br>• fixed-line telephony. |
| Data | • Fixed data, retail data transmission services and leased lines; and<br>• mobile data (eg, dongles, data cards, tablets, internet through mobile phone connections, for example, 3G, GPRS, Edge). |
| Upstream segments | • Spectrum;<br>• tower sites;<br>• network equipment;<br>• wholesale broadband or internet access; and<br>• wholesale leased lines and transmission capacity. |
| Downstream segments | • Handsets/devices (includes the device operating system); and<br>• 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 |



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| | 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, the NCC (in exercising its power to remedymarket failure and prevent 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.

Pursuant to Regulations 10–12 of the Telecommunications Networks Interconnection Regulations 2007 (the Interconnection Regulations) made by the NCC under its rule-making powers, one or more communications market relating to interconnection in which a licensee has been declared dominant by the NCC would trigger the application of ex ante regulatory obligations. In this regard, the dominant licensee would be obligated 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.

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.

**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 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, if the monopoly cannot be adequately remedied under any


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other provision of the Competition Act or is substantially a repeat by that undertaking of conduct previously found by the Competition Tribunal to be a prohibited practice. In addition, pursuant to the provisions of 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.

**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) regulate the allocation (or assignment) of numbers. The Numbering Regulations provide 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 (MNOs) and is currently available across only Global Systems for Mobile (GSM) networks (although number portability is intended to be implemented in phases that will cover Code Division Multiple Access (CDMA), 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 provisions of the Competition Act, the NCA and the Competition Practice Regulations may limit the application of certain customer



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terms and conditions deemed to be undermining of consumer rights or 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 Guidelinesfor the provision of internet service, the licence for the provision of internet service, the UASL and the WWASL do, however, impose some obligations on an ISP and 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.

In addition, 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;
- prescribes the circumstance in which zero-rating is permissible; 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 for the Use of Social Media Platforms in Public Institutions that provides guidance on the use of social media within a public institution's communications environment, issued by the National Information Technology Development Agency (NITDA) in January 2019, 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 is in the sum of 65 billion naira and 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;



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- 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.

In addition, the NITDA Data Protection Regulations 2019, enacted by the NITDA, specify the conditions in which personal data may be processed. The NITDA Data Protection Regulations set out the lawful basis for processing personal data, the rights of the data subject, obligations of data controllers and conditions under which the cross-border transfer of personal data is permissible. NITDA Data Protection Regulations apply to all sectors of Nigeria's economy, including the communications sector.

**Cybersecurity**

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

Yes. The Cybercrime Act 2015 (the Cybercrime Act) provides a unified and comprehensive legal framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria. The Cybercrime Act 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.

The Cybercrime Act 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. 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 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.

The NITDA Data Protection Regulation requires that anyone involved in data processing or the control of data shall develop security measures to protect data. Such measures include, but are not limited to, protecting systems from hackers, setting up firewalls, storing data securely with access to specific authorised individuals, employing data encryption technologies, developing an organisational policy for handling personal data (and other sensitive or confidential data), protection of emailing systems and continuous capacity building for staff.

**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 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 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 in this regard, 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 require 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.

Several key changes have occurred in the past year. The main ones are;

- the President approved the redesignation of the Federal Ministry of Communications to the Federal Ministry of Communications and Digital Economy. This is in line with the intention to accelerate growth in the digital economy; and
- the Federal Government of Nigeria released the National Digital Economy Policy and Strategy, which is pillared on eight policy objectives, namely:
  - developmental regulation;
  - digital literacy and skills;
  - solid infrastructure;
  - service infrastructure;
  - digital services development and promotion;
  - soft infrastructure;
  - digital society and emerging technology; and
  - indigenous content promotion and adoption.

To implement the National Digital Economy Policy and Strategy, the Federal Government of Nigeria constituted an expert review committee with the mandate to produce an actionable plan:

- The uniform Right of Way (RoW) charges of 145 naira per linear meter for the siting of telecommunications infrastructure across Nigeria has not been adhered to by some states that charge in excess of the uniform RoW. This continues to present several cost challenges for operators in these states. At the time of writing, the federal government and the governors of states in Nigeria are discussing how to resolve the RoW charges.
- The National Broadband Plan expired in 2018, and on 10 March 2020 a new National Broadband Plan with milestones was produced by a committee set up by the Minister of Communication and Digital Economy, to be achieved between 2020 and 2025. The Broadband Plan is designed to deliver data download speeds across Nigeria of a minimum 25Mbps in urban areas, and 10Mbps in rural areas, with effective coverage available to at least 90 per cent of the population by 2025 at a price not more than 390 naira per 1GB of data (ie, 2 per cent of median income or 1 per cent of minimum wage).
- In the last quarter of 2019, MTN, one of the GSM operators in Nigeria conducted a successful 5G trial test, a first for any country in West Africa. According to MTN, they intend to commercially deploy 5G network technology nationwide before the end of 2020.
- NCC, in conjunction with Nigerian Broadcasting Commission (NBC), released a draft Guidelines on the use of Television White Spaces in Nigeria. The Guidelines seek to provide a framework to enable



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licence-exempt transmitters to operate in the UHF band. This usage is allocated on a primary basis to the broadcast television service, on frequencies and at locations where the spectrum is either not assigned to licensed services or not in use at particular times, while protecting primary users from receiving harmful interference. These licence-exempt radio transmitters allow for the provision of affordable broadband and internet access in unserved and underserved areas within Nigeria, and support the development of internet of things applications, including in the agriculture sector.

- The NCC has published a set of draft Regulations, which are under consideration. These Regulations are:
  - Frequency Spectrum (Fees and Pricing, Etc.) (Amendment) Regulations 2009, which seek to amend the Frequency Spectrum (Fees and Pricing, etc) Regulations 2004 by amending the Band Factor under PART A of the Second Schedule thereto by adding new band factors;
  - the Nigerian Communications Industry E-waste Regulations 2018, which, inter alia seek to provide regulatory framework for the management and control of e-waste in the Telecommunications Industry; and
  - the Consumer Code of Practice Regulations 2018, which seeks to amend the Consumer Code.

## 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 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:

| Service | Applicable fees and security | |
|---|---|---|
| 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.



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**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 Nigerian Communications Commission 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.

Completion of the digital switchover continues to be the most pressing issue in the broadcasting sector and is being rolled out in phases across parts of Nigeria. At the time of writing, this process is ongoing, and we expect it to continue in the coming months until full transition is attained.

## 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 Nigerian Communications Commission (NCC) and the Nigerian Broadcasting Commission (NBC) respectively regulate the communications and broadcast sectors, while the Competition Commission created by the Competition Act is the lead antitrust regulator in Nigeria and is a separate institution from 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.

However, although the Competition Act establishes a concurrent jurisdiction between the Competition Commission and both the NCC and the NBC in matters of competition enforcement, the Competition Commission has precedence over both the NCC and the NBC and, according to the provision of the Competition Act, all appeals or request for review of the exercise of the competition power of the NCC and the NBC shall in the first instance be heard and determined by the Competition Commission before such appeals can proceed to the Competition Tribunal established under the Competition Act.

**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


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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.

NCC is presently investigating a complaint received from the Computer & Allied Products Dealers Association of Nigeria for anti-competitive practices by some original equipment manufacturers in Nigeria. At the time of writing, the outcome of this investigation has not yet been revealed. In addition, NCC is conducting a market study for the purpose of determining whether ex ante obligations should be placed on licensees that are found to be dominant.

STREAMSOWERS & KÖHN
BARRISTERS, SOLICITORS & ARBITRATORS

**Tamuno Atekebo**
tamuno@sskohn.com

**Otome Okolo**
otome@sskohn.com

**Chukwuyere E Izuogu**
chukwuyere@sskohn.com

16D Akin Olugbade Street, off Adeola Odeku Street
Victoria Island
Lagos
Nigeria
Tel: +234 1 271 2276 / 3846
Fax: +234 1 271 2277
www.sskohn.com



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# Pakistan

**Mustafa Munir Ahmed and Saira Khalid Khan**

RIAA Barker Gillette

## 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 Pakistan Telecommunication PTA (PTA) is the regulatory body for the telecom sector in Pakistan and was established under the Pakistan Telecommunication (Re-organization) Act 1996 (the PTA Act). PTA has the mandate to regulate the establishment, operation and maintenance of telecommunication systems and the provision of the telecommunications services in Pakistan, which are regulated in terms of the PTA Act and the rules, regulations and guidelines framed thereunder (the PTA Laws).

For the purposes of the foregoing:

- 'telecommunication system' includes any electrical, electro-magnetic electronic, optical or optio-electronic system for the emission, conveyance, switching or reception of any intelligence within, or into, or from, Pakistan, whether or not that intelligence is subjected to rearrangement, computation or any other process in the course of operation of the system, and includes a cable transmission system, a cable television transmission system and terminal equipment; and
- 'telecommunication service' includes a service consisting of the emission, conveyance, switching or reception of any intelligence within, into or from Pakistan by any electrical, electro-magnetic, electronic, optical or optio-electronic system, whether or not the intelligence is subjected to rearrangement, computation or any other process in the course of the service.

The PTA is also responsible for dealing with applications relating to the use of radio-spectrum frequency through its Frequency Allocation Board (FAB), which has the exclusive authority to allocate and assign portions of the radio frequency spectrum to the government; providers of telecommunications services and telecommunication systems; radio and television broadcasting operations; public and private wireless operators; and others.

The primary functions of the PTA include:

- regulation, establishment, operation and maintenance of telecommunication systems and provision of telecommunications services in Pakistan, including but not limited to the grant and renewal of licences, and the monitoring and enforcement of the terms thereof;
- establishment or modification of accounting procedures for licences and regulation of tariffs for telecommunications services in accordance with the PTA Act;
- prescribing standards for telecommunications equipment and terminal equipment, certifying compliance of such equipment with prescribed standards and issuing of approvals of terminal equipment and of installers;
- providing guidelines for and determining the terms of interconnection arrangements between licensees where the parties to those arrangements are unable to agree upon such terms;
- receiving and expeditiously disposing of applications for the use of radio-frequency spectrum;
- to auction on such terms and conditions as the PTA may determine from time to time, or other open transparent competitive processes to determine eligibility for licensing the FAB's allocated or assigned specific portions of radio frequency spectrum;
- to promote and protect the interests of users of telecommunications services in Pakistan;
- to promote the availability of a wide range of high-quality, efficient, cost-effective and competitive telecommunications services throughout Pakistan;
- to promote rapid modernisation of telecommunication systems and telecommunications services;
- to investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contraventions of the provisions of the PTA Laws;
- to make recommendations to the federal government on policies with respect to international telecommunications, provision of support for participation in international meetings and agreements to be executed in relation to the routing of international traffic and accounting settlements; and
- to perform such other functions as the federal government may assign from time to time.

The relevant government ministry with regard to telecommunications services is the Ministry of Information and Technology and Telecommunication (MOITT).

The telecommunications sector in Pakistan does not have a minimum domestic legal presence requirement; however, the PTA prefers that a local entity (SPV) be established that applies for a licence to provide telecommunications services. The SPV or local entity can be completely foreign owned or controlled.

**Authorisation/licensing regime**

2 | Describe the authorisation or licensing regime.

In terms of the PTA Act, no person shall establish, maintain or operate any telecommunications system or provide any telecommunications service unless a licence for the same has been granted to it by the PTA. Additionally, no terminal equipment may be directly or indirectly connected to a public switch network, unless a type-approval for such equipment has been granted by the PTA.

Licences for core telecommunications services include:

- a local loop (LL) licence: a person licensed under the PTA Act to establish, maintain and operate a public fixed switched network for the provision of local exchange telecommunication service,



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including Pakistan Telecommunication Company Limited, National Telecommunication Corporation and licensee providing service using wireless in LL;
- a long-distance and international (LDI) licence: LDI licensee means a person licensed under the PTA Act to establish, maintain and operate a public fixed switched network for the provision of a nationwide long-distance and international telephony service, and includes Pakistan Telecommunication Company Limited and National Telecommunication Corporation); and
- mobile cellular licence: 'mobile cellular licensee' means a person licensed under the PTA Act to establish, maintain and operate a public switched network to provide wireless-based telecommunication system by wireless means and used while in motion, but excluding a person that is licensed to provide a service using wireless in local loop.

These licences are granted under the terms of the Pakistan Telecom Rules 2000 (the PTA Rules).

Licences for value added services (telecom services other than for which licences are granted under the PTA Rules) and Registered Services are issued under the Class Value Added Services Licensing and Registration Regulation 2007 (the CVAS Regulations).

**PTA Rules**

The PTA Rules provide that a licence granted under the PTA Act and the PTA Rules shall be personal to the licensee and shall not be assigned, sub-licensed to, or held on trust for any person, without the prior written consent of the PTA.

As per the PTA Rules, an application for the grant of a licence to operate any telecommunication system or provide any telecommunication service shall be made in the form set out in Appendix A of the PTA Rules https://www.pta.gov.pk/assets/media/rules-280208.pdf. An application shall be accompanied by the payment of fees in the amount prescribed in accordance with the conditions for each type of licence to be issued. An application may be withdrawn at any time before the grant of a licence.

The PTA may grant licence to an individual, class of persons, company or corporation. Except for the licence granted to an applicant for basic telephone service, no licence shall confer exclusive rights. Applications shall be considered on their individual merits, and in determining whether or not to grant a licence the PTA shall take into account the following factors:
- the financial and economic viability of the applicant;
- the applicant's experience in telecommunications and relevant past history;
- the technical competence and experience of the applicant's management and key members of staff and local participation in the business;
- the nature of the services proposed and the viability of the applicant's business plan including the applicant's proposed roll-out and service quality commitments and its contribution to the development of the telecommunications sector;
- the quality of the applicant's telecommunications system or network; and
- the terms of bid made by the applicant where the licence is to be issued under a competitive process.

The PTA may, if it is satisfied that there are any factors in relation to that application that threaten or potentially threaten national security, reject an application.

A licensee shall have the right to establish, maintain and operate a telecommunications system in the territory and for the period stipulated by the PTA in the licence, in accordance with the provisions of the Act and the PTA Rules.

A licence granted in accordance with the provisions of the PTA Act and the PTA Rules shall be subject to the restrictions on transfer of the licence and on change of ownership of the licensee and such further restrictions as are contained in the PTA Rules.

Subject to the PTA Act and PTA Rules, a licence shall be granted for an initial term of not less than 25 years. After the expiry of the initial term, the licence shall be renewed on terms and conditions consistent with the policy of the federal government at the relevant time. If the licence is not to be renewed, the PTA shall serve a written notice on the licensee of at least one fourth of the initial licence term and that notice shall terminate the licence on the expiration of the initial term.

Further, if a substantial ownership interest in, or control of, a licensee is proposed to be changed, the licensee shall give the PTA notice of that fact in writing. That written notice shall include all relevant details of the proposed change. If the PTA is of the opinion that change shall adversely affect the ability of the licensee to provide its licensed telecommunications services, it may impose such additional conditions in the licence as shall be reasonable and directly relevant to the proposed change.

For the purpose of understanding, the terms 'control' and 'substantial ownership interest' used in the response to this shall bear the following meanings:
- 'control' means the ability to direct the exercise, whether directly or indirectly and whether through one or more entities, of more than 50 per cent of the voting rights exercisable at any general meeting of the shareholders of the licensee; and
- 'Substantial ownership interest' means more than 10 per cent of the issued share capital of the licensee.

Additionally, telecom services cannot be resold without the prior written consent of the PTA. No distinction has been made for foreign or local companies in this regard.

**CVAS Regulations**

Pursuant to the CVAS Regulations, on receipt of an application package by the applicant (ie, any defined class of persons that applies for a licence to provide value added service or registered service), the PTA shall examine it and the suitability of the grant of licence or registration certificate. A prescribed format for making the application is provided in the CVAS Regulations. The main factors that the PTA considers while examining the application are:
- the financial and economic viability of the applicant;
- the applicant's experience in telecommunication and relevant past history;
- the technical competence and experience of the applicant's management and key members of staff and local participation in the business; and
- the nature of the services proposed and the viability of the applicant's business plan, including its contribution to the development of the telecommunication sector.

The CVAS Regulations provide that a licence shall be granted for a period of 15 years and shall be technology neutral. The licence shall be renewed on terms and conditions consistent with the policy of the federal government and the regulations in force at the relevant time. The applicant shall pay the appropriate initial licence fee and processing fee to the PTA in the prescribed manner with the application. The licensee shall pay the annual licence fee to PTA, calculated on the basis of 0.5 per cent of the licensees annual gross revenue from licensed services for the most recently completed financial year minus inter-operator payments from the effective date of the licence. The PTA may grant licence of registration certificate to any applicant that fulfils the open, transparent and non-discriminatory eligibility criteria given by the PTA from time to time.



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It is pertinent to highlight that all fees for the scarce resources, including short codes, shall be paid by the licensee to the PTA as applicable. The licensee shall also promptly pay to the PTA all fees required to be paid under the PTA Act, PTA Rules and CVAS Regulations. A licence granted under the CVAS Regulations shall be subject to the PTA Act, PTA Rules and CVAS Regulations framed thereunder and the CVAS Regulations. A licence granted in accordance with the provisions of the PTA Act and the CVAS Regulations shall be subject to the restrictions on transfer of the licence and on change of ownership of the licensee, and such further restrictions as contained in the PTA Rules. The tariff of the licensee shall not be regulated until it attains the status of significant market power (SMP) as described in the PTA Rules.

Telecommunication infrastructure provider licences are issued under the PTA Act, whereby the licensee has the non-exclusive licence to establish, maintain, lease, rent or sell telecom passive infrastructure facilities in Pakistan, subject to the terms and conditions contained in the licence. Such licensee shall not provide any telecommunication or broadcasting service.

All infrastructure or telecommunication tower providers shall be responsible for the safety of public and government property near or around the area in which its equipment may be installed. Infrastructure or telecommunication tower providers shall enter into a formal lease or rental agreement covering all aspects of the transaction of lease, rent, etc.

**Spectrum – Frequency Allocation Board**

The FAB was established under section 42 of the PTA Act, and has exclusive authority to allocate and assign portions of the radio frequency spectrum to government providers of telecommunications services and telecommunication systems, radio and television broadcasting operations, public and private wireless operators and others.

Every application for allocation and assignment of radio frequency spectrum has to be made to the PTA. The PTA is required to refer the application to the FAB within 30 days from the receipt of such application.

On receipt of the application, the FAB classifies the telecommunications services and may allocate or assign the specific frequencies to the applicant. The FAB is required to notify the applicant of the status of the application within three months.

The FAB auctions spectrum and frequency for use by cellular and mobile network operators. The Pakistan Table of Frequency Allocations is the broadest technical document showing the allocation of bands to various types of services. The Pakistan Table of Frequency Allocations is drawn from, and kept current with, the ITU Radio Regulations, which are revised every few years at the World Radio Communication Conferences.

Subject to article 4.4 of the Mobile Cellular Policy 2004 (the Mobile Cellular Policy) for Mobile Cellular Licences, where the assignment of spectrum is linked to a set of licence conditions, the associated fees will consist of two parts. The spectrum price for national mobile cellular licences will be determined through auction.

The spectrum price resulting from the auction will also be used as a benchmark to determine price per MHz per annum for the existing operators, once they come under the purview of this policy. The mobile licensees will pay the PTA, in addition to the spectrum administration fee and the spectrum price, an annual licence administration fee (the regulatory fee) to reasonably cover the cost of regulation. The annual regulatory fee shall not exceed 0.5 per cent of last year's gross revenue, minus inter-operator and related PTA/FAB-mandated payments.

Administrative fees for radio spectrum will be set to recover the cost of administration of that spectrum. The total income generated from administrative fees for the whole spectrum should recover the reasonable operational costs by the FAB incurred while managing, licensing and policing that spectrum. Spectrum price for line of site links will be limited to the administration fees.

However, we note from a decision of the PTA dated 23 July 2019 that the PTA has decided, inter alia, that, the fee for the renewal of a licence shall be US$39.5 million per MHz for a frequency spectrum of 900MHz and US$29.5 million per MHz for a frequency spectrum of 1800MHz. Licences that require renewal shall be done on a technology neutral basis, subject to payment of a renewal fee to be calculated in accordance with a per-MHz price as provided above. The terms and conditions relating to enhanced quality of service and coverage of network shall be finalised in line with applicable regulatory practice and the Telecom Policy 2015.

**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 FAB has exclusive authority to allocate and assign portion off the radio frequency spectrum to the government, providers of telecommunications services and telecommunication systems, radio and TV broadcasting operations, public and private wireless operators and others. The band plans are formulated based on ITU Radio Regulations and best international practices, thereby allocating potions of radio frequency spectrum to different services. Spectrum licences generally specify the permitted use for the same.

Spectrum is granted as part of a licence issued by the PTA, and shall be personal to the licensee and shall not be assigned, sub-licensed to or held on trust for any person without the prior written consent of the PTA.

**Ex-ante regulatory obligations**

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

The PTA has decided to identify operators with SMP status to prohibit them from abusing their dominant positions through anti-competitive practices and promote fair competitions in the sector. Pursuant to section 4(d) and 6 (e) of the PTA Act, the PTA is required to promote and ensure competitive telecommunications services throughout Pakistan and to encourage fair competition in the telecommunication sector. If the PTA determines that a licensee possesses SMP in a relevant market, the licensee shall comply with orders of the PTA that are intended to promote competition in respect of that relevant market or markets ancillary thereto.

The Fixed Line Tariff Regulations 2004 (the Tariff Regulations) provide, inter alia, that non-SMP operators are free to set and revise their tariffs at any time and in any manner they like, provided that they inform the PTA about their proposed tariffs 30 days before the applicability of new tariffs. The PTA may make amendments to the tariffs of non-SMP operators where the tariffs.

The PTA Rules provide that an operator 'shall be presumed to have SMP when it has a share of more than 25 per cent of a particular telecommunication market'. The PTA has the authority to extend the SMP status to operators with less than 25 per cent market share or to relieve those with more than 25 per cent of the status after a comprehensive analysis of the market.

Pursuant to the Interconnection Guidelines 2004 (the Interconnection Guidelines), all operators are obliged to provide interconnection to other operators desiring to interconnect. The operator with SMP is obliged to prepare and submit its reference interconnect



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offer (ROI) to the PTA within one month of its determination as an SMP operator by the PTA. The SMP operator shall make the ROI publicly available within seven days after approval by the PTA.

**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 requirements for a structural separation between the network and service activities of an operator.

**Universal service obligations and financing**

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

Every licence granted under the Act may contain conditions requiring the licensee to contribute to the Research and Development Fund and Universal Service Fund (USF). Persons who have been issued a licence to provide telecommunications services are required to pay a USF charge limited to 1.5 per cent of gross revenue, minus inter-operator and related PTA/FAB mandated payments as determined by the government.

The federal government has also created a Research and Development Fund (the R&D Fund). Persons who have been issued a licence to provide telecommunications services have to contribute 0.5 per cent of gross revenue, minus inter-operator and related PTA/FAB mandated payments, to the R&D Fund.

**Number allocation and portability**

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

Licences of the PTA are eligible to apply for allocation of number capacity, as per the Number Allocation and Administration Regulations 2005 (the 2005 Regulations). Numbering is a finite national resource and must be managed prudently to ensure that the numbering resource is adequate to support existing telecommunications services and has enough capacity for the introduction of new networks and services as they become available.

The PTA Act mandates the PTA to develop and manage a national numbering plan for the provision of a wide range of efficient telecommunications services in Pakistan. Under the plan, the leading digit defines the service or network for the use of a particular numbering range. The structure of the national numbering plan complies, as far as possible, with the ITU-T Recommendations E.164.

The plan defines number ranges and their assignment to various telecommunications services, including PSTN and Wireless Networks, international direct dialling, emergency and special services such as voicemail, carrier identification and selection codes, and Intelligent Network (IN)-based services. Numbers beginning with the digit '0' are reserved for national and international services. Level '0' is used as an escape code for long-distance (national) dialling and for access to other networks, namely, mobile, IP-based services, while '00' is assigned to international direct dialling for all telecommunication users in the country, irrespective of their service provider and as such shared by all service providers.

Numbers starting with the leading digit '1' are reserved for short codes and access to intelligent network-based services. Short codes for emergency services, customer services and carrier selection also start with the digit '1'. Some short codes are three digits long while others are four digits long, depending on their use. The country is divided into two geographic areas, and the leading digits '02' and '04' are assigned to these geographic areas, where the second, third or fourth digit leads to the complete national destination code. The subscriber number consists of six, seven or eight digits. A National Significant Number is 10 digits long in all cases. The leading digits '01' and '03' are assigned to cellular mobile operations with a two-digit network access code and eight-digit subscriber number. Twenty mobile operators can launch their services, while each operator can hold a theoretical base of 100 million customers.

The leading digits '05' and '06' are reserved for future services. The leading digit '07' is reserved for IP-based services, while the leading digit '08' is assigned to free phone and new non-geographic services. The leading digit '09' is assigned to premium rate services and new non-geographic services. A local loop licensee may request geographic and non-geographic numbers from the PTA, as well as short codes, in accordance with the national numbering plan developed by the PTA, for use in the provision of licensed services in the areas concerned.

The licensee can allocate individual numbers to customers from the blocks allocated to it by the PTA, and shall maintain suitable records of its utilisation of numbering capacity, subject to the following conditions:

- the blocks of numbers and short codes allocated to the licensee, and the individual numbers allocated by the licensee to its customers, are a national resource; and
- the allocation of a number does not confer ownership of the number to the customer.

However, an allocation conveys an ongoing right of use and an expectation of at least a three-month notice period, should it be necessary to withdraw or change allocated numbers.

Pursuant to the Mobile Number Portability Regulations 2005 (the Portability Regulations), all operators shall make mobile number portability available to their subscribers as per the Portability Regulations. However, the local loop licensee shall not be required to make available number portability to its customers or other operators unless the PTA so requires. Every recipient operator shall keep and maintain records of the application forms of those subscribers who have requested porting for at least six months, for inquiry by concerned donor operators or examination by the PTA. The operators are required to maintain usage records, including, where available, called and calling numbers date, duration, time and the called number cell with regards to usage made on its central data bases for a rolling 12 months, for security by, or as directed by, the PTA or as required by any law enforcement or intelligence agency.

**Customer terms and conditions**

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

In terms of the PTA Rules, all licensees are required to make available to their customers a set of standard terms and conditions that will apply to its contractual relationships with its customers when providing those customers with line rental, terminal equipment and any form of telecommunications services. The licensee shall also file a copy of all those standard terms with the authority prior to entering into agreements with its customers on those terms.

The above condition shall not prevent the licensee from negotiating and entering into an agreement with any customer for the provision of any licensed service on terms that are not the standard terms and conditions, or that have not been filed with the authority.



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### 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?

Currently, there are no specific laws relating to net neutrality in Pakistan. There is no formal law guaranteeing net neutrality in the country. For instance, while the Broadband Quality of Service Regulations 2014 allow the PTA to keep checks on ISPs to maintain network availability and link speed, these indicators are not grounded in net neutrality. So while ISPs have to maintain certain speeds, there is no requirement for internet speech to be uniform and non-discriminatory for all content.

### Platform regulation

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

On 28 January, the federal cabinet approved the Citizens Protection (Against Online Harm) Rules 2020, a set of regulations on social media content, without public consultation, which attracted criticism from different segments of society. The Asia Internet Coalition had written a letter to Prime Minister, while Google, Facebook and other tech giants threatened to abandon Pakistan regarding the rules. Owing to the same, the implementation of the rules has been suspended and the consultation and review process initiated.

Additionally, the PTA, being the telecom regulator in Pakistan, will implement policies to block websites with blasphemous, un-Islamic, offensive, objectionable, unethical and immoral material. In this regard, PTA as and when directed by the federal government can direct or require its licensees to implement IP/URL blocking and filtering protocols.

Having stated the above, whoever with dishonest intention gains unauthorised access to any information system or data; gains unauthorised access to, copies or otherwise transmits or causes to be transmitted any data; interferes with or damages or causes to be interfered with or damages any part or whole of an information system or data; or interferes with or damages, or causes to be interfered with or damaged, any part or whole of a critical information system, or data, shall be punishable with imprisonment, under the Prevention of Electronic Crimes Act 2016 (the PECA).

The provisions of PECA are not only specific to the licensees of PTA, but the scope of PECA extends to every citizen of Pakistan, wherever he or she may be, and also to every other person for the time being in Pakistan. The same also applies to any act committed outside Pakistan by any person, whereby the act constitutes an offence under PECA and affects any person, property, information system or data in Pakistan.

For the purposes of the above:

- the term 'information system' includes electronic system for creating, generating, sending, receiving, storing, reproducing, displaying, recording or processing any information; and
- the term 'data' includes any representation of fact, information or concept for processing in an information system including source code or a programme suitable to cause an electronic system for creating, generating, sending, receiving, storing, reproducing, displaying, recording or processing any text, message, data, voice, sound, database, video, signals, software, computer programs, any forms of speech, sound, data, signal, writing, image or video, to perform a function or data relating to a communication indicating its origin, destination, route, time, size, duration or type of service.

Further, PECA provides that a service provider shall, within its existing or required technical capability, retain its specified traffic data (data relating to a communication indicating its origin, destination, route, time, size, duration or type of service) for a minimum period of one year or such period as PTA may notify from time to time and, subject to the production of a warrant issued by the court, provide that data to the investigation agency or the authorised officer whenever so required.

For the purpose hereof, 'service provider' means a person who:

- acts as a service provider in relation to sending, receiving, storing, processing or distributing any electronic communication, or the provision of other services in relation to electronic communication through an information system;
- owns, possesses, operates, manages or controls a public switched network or provides telecommunications services; or
- processes or stores data on behalf of such electronic communication service or users of such service.

Service providers are required to retain traffic data by fulfilling all requirements of data retention and its originality, as per the provisions of the PECA.

### 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 targeted at next-generation access in Pakistan; however, the PTA's strategies are evolving to address the new emerging digital priorities of Pakistan. With 5G on the global horizon, the government of Pakistan issued a policy directive for the introduction and trials of 5G wireless networks in Pakistan. The PTA is in the process of finalising a framework and will be holding consultation session with all the stakeholders in the near future.

### Data protection

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

There is no specific data protection regime in Pakistan. However, a personal data protection bill has been uploaded by the MOITT on its website for stakeholder comments before it is tabled before the Parliament. The definition of the term 'personal data' therein has been widened to include, inter alia, any information that relates directly or indirectly to a data subject, whereby a data controller shall (when once the law is promulgated) be required to provide to the data subject in written notice, the legal basis for the processing of personal data and time duration for which the data is likely to be processed and retained thereafter. However, since the law has not yet been promulgated, the requirements thereunder are not yet applicable.

All licensees of the PTA are required to take all reasonable steps to ensure that those of its employees who obtain, in the course of their employment, information about customers of the licensee or about the customer's business (Customer Information), observe the provisions of a code of practice on the confidentiality of Customer Information (the Confidentiality Code). Such Confidentiality Code is required to be prepared by the licensee in consultation with the PTA and shall specify the persons to whom Customer Information may not be disclosed without the prior consent of that customer; and regulate the Customer information that may be disclosed without prior consent of that customer.

The PTA, in exercise of its powers under the PTA Act, has framed the Telecommunication Consumer Protection Regulations 2009, which is the principal consumer protection legislation that applies specifically to telecom service providers.

The highlights of the same are as follows:



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- ability of a consumer to choose an operator and services as per their choice, including the provision of services to such a consumer on a fair, transparent, efficient, and non-discriminatory manner;
- a consumer is to be provided with uninterrupted service, subject to certain technical exceptions;
- requirement of due notice in the case of suspension, withdrawal or disconnection of services by operators to a consumer;
- protection of a consumer against operators engaging in unfair commercial practices;
- operator to disclose to end users the price, terms and conditions of the service, and protection to a consumer against unilateral changes in tariff;
- requirement on operators to establish and maintain robust complain handling and resolution mechanisms; and
- operator required to maintain confidentiality of consumer's data or information.

**Cybersecurity**

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

The current legal framework for cybersecurity is governed by the PECA. The purpose of the PECA is to control the increasing number of cybercrimes in Pakistan, and to control the offences related to information systems. It provides mechanisms for the investigation, prosecution and trial of electronic crimes.

The PECA provides that the unauthorised access or the unauthorised copying or transmission of data or an information system with the intent of injury, wrongful gain or wrongful loss or harm to any person shall be treated as a punishable offence. Further, the PECA provides that a service provider shall, within its existing or required technical capability, retain its specified traffic data (data relating to a communication indicating its origin, destination, route, time, size, duration or type of service) for a minimum period of one year or such period as the PTA may notify from time to time and, subject to the production of a warrant issued by the court, provide that data to the investigation agency or the authorised officer whenever so required.

For these purposes, the term 'service provider' includes a person who:

- acts as a service provider in relation to sending, receiving, storing, processing or distributing any electronic communication, or the provision of other services in relation to electronic communication through an information system;
- owns, possesses, operates, manages or controls a public switched network or provides telecommunications services; or
- processes or stores data on behalf of such electronic communication service or users of such service.

Service providers are required to retain traffic data by fulfilling all requirements of data retention and its originality, as per the provisions of the PECA.

**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?

None.

**Data localisation**

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

There are no specific laws that regulate data protection in Pakistan, and while the PECA criminalises unlawful or unauthorised access to information or data, or copying or transmission of critical infrastructure data, it too does not regulate data protection in Pakistan. However, a personal data protection bill has been uploaded by the MOITT on its website for stakeholder comments before it is tabled before the Parliament. The same provides that personal data shall not be transferred to any unauthorised person or system. If personal data is required to be transferred to any system located beyond territories of Pakistan or system that is not under the direct control of any of the governments in Pakistan, it shall be ensured that the country where the data is being transferred offers personal data protection equivalent to the protection provided under this Act, and the data so transferred shall be processed in accordance with this Act and, where applicable, the consent given by the data subject.

Further, all licences granted by PTA generally, inter alia, contain provisions to the effect that the licensee shall keep confidentiality of the message transmitted over the licensee's system and shall not divulge the contents of any message or part thereof to any person not entitled to become acquainted with the system and shall conform to the rules and regulation. Licensees are required to take all reasonable measures to prevent information about its subscribers, including information about their business, other than directory information, from being disclosed to third parties, including the licensee's own subsidiaries, affiliates and associated companies. A licensee shall be permitted to disclose information about a subscriber where the licensee has clearly explained to the subscriber the nature of the information to be disclosed; the recipients of the information to be disclosed; and the purpose for the disclosure, and the subscriber has provided licensee with consent to such disclosure.

**Key trends and expected changes**

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

The rapid growth in mobile data traffic and consumer demand for enhanced mobile broadband have led to an increasing emphasis on the upcoming fifth generation of mobile technology (5G). Seen as a comprehensive wireless-access solution with the capacity to address the demands and requirements of mobile communication for IMT-2020 and beyond, it is projected that this technology will operate in a highly heterogeneous environment and provide ubiquitous connectivity for a wide range of devices, new applications and use cases.

## MEDIA

**Regulatory and institutional structure**

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

**Pakistan Electronic Media Regulatory**

The Pakistan Electronic Media Regulatory Authority (PEMRA) was established under the Pakistan Electronic Media Regulatory Authority (the PEMRA Ordinance), and has the mandate to regulate the establishment and operation of all broadcast media and distribution services, which are regulated in terms of the PEMRA Ordinance and the rules and regulations framed thereunder (the PEMRA Laws). PEMRA regulates the distribution of foreign and local TV and radio channels in Pakistan

PEMRA shall have the exclusive right to issue licences for the establishment and operation of all broadcast media and distribution services,



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provided that this exclusive right shall be used by PEMRA in conformity with the principles of fairness and equity applied to all potential applicants for licences, whose eligibility shall be based on prescribed criteria notified in advance. In the case of radio, television and multichannel multipoint distribution service (MMDS) broadcast station licences, this shall be done through an open, transparent bidding process if the number of applications exceeds the number of licences to be issued by PEMRA. No person or entity can engage in broadcasting or CTV operation except after procuring a licence issued by PEMRA. For purposes of the foregoing:

- 'broadcast media' includes such media that originate and propagate broadcast and prerecorded signals by terrestrial means or through satellite for radio or television and includes teleporting, provision of access to broadcast signals by channel providers and such other forms of broadcast media as the PTA may allow, with the approval of the federal government; and
- 'distribution services' includes a service that receives broadcast and prerecorded signals from different channels and distributes them to subscribers through cable, wireless or satellite options and includes cable TV, Local Multipoint Distribution Service, MMDS, direct-to-home (DTH) and such other similar technologies.

The relevant government ministry regarding telecommunications services is the Ministry of Information, Broadcasting, National History and Literary Heritage (Pakistan).

PEMRA shall issue licences for broadcast media and distribution services in the following categories, namely:

- international- and national-scale stations;
- provincial-scale broadcasts;
- local area or community-based radio and TV broadcasts;
- specific and specialised subjects;
- distribution services; and
- uplinking facilities, including teleporting and digital satellite news gathering.

**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, a licence shall not be granted to:

- a person who is not a citizen of Pakistan or resident in Pakistan;
- a foreign company organised under the laws of any foreign government;
- a company the majority of whose shares are owned or controlled by foreign nationals or companies whose management or control is vested in foreign nationals or companies; or
- any person funded or sponsored by a foreign government or organisation.

**Licensing requirements**

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

**PEMRA**

A person who is issued a licence under the PEMRA Ordinance shall:

- ensure the preservation of the sovereignty, security and integrity of the Islamic Republic of Pakistan;
- ensure the preservation of the national, cultural, social and religious values and the principles of public policy as enshrined in the Constitution of the Islamic Republic of Pakistan;
- ensure that all programmes and advertisements do not contain or encourage violence, terrorism, racial, ethnic or religious discrimination, sectarianism, extremism, militancy, hatred, pornography, obscenity, vulgarity or other material offensive to commonly accepted standards of decency;
- comply with rules made under the PEMRA Ordinance;
- broadcast, if permissible under the terms of its licence, programmes in the public interest specified by the federal government or PEMRA in the manner indicated by the government, or, as the case may be, PEMRA, provided that the duration of such mandatory programmes does not exceed 10 per cent of the total duration of the broadcast or operation by a station in 24 hours, except if, by its own volition, a station chooses to broadcast such content for a longer duration;
- comply with the codes of programmes and advertisements approved by PEMRA and appoint an in-house monitoring committee, under intimation to PEMRA, to ensure compliance with the Code;
- not broadcast or distribute any programme or advertisement in violation of copyright or any other property right;
- obtain a no-objection certificate (NOC) from PEMRA before the import of any transmitting apparatus for broadcasting, distribution or teleporting operation; and
- not sell, transfer or assign any of the rights conferred by the licence without prior written permission of PEMRA.

Pursuant to the PEMRA Ordinance, any person desirous of obtaining a licence for establishment and operation of broadcast media or a distribution service shall apply to PEMRA in such manner and form as may be prescribed. The PEMRA shall process each application in accordance with prescribed criteria and shall hold public hearings in the respective provincial capitals of each Province, or as the case may be, in Islamabad, before granting or refusing the licence. Each application shall be accompanied by such fee as the PTA may prescribe. A licence shall be valid for a period of five, 10 or 15 years subject to payment of the annual fee prescribed from time to time. The PTA may renew a licence on such terms and conditions as may be prescribed and in case of refusal to renew a licence reasons shall be recorded in writing.

PEMRA may also grant permission to a distribution service licensee for running of in-house distribution channel subject to such terms and conditions and payment of fee and other charges as the PTA may prescribe, provided that only Pakistani content shall be distributed on such channel.

PEMRA regulates the traditional distribution platforms, whereas the Pakistan Telecommunication PTA, in addition to PEMRA, jointly regulates internet-based platforms.

Every application form shall be accompanied by a non-refundable application processing fee as set out in Schedule-B of the Pakistan Electronic Media Regulatory Authority Rules 2009 (the PEMRA Rules). Applications for the grant of a licence shall, in the first instance, be short listed by adopting the following criteria:

- financial viability;
- technical feasibility;
- financial strength;
- credibility and track record;
- majority shareholding and management control shall vest in Pakistani nationals;
- prospects of technical progress and introduction of new technology;
- market advancement, such as improved service features or market concepts;
- contribution to universal service objectives; and
- contribution to other social and economic development objectives.

PEMRA shall, within 100 days from the date of its receipt, take a decision on the application for the grant of a licence subject to clearance


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from the Ministry of Interior and frequency allocation by the Frequency Allocation Board (FAB) in relevant cases. PEMRA shall prescribe procedures for an open and transparent bidding in such cases where number of the applicants is likely to exceed the number of licences which PEMRA has fixed for that category or subcategory.

PEMRA shall, if it is satisfied that the applicant fulfils the criteria, and has paid the prescribed fee and other charges, if any, grant licence to the applicant. Every licensee shall follow the general terms and conditions as set out in Schedule-C of the PEMRA Rules.

Each successful applicant shall, within time prescribed by PEMRA and before the issues of the licence, deposit the applicable licence fee and make a security deposit, if applicable, as set out in Schedule-B. The security deposit shall be refundable after the expiry of one year of operation of the station to the satisfaction of PEMRA.

**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?

Licensees of PEMRA, pursuant to the terms of their licence, are required to carry all channels of the National Broadcaster and all licensed satellite TV and foreign satellite TV channels having landing rights permission of PEMRA. Such licensees, under all circumstances, shall provide 'basic service', which includes a bouquet of satellite TV channels as determined by PEMRA comprising channels with religious, educational, informational, news and entertainment content. A licensee shall be restricted to carry or relay only those foreign satellite TV channels that have obtained necessary landing rights permission of PEMRA for 'landing' into Pakistani territory. A licensee may not discriminate against any licensed TV channel or landing rights permission holder in offering its broadcast or distribution platform.

Licensees of PEMRA, pursuant to the terms of their licence, are required to offer at least one basic service package (this means the free-to-air television channels of the national broadcasters, non-commercial educational and health-related TV channels licensed by PEMRA and such other free-to-air television channels as determined by PEMRA to be distributed by a distribution service licensee to its subscribers against a fixed minimum monthly subscription fee) that includes the must-carry channels (this means the channels of national broadcasters, non-commercial educational channels licensed by PEMRA and such other free to air television channels as determined by PEMRA to be distributed by the distribution networks including IPTV networks to its subscribers), for which it does not charge a subscription fee at a rate higher than the maximum fee prescribed by PEMRA.

PEMRA has recently issued a notification whereby airing of Indian content has been banned. Further, airing programmes that are a production of international entities requires prior approval from PEMRA. PEMRA has also prohibited the broadcast media or distribution service operator from broadcasting or rebroadcasting or distributing any programme or advertisement if PEMRA is of the opinion that such particular programme or advertisement is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance of law and order, or is likely to disturb public peace and tranquillity or endangers national security or is pornographic, obscene, vulgar or offensive to the commonly accepted standards of decency.

Web TV and OTT distribution falls outside this scope.

**Advertising**

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

Broadcast media advertising is also regulated by PEMRA. Advertisements broadcast or distributed by the broadcast media or distribution service operator shall be required to comply with the PEMRA Laws, and the provisions of the Motion Pictures Ordinance 1979, the rules and code of conduct made thereunder. Advertisements shall also conform to the TV Code of Advertising Standards and Practices in Pakistan and Advertisement Code issued by PEMRA. During a regular programme a continuous break for advertising shall not exceed three minutes and the duration between two such successive breaks shall not be less than 15 minutes. The licensee shall maintain a record and register of the programmes being broadcast or distributed by him or her and shall, for a period of not less than 45 days, preserve such programmes.

Advertisements aired or distributed by a broadcast or cable TV station shall be designed in such a manner that they conform to the laws of the country and are not offensive to morality, decency and religious sects of the people of Pakistan. No advertisement shall be permitted that:

- promotes or supports sedition, anarchy or violence in country;
- is against any provisions of the Constitution of Pakistan or any other law for the time being in force;
- tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way;
- glorifies adultery, lustful passions or alcoholic drinks or the non-Islamic values;
- distorts historical facts, traditions of Pakistan or the person or personality of a national leader or a state dignitary;
- fans racial, sectarian, parochial, regional or class hatred;
- promotes social inequality or militates against concepts of human dignity and dignity of labour;
- is directed against sanctity or home, family and marriage;
- is wholly or mainly of a religious or political nature;
- contains references that are likely to lead the public to infer that the product advertised or any of its ingredients has some special property or quality that is incapable of being established;
- contains indecent, vulgar, or offensive themes or treatment; or
- contains material that is repugnant to ideology of Pakistan or Islamic values.

The goods or services advertised shall not suffer from any defects that are harmful to human health. Misleading claims about the goods shall not be made. No advertisement that is likely to be seen by children in large numbers should urge children directly to purchase goods of a particular brand or ask their parents to do so. All advertisements must be clearly distinguishable as such and be separate from the programmes, and should not in any manner take the form of news or documentary.

**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?

Licensees of PEMRA, pursuant to the terms of their licence, are required to carry all channels of the National Broadcaster and all licensed satellite TV and foreign satellite TV channels having landing rights permission of PEMRA. Such licensees, under all circumstances, shall provide 'basic service', which includes a bouquet of satellite TV channels as determined by PEMRA comprising channels with religious,


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educational, informational, news and entertainment content. A licensee shall be restricted to carry or relay only those foreign satellite TV channels that have obtained necessary landing rights permission of PEMRA for 'landing' into Pakistani territory. A licensee may not discriminate against any licensed TV channel or landing rights permission holder in offering its broadcast or distribution platform.

Licensees of PEMRA, pursuant to the terms of their licence, are required to offer at least one basic service package (this means the free-to-air television channels of the national broadcasters, non-commercial educational and health-related TV channels licensed by PEMRA and such other free-to-air television channels as determined by PEMRA to be distributed by a distribution service licensee to its subscribers against a fixed minimum monthly subscription fee) that includes the must-carry channels (this means the channels of national broadcasters, non-commercial educational channels licensed by PEMRA and such other free to air television channels as determined by PEMRA to be distributed by the distribution networks including IPTV networks to its subscribers), for which it does not charge a subscription fee at a rate higher than the maximum fee prescribed by PEMRA.

PEMRA has recently issued a notification whereby airing of Indian content has been banned. Further, airing programmes that are a production of international entities requires prior approval from PEMRA. PEMRA has also prohibited the broadcast media or distribution service operator from broadcasting or rebroadcasting or distributing any programme or advertisement if PEMRA is of the opinion that such particular programme or advertisement is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance of law and order, or is likely to disturb public peace and tranquillity or endangers national security or is pornographic, obscene, vulgar or offensive to the commonly accepted standards of decency.

**Regulation of new media content**

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

PEMRA has provided on its website Consultation Paper No. Web&OTT/1-2020 in relation to consultation on regulating the Web TV & Over the Top TV (OTT) Content Services.

The consultation paper states that the extensive growth of Web TV and OTT market and the excessive disruption of these services to traditional broad case services have made regulators vigilant all over the world. It further states that it is the responsibility of PEMRA to provide a level playing field to all. Since OTT and Web TV operators are completing for the same advertisement or subscription revenue as the licensed operators, therefore, it is imperative that the services be regulated at par with other services.

'Web TV' refers to broadcast of content either live or recorded made available for viewing of the public through the internet, either free of cost or on payment of a subscription fee. The content to be made available will either be produced by the licensee or he or she shall own its copyright. The service is equivalent to linear TV such as the satellite TV channels licensed by the PTA; however, the difference is only in the medium (ie, it is available via the internet). The content shall be in accordance with the Code of Conduct of PEMRA. Web TV shall be considered as a broadcast service. The term 'over-the-top' (OTT) TV refers to content services that are accessible over the internet and can be accessed from any place at any time on private or public internet by users using variety of devices either free of cost or by paying a subscription fee to the service providers. The content to be made available shall be either produced by the licensee or he or she shall own its copyright. The content shall be in accordance with the Code of Conduct of PEMRA.

If all or part of the offering of a service provider to viewers is likely to compete with linear TV, and the nature of the content and its access will lead viewers to expect some sort of regulatory protection, there is a probability that the service being provided is either Web TV or OTT.

If a service is competing for the same viewers or audience as a linear or non-linear TV or broadcast service, then it can be considered OTT or Web TV.

The following examples give some introduction of the types of service that are likely to be considered OTT or Web TV:

- a content streaming service whereby a news or entertainment (eg, movies, dramas, sports, documentaries, regional, science and technology, music and other similar content) is made available via a website either live or recorded that may compete with the linear TV service (the service can be classified as a Web TV service);
- video-on-demand (non-linear content) (ie, movies, music, drama, etc) provided online via a website by a provider exercising editorial control over the content (the service can be classified as an OTT service);
- a pay per view content service via a website whereby the provider, while exercising editorial control, charges the viewer on a per-view basis (OTT service);
- a catch-up service, whether programmes are made available from the broadcaster's own website, an online aggregated media player service or through a television platform to a set-top box linked to a television (whether using broadcast 'push' technology or 'pull' video on demand) (an OTT service); and
- a television programme archive service comprising less recent television programmes from a variety of broadcasters or production companies, made available by a content aggregator exercising editorial responsibility over all the programmes, whether via a dedicated website, online aggregated media player service or through a television platform (OTT service).

Services that are primarily non-commercial or non-economic, and that are not in competition with television broadcasting (linear or non-linear TV) may not be classified as OTT or Web TV. This may include public service material, user-generated video content posted by private individuals for non-commercial purposes of sharing and exchange within communities of interest.

It is also possible that part of an overall consumer offering of a service provider constitutes an OTT or a Web TV in its own right. For example, where a service provider offers a movie and television programme download service as part of its broader, non-audio-visual online activities, then such a service may be considered to be an OTT Content Service. More generally, a single outlet or platform (such as a website) can be home to one service or several services.

**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?

PEMRA issued a directive requiring all cable operators in Pakistan to replace analogue cable systems with digital cable TV systems by September 2016 across the country, starting with 12 major cities, at estimated cost of 90 billion rupees. However, PEMRA extended the deadline for local cable operators to switch from analogue to digital cable TV in major cities of Pakistan to the end of May 2017, while the entire urban area of the country was to be digitalised by end of September 2016. The same, however, has not yet been completed on account of litigation initiated against PEMRA regarding auction of DTH licences.

The Pakistan Table of Frequency Allocations is the broadest technical document showing the allocation of bands to various types of



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services. The Pakistan Table of Frequency Allocations is drawn from, and kept current with, the ITU Radio Regulations, which are revised every few years at the World Radio Communication Conferences.

### Digital formats

**25 Does regulation restrict how broadcasters can use their spectrum?**

Spectrum can only be used for the purpose for which is has been assigned to broadcasters by the FAB, unless the licence held by them provides otherwise.

### 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 such process available in the public domain. However, a private entity called the Freedom Network independently operates a media ownership monitor for Pakistan. We cannot comment on the correctness of the data that has been reflected on their website.

### Key trends and expected changes

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

PEMRA recently issued a notification whereby airing of Indian content has been banned. Further, airing programmes that are a production of international entities requires prior approval from PEMRA. PEMRA has also prohibited the broadcast media or distribution service operator from broadcasting or rebroadcasting or distributing any programme or advertisement if PEMRA is of the opinion that such particular programme or advertisement is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance of law and order, or is likely to disturb public peace and tranquillity or endangers national security or is pornographic, obscene, vulgar or offensive to the commonly accepted standards of decency.

Further, PEMRA has provided on its website Consultation Paper No. Web&OTT/1-2020 in relation to consultation on regulating the Web TV & Over the Top TV (OTT) Content Services.

The consultation paper states that the extensive growth of Web TV and OTT market and the excessive disruption of these services to traditional broadcast services have made regulators vigilant all over the world. It further states that it is the responsibility of PEMRA to provide a level playing field to all. OTT and Web TV operators are competing for the same advertisement or subscription revenue as licensed operators; therefore, it is imperative that the services be regulated at par with other services.

'Web TV' refers to broadcast of content either live or recorded made available for viewing of the public through the internet, either free of cost or on payment of a subscription fee. The content to be made available will either be produced by the licensee or he or she shall own its copyright. The service is equivalent to linear TV such as the satellite TV channels licensed by the PTA; however, the difference is only in the medium (ie, it is available via the internet). The content shall be in accordance with the Code of Conduct of PEMRA. Web TV shall be considered as a broadcast service. The term 'over-the-top' (OTT) TV refers to content services that are accessible over the internet and can be accessed from any place at any time on private or public internet by users using variety of devices either free of cost or by paying a subscription fee to the service providers. The content to be made available shall either be produced by the licensee or he or she shall own its copyright. The content shall be in accordance with the Code of Conduct of PEMRA.

If all or part of the offering of a service provider to viewers is likely to compete with linear TV, and the nature of the content and its access will lead viewers to expect some sort of regulatory protection, there is a probability that the service being provided is either Web TV or OTT.

If a service is competing for the same viewers or audience as a linear or non-linear TV or broadcast service, then it can be considered OTT or Web TV.

The following examples give some introduction to the types of service that are likely to be considered OTT or Web TV:

- a content streaming service whereby a news or entertainment (eg, movies, dramas, sports, documentaries, regional, science and technology, music and other similar content) is made available via a website either live or recorded that may compete with the linear TV service (the service can be classified as a Web TV service);
- video-on-demand (non-linear content) (ie, movies, music, drama, etc) provided online via a website by a provider exercising editorial control over the content (the service can be classified as an OTT service);
- a pay per view content service via a website whereby the provider, while exercising editorial control, charges the viewer on a per-view basis (OTT service);
- a catch-up service, whether programmes are made available from the broadcaster's own website, an online aggregated media player service or through a television platform to a set-top box linked to a television (whether using broadcast 'push' technology or 'pull' video on demand) (an OTT service); and
- a television programme archive service comprising less recent television programmes from a variety of broadcasters or production companies, made available by a content aggregator exercising editorial responsibility over all the programmes, whether via a dedicated website, online aggregated media player service or through a television platform (OTT service).

Services that are primarily non-commercial or non-economic, and that are not in competition with television broadcasting (linear or non-linear TV) may not be classified as OTT or Web TV. This may include public service material, user-generated video content posted by private individuals for non-commercial purposes of sharing and exchange within communities of interest.

It is also possible that part of an overall consumer offering of a service provider constitutes an OTT or a Web TV in its own right. For example, where a service provider offers a movie and television programme download service as part of its broader, non-audio-visual online activities, then such a service may be considered to be an OTT Content Service. More generally, a single outlet or platform (such as a website) can be home to one service or several 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 Pakistan Telecommunication PTA (PTA) is the regulator for the telecom sector in Pakistan and the Pakistan Electronic Media Regulatory Authority (PEMRA) is the regulator for the broadcast, distribution and media sector in Pakistan.



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Anticompetitive practices are generally the subject of the Competition Commission of Pakistan (CCP), which is an independent, regulatory, quasi-judicial body that helps to ensure healthy competition between undertakings for the benefit of the economy, in terms of the Competition Act 2010. The CCP prohibits the abuse of a dominant position in the market, certain types of anti-competitive agreements and deceptive marker practices. It also reviews mergers of undertakings that could result in a significant lessening of competition, or that could have the effect of altering market conditions artificially.

The telecommunication and the media regulators are both separate, however, there is an overlap in terms of regulation of these entities from a competition perspective by their own respective regulator (PTA/PEMRA) and the CCP.

### Appeal procedure

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

#### PTA

Yes, the PTA Act inter alia provides that any person aggrieved by any decision or order of the PTA on the grounds that is contrary to the provisions of the PTA Act may, within 30 days of the receipt of such decision or order, appeal to the high court or to any other tribunal established by the federal government for that purpose, in the manner prescribed by the high court for filing the first appeal before the court (or tribunal). the court or tribunal shall decide such appeal within 90 days.

No tribunal has, of yet, been established by the federal government for this purpose; hence, all appeals are made before the relevant high court.

#### PEMRA

Yes, the PEMRA Ordinance, inter alia, provides that any person aggrieved by any decision or order of PEMRA may, within 30 days of the receipt of such decision or order, prefer an appeal to the high court. Within 24 hours of the decision, PEMRA shall make a copy of its decision or order of revocation of licence available to the licensee for referring an appeal to the high 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 following approvals for mergers have been granted by the Competition Commission of Pakistan, which are available on its website:

- *Acquisition of the entire issued share capital of Warid Telecom (Pvt) Limited by Pakistan Mobile Communications Ltd and amalgamation of Pakistan mobile communications Ltd and Warid Telecom (Pvt) Limited;*
- *In the matter of Phase II Review of Amalgamation of Pakistan Mobile Communications Limited and Warid Telecom (Private) Limited;*
- *In the Matter of Phase II Review of Integration of Karachi Stock Exchange limited, Lahore Stock Exchange Limited and Islamabad Stock Exchange Limited;*
- *In the Matter of Second Phase review acquisition of the Global Vaccines business (excluding influenza vaccines business except in China) from Novartis AG by Glaxosmithkline PLC;*
- *Acquisition of Business relating to a portfolio of Oncology products (excluding manufacturing) from Glaxosmithkline by Novaris AG;*
- *In the matter of acquisition of shareholding in M/s. Ferozee1888 Mills Limted by M/s. Liberty Mills Limited; and*
- *In the matter of acquisition of shareholding in M/s. Opal Laboratories (Pvt.) Limited by Mr. Danish Elahi from M/s. Wellinnova Life Sciences (Pvt.) Limited.*

RIAA Barker Gillette

**Mustafa Munir Ahmed**
mustafa.ahmed@riaabg.com

**Saira Khalid Khan**
saira.khalid@riaabg.com

3rd Floor
65-W
Executive Heights
Block-H
Fazal-e-Haq Road
Blue Area
Islamabad
Pakistan
Tel +92 51 111529937
www.riaabarkergillette.com/pk



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# Philippines

**Rose Marie M King-Dominguez, Miguel Franco T Dimayacyac and Leo Francis F Abot**

SyCip Salazar Hernandez & Gatmaitan

## 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 services enterprises are generally viewed as public utilities subject principally to provisions of the Philippine Constitution, the Public Service Act (Commonwealth Act No. 146, as amended) and the Public Telecommunications Policy Act (Republic Act No. 7925). The Philippines has other statutes and regulations that specifically apply to the communications sector, such as the Radio Control Act (Act No. 3846, as amended) and the issuances of the National Telecommunications Commission (NTC).

The NTC has supervision and control over telecommunications and broadcasting entities, and generally has the mandate to administer and implement laws on the licensing and operations of the covered entities. The NTC is an attached agency of the Department of Information and Communications Technology (DICT). The DICT is mandated to be the primary policy, planning, coordinating, implementing and administrative entity of the Executive Branch that will plan, develop and promote the national Information and Communication Technology development agenda.

Public telecommunications entities (PTEs) must be at least 60 per cent Filipino owned, and generally would have to obtain a legislative franchise from the Philippine Congress, as well as certain operating licences. Broadcasting entities, on the other hand, are considered mass media enterprises and under the Philippine Constitution must be wholly owned by Filipinos.

### Authorisation/licensing regime

**2 Describe the authorisation or licensing regime.**

The provision of all types of public telecommunications services, including fixed, mobile and satellite services, is subject to franchise and licensing requirements.

A PTE would need to be a corporation established in the Philippines with a franchise granted by the Philippine Congress (unless the PTE is a value-added service provider). This franchise is in the form of a law, and therefore its grant goes through the same process as other types of statutes. The term of a Congressional franchise is 25 years and is renewable upon application.

An enfranchised PTE would also have to obtain certain principal licences from the NTC. These are:

- Certificate of public convenience and necessity (CPCN). The application process is of a judicial nature, where an applicant files a petition for the CPCN issuance, and must prove its legal, technical and financial capability, as well as the feasibility of offering the contemplated service. The particular parameters and specific requirements utilised by the NTC to assess an application will depend on the service being proposed. Parties, such as entities engaged in the same service, may participate in the proceeding to oppose the application. Typically, it takes up to 10 years for the NTC to act on the petition. CPCNs usually have a term of 10 years and are renewable upon application. They are non-exclusive and may be amended. A nationwide application for a CPCN has a filing fee of 330,981 pesos.
- Provisional authority (PA). The PA is an authority to operate issued to a CPCN applicant once it successfully proves that it has the financial and technical capacity to deliver its services to the public. The PA is issued pending the full assessment of the application for, and issuance of, the CPCN. The holder of a PA can already operate the service even if the CPCN petition is still pending. A PA's term is 18 months and is renewable upon application.
- Frequency allocation. This is typically applied for and allocated after the issuance of the PA or CPCN. An application is made using the NTC-prescribed form, supported by technical specifications of the network and of the equipment to be used. The frequencies shall then be allocated upon verification that they are available or are properly allocated within the National RF Allocation Table, and that the applicant can properly utilise them. Frequency bands assigned are subject to an annual spectrum user fee, depending on the frequency band, channel and coverage applied for.

On satellite services, and in general, only enfranchised and certificated PTEs are allowed direct access to international satellite systems. Access is subject to the satellite operator's commercial presence in the Philippines, and the jurisdiction where the operator has been established having reciprocal terms with the Philippines.

If the PTE is a provider of value-added services (VAS), the entity need not obtain a Congressional franchise but must obtain a certificate of registration (CoR) from the NTC, provided it does not set up its own network. Like other PTEs, it must be at least 60 per cent Filipino-owned. VAS are services that improve upon the quality and functionality of services ordinarily offered by PTEs, such as audio conferencing and videoconferencing. The CoR, which specifies the VAS that will be rendered, is valid for five years and may be renewed upon application. An application for a VAS CoR has a filing fee of 300 pesos. Further, there is an annual registration fee of 6,000 pesos for the first five services registered, and an additional 1,000 pesos for each additional service.

### 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?**

Use of spectrum allocated by the NTC can only be in accordance with services allowed in the PA/CPCN that are granted to the PTE. In this



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regard, the Public Telecommunications Policy Act and NTC regulations require periodic review of radio frequency spectrum allocation and assignment. In order to optimise the use of the radio spectrum, regulations require radio frequency (RF) to be assigned to those who will use it efficiently and effectively to meet public demand for telecommunications services. Regulations provide for the recall of RF unused for at least one year from the date of issuance of the licence. RF licences are granted according to use permitted by the National RF Allocation Table, the service licensed to the grantee and the radio equipment to be used.

RF spectrum is not tradable or assignable. The NTC has exclusive authority to allocate RF spectrum to specific services and assign them to qualified entities. Unless the NTC permits otherwise, RF spectrum may only be used for services indicated in the National RF Allocation Table and may not be transferred to another entity. However, in exceptional instances, the NTC may allow co-use of the RF spectrum.

### Ex-ante regulatory obligations

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

Billing and rate-fixing is subject to ex-ante regulation. The NTC is empowered to regulate and fix rates of telecommunications entities upon due notice and hearing. Further, the NTC regulates the manner and procedure of billing subscribers of telecommunication providers. However, rates for VAS are deregulated.

### 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 existing or proposed law or regulation to effect structural separation in the industry. Provided that activities are covered by a PTE's franchise and operating licences, it may pursue those activities.

The Public Telecommunications Policy Act prohibits a single franchise authorising an entity to engage in both telecommunications and broadcasting. This was seen as a move to prevent entities from monopolising available resources, such as available frequencies.

### Universal service obligations and financing

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

USOs (universal service obligations) became a statutory obligation in the early 1990s for international gateway facility (IGF) and cellular mobile telephone system (CMTS) operators in the form of mandatory deployment of a required number of local exchange lines or public calling offices. These operators were expected to subsidise the costs of providing local exchange services from revenues generated from their IGF and CMTS operations. But the implementation of USOs through the NTC's Service Area Scheme has generally become viewed as unsustainable owing to falling revenue from international services, the weak demand for LEC in rural areas and the growth of mobile telephony. The NTC has since generally eased the USO's enforcement but has extended the USO to 3G licensees. The NTC now allows USO compliance through an equivalent number of telecentres (ie, facilities providing voice, internet or any telecommunications service) in lieu of local exchange lines or public calling offices. Recently, the DICT has adopted rules regarding common towers to improve telecommunications services throughout the country.

### Number allocation and portability

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

Number allocation in the Philippines is administered by the NTC and follows an open telephone numbering plan and open dial plan. On the other hand, the Mobile Number Portability Act (Republic Act No. 11202) was signed into law on 8 February 2019, requiring a licenced telecommunications provider to allow mobile number portability to all qualified subscribers free of charge. A qualified subscriber must be the assignee of the mobile number used in a device that is not locked to a particular telecommunications provider and must not have any outstanding financial obligation with the donor provider. The subscriber must also not be blacklisted owing to previous fraudulent activities.

According to local telecoms companies that recently tapped a US-based mobile number portability service provider, subscribers can begin availing of mobile number portability in the latter part of 2021.

### Customer terms and conditions

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

The NTC regulations state that a clear and unambiguous statement of the terms and conditions on which telecommunications service will be offered, including any discounts or special conditions that will be offered, must be contained in the tariff structure submitted to the NTC for approval. Terms pertaining to the rates, conditions of access and manner of opting in or out must be fully disclosed to subscribers.

### 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 currently no law, rule or regulation on net neutrality or 'zero-rating' of data transmission in the Philippines. While there have been previous attempts to pass an internet freedom law, the regulation of net neutrality is not included in the legislative agenda of the present administration.

While there is no specific law or rule prohibiting bandwidth throttling, the Department of Justice has issued an advisory warning internet service providers against using false, deceptive and misleading advertisements when marketing the maximum internet speed in the internet packages that they offer. They must also fully disclose their respective fair use policies and terms of use to give the end users equal opportunities to access their services. Failure to comply with these directives are seen as violations of the Consumer Act (Republic Act No. 7394) and will lead to imposition of the appropriate penalties.

It is possible that bandwidth throttling may be considered as a form of abuse of dominant position under the Philippine Competition Act (Republic Act No. 10667). This assumes that the entity engaged in it can be shown as having a dominant position in the relevant market. We are not aware of any ruling made by the Philippine Competition Commission (PCC) on the matter.

### 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 law dealing specifically with digital platforms. However, there is a bill currently pending in Congress that aims to



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regulate online transactions and to establish a regulator dedicated 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?

Philippines regulators have only recently regulated broadband services by imposing duties to disclose their service reliability to consumers, and to observe the minimum service reliability standard of 80 per cent. They have not yet come up with circulars on standardisation and transition to next-generation access networks such as 5G.

**Data protection**

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

The Philippines does not have a data protection regime that specifically applies only to the communications sector, although the NTC has issued regulations on retention periods on traffic data for voice and non-voice communications. The general law on privacy of personal data, the Data Privacy Act (Republic Act No. 10173), applies to the communications sector.

**Cybersecurity**

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

The Cybercrime Prevention Act of 2012 (CPA) (Republic Act No. 10175) protects the confidentiality and integrity of computer data and systems by declaring the following as cybercrimes:

- offences against the confidentiality, integrity and availability of computer data and systems (illegal access, illegal interception, data interference, system interference, misuse of devices and cybersquatting);
- computer-related offences (computer-related forgery, computer-related fraud and computer-related identity theft); and
- content related offences (cybersex, child pornography, and cyber libel).

The CPA appointed the National Bureau of Investigation and Philippine National Police (PNP) as enforcement authorities, and regulates their access to computer data, creating the Cybercrime Investigation and Coordinating Centre as an inter-agency body for policy coordination and enforcement of the national cybersecurity plan, and an Office of Cybercrime within the Department of Justice for international mutual assistance and extradition.

The Electronic Commerce Act of 2000 (ECA) (Republic Act No. 8792) penalises hacking and piracy of protected material, electronic signature or copyrighted works; limits the liability of service providers that merely provide access; and prohibits persons who obtain access to any electronic key, document or information from sharing them. The ECA also expressly allows parties to choose their type of level of electronic data security and suitable technological methods, subject to guidelines issued by the Department of Trade and Industry.

The Access Devices Regulation Act of 1998, as amended penalises various acts of access device fraud such as using counterfeit access devices. An access device is any card, plate, code, account number, electronic serial number, personal identification number; or other telecommunications service, equipment, or instrumental identifier; or other means of account access that can be used to obtain money, goods, services or any other thing of value; or to initiate a transfer of funds (other than a transfer originated solely by paper instrument). Banks, financing companies and other financial institutions issuing access devices must submit annual reports of access device frauds to the National Bureau of Investigation and the Anti-Cybercrime Group of the PNP.

**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 Philippines currently does not have specific legislation regarding big data. However, there is a proposal in Congress to establish a Big Data Centre for research purposes.

**Data localisation**

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

We do not have laws generally requiring 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.

There is a proposal in Congress that removes nationality restrictions in telecommunications and media; in effect, liberalising the industries. However, some have expressed the view that the proposal is against the Philippine Constitution.

In addition, there is pending legislation in Congress that seeks to regulate internet transactions. Generally, this proposal aims to impose registration requirements to online merchants, as well as to adopt a code of conduct applicable for all online merchants. This proposal also outlines their obligations and corresponding liabilities.

## MEDIA

**Regulatory and institutional structure**

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

There is no general law that applies to the media sector as a whole. Nevertheless, the laws and regulations in place typically focus on regulating access to content, such as age-gating with respect to movies, age advisories in relation to television shows, and ownership restrictions and consumer protection. In addition, the media sector is affected by legislation on press freedom, intellectual property, privacy, criminal law and the general civil law.

Various government agencies handle content regulation, such as the Movie and Television Review and Classification Board, the Optical Media Board and the National Council for Children's 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?

Only Philippine nationals or corporations, partnerships or associations wholly owned by Philippine nationals may engage in broadcasting.

There are no regulations in relation to the cross-ownership of media. However, an entity cannot engage in both telecommunications and broadcasting under a single franchise.


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### Licensing requirements

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

A broadcasting company would need to be a corporation established in the Philippines with a franchise granted by the Philippine Congress. This franchise is in the form of a law and therefore its grant goes through the same process as other types of statutes. The term of a Congressional franchise is 25 years and is renewable upon application.

An enfranchised broadcasting company would have to also obtain certain principal licences from the National Telecommunications Commission (NTC). These are:

- Certificate of public convenience and necessity (CPCN). The application process is of a judicial nature, where an applicant files a petition for the CPCN issuance, and must prove its legal, technical and financial capability, as well as the feasibility of offering the contemplated service. The particular parameters and specific requirements utilised by the NTC to assess an application will depend on the service being proposed. Parties, such as entities engaged in the same service, may participate in the proceeding to oppose the application. Typically, it takes up to 10 years for the NTC to act on the petition. CPCNs usually have a term of 10 years, and are renewable upon application. They are non-exclusive and may be amended. A nationwide application for a CPCN has a filing fee of 330,981 pesos.
- Provisional authority (PA). The PA is an authority to operate issued to a CPCN applicant once it successfully proves that it has the financial and technical capacity to deliver its services to the public. The PA is issued pending the full assessment of the application for, and issuance of, the CPCN. The holder of a PA can already operate the service even if the CPCN petition is still pending. A PA's term is 18 months and is renewable upon application.
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### 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 rules requiring television broadcasters to include a minimum amount of local content in their programming. However, the Broadcast Code of the Philippines (which was formulated by the local organisation of broadcasters and adopted by the NTC) provides that the airing of programmes in a foreign language other than English must take into account the broader interests of the public in the scheduling and presentation of the programmes. Also, stations broadcasting such programmes are mandated to keep a record of the broadcasts for not less than six months. In respect of radio programming, the NTC requires all radio stations to broadcast a minimum of four original Philippine musical compositions every hour. There are no similar regulations for online or other media.

### Advertising

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

Only Philippine nationals or corporations, where at least 70 per cent of the capital stock is owned by Philippine nationals, may engage in advertising, including online advertising, directed at the Philippine market or using Philippine mass media. Advertising companies do not need to obtain a special licence or register with any regulatory body specifically supervising the advertising industry, and there is no such governmental body. Instead, local companies and other participants in the industry have formed an organisation called the Ad Standards Council (ASC). It is essentially a self-regulating body.

Advertising content is principally regulated by the provisions of the Broadcast Code of the Philippines and the Consumer Act, as well as various special laws and regulations, such as regulations issued on tobacco advertisements and those issued by the Philippine Food and Drug Administration. The ASC has also issued a Code of Ethics and is guided by its Manual of Procedures. These seek to regulate both advertising content and the behaviour of participants in the advertising industry.

### 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?

Local rules require a cable TV system operating in a community that is within particular field intensity contours of an authorised TV broadcast station or stations to carry the TV signals of these stations. A cable television system operating in a community may carry or, upon request by a relevant station licensee or permittee, shall carry the television broadcast signals from certain broadcast stations such as non-commercial educational TV stations. The cable company's retransmission of broadcast signals without charge does not infringe the intellectual property rights of the broadcasting station. In addition to the signals that such cable TV system is required to carry, an access channel should be provided for the use of certain entities (such as the national government and socio-civic organisations) for free, as a public service feature of the television cable system.

### Regulation of new media content

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

Except for special laws against content-related offences online under the Cybercrime Prevention Act and the Anti-Child Pornography Act (Republic Act No. 9775), there are no general regulations expressly governing new media content, so that to the extent that the new media operator is based in the Philippines and providing a service here, local authorities will likely try to apply media laws in general.

There are existing regulations on the aspect of transmission of new media. Generally, entities engaged in the delivery of content, information, applications, programmes and e-mails online may be considered value-added services (VAS) providers. VAS providers need to be Philippine nationals or corporations the foreign ownership of which does not exceed 40 per cent of the corporation's capital stock. VAS providers do not need to obtain a congressional franchise or a CPCN, but must register with the NTC.



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### 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 NTC was initially set to switch from analogue to digital TV by 11:59pm on 31 December 2015, and chose the integrated services digital broadcast-terrestrial (ISDB-T) standard as the sole standard in the delivery of digital terrestrial television services in the country. However, this did not occur, and the Department of Information and Communications Technology has mentioned that the switchover is now scheduled for 31 December 2023.

### Digital formats

**25 Does regulation restrict how broadcasters can use their spectrum?**

No. Regulations allow multiplexing and broadcast of high-definition feeds. However, an early warning broadcast system is a required feature in the Philippine digital terrestrial television system. In general, broadcasters would need to use the spectrum only for the services covered by its franchise and licences.

### 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?**

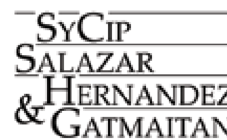
Media plurality per se has not been the subject matter of regulatory efforts in the country. Concepts such as diversity and representation are only beginning to enter the mainstream of public discussion. However, owing to the proliferation of fake news and its consequences in Philippine electoral politics, there have been attempts to pass bills regulating social media and penalising fake news.

### Key trends and expected changes

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

There is a proposal in Congress that removes nationality restrictions in telecommunications and media; in effect, liberalising the industries. However, some have expressed the view that the proposal is against the Philippine Constitution.

On 10 February 2020, the Philippine government filed an action before the Supreme Court seeking the revocation of the legislative franchise of ABS-CBN Corporation (ABS-CBN), a leading broadcast company, alleging various violations of the terms of its legislative franchise. Among others, the government alleged that ABS-CBN had foreign ownership, which is prohibited by the Philippine Constitution. In a hearing before the Senate, a PCC commissioner aired concerns about the degree of competition within the broadcast industry in the Philippines should the legislative franchise be revoked, since a major player will be forced to shut down. The matter is currently pending before the Supreme Court.




**Rose Marie M King-Dominguez**
rmmking@syciplaw.com

**Miguel Franco T Dimayacyac**
mftdimayacyac@syciplaw.com

**Leo Francis F Abot**
lffabot@syciplaw.com

SyCipLaw Center
105 Paseo de Roxas
Makati City
1226
Philippines
Tel: +632 8982 3500
+632 8982 3600
+632 8982 3700
www.syciplaw.com

## 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 National Telecommunications Commission (NTC) is the government body that principally regulates the telecommunications and broadcasting industries. The Department of Information and Communications Technology, Department of Trade and Industry, and the National Privacy Commission are mandated to issue relevant regulations to communications services providers.

Content provision, however, is mainly regulated by the Movie and Television Review and Classification Board and the Optical Media Board. The National Council for Children's Television issues special regulations. Local broadcasters have formed a self-regulatory body called the Association of Philippine Broadcasters, which has issued certain programme standards for television and radio.

The Philippine Competition Commission (PCC) is the main antitrust regulator tasked with curbing anti-competitive agreements, abuse of dominant position, and anti-competitive mergers. However, the NTC has the power to exempt any specific telecommunications service from its rate or tariff regulations if the service has sufficient competition to ensure fair and reasonable rates or tariffs. The NTC nevertheless retains its residual powers to regulate rates or tariffs when ruinous competition results, or when a monopoly or a cartel or combination in restraint of free competition exists.



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**Appeal procedure**

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

Decisions of the NTC issued in the exercise of its quasi-judicial powers may be brought to the Court of Appeals for review either through a petition for review or a petition for certiorari. The former may be taken based on questions of law, facts or mixed questions of law and facts, while the latter may be taken based on a claim of grave abuse of discretion on the part of the regulator whose decision is being challenged. Both are taken by filing verified petitions, with proof of service of a copy on the adverse party and on the regulator whose decision is challenged, and payment of docket and other fees.

**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.

On 30 September 2019, the PCC ordered a condominium developer to cease and desist its exclusive arrangement with its partner internet service provider (ISP), thereby making the partner ISP the only available ISP in a particular condominium. During the proceedings, the condominium developer conceded that its arrangement amounted to an abuse of dominant position and cooperated with the PCC. Nevertheless, the PCC imposed fines of approximately 27 million pesos, in addition to the cease and desist order.



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# Portugal


**Mara Rupia Lopes and Nuno Peres Alves**

Morais Leitão, Galvão Teles, Soares da Silva & Associados


## 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; Decree-Law No. 92/2017 of 31 July and Decree-Law No. 95/2019 of 18 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 the National Communications Authority (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. 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 (as amended) 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.




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**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 10 years, ANACOM has been adopting a more flexible approach regarding the 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 the 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 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 (which occurred on 1 June 2019, in what concerns the connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location) and its proposal for a legislative amendment to the rules on universal service provision. 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.



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| 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;<br>non-discriminate in quality of service, delivery time and tariff;<br>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<br>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<br>Vodafone<br>NOS | To meet reasonable requests for access;<br>non-discrimination in the access and interconnection offer and in the respective information provision;<br>transparency in the publication of information; and<br>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;<br>non-discrimination;<br>transparency;<br>accounting separation;<br>price control; and<br>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:<br>to meet reasonable requests for access to network and use of specific network resources;<br>non-discrimination;<br>transparency;<br>accounting separation;<br>price control; and<br>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;<br>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;<br>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;<br>costing system and accounting separation;<br>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<br>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;<br>non-discrimination in the offer of access and interconnection and respective provision of information;<br>transparency in the publication of information, including reference proposals;<br>price control obligation and cost accounting; and<br>accounting separation and costing accounting system regarding specific activities related to access or interconnection (applies to PT Group only). |



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There are no universal service obligations associated with the provision of broadband.

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 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.

As of November 2019, ANACOM is going to define the conditions to enable electronic communications service providers, with a small number of customers or those that operate on a relatively small national scale, to use, by agreement, the numbers allocated to other providers in the offer of the same service. This measure will boost competition in the offer of electronic communications services, eliminating barriers to the entry of companies in the market, while also optimising the use of numbering resources and increasing consumer freedom of choice.

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, as amended,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.


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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 the generality of digital platforms, besides the law applicable to information society services and e-commerce – Law No. 7/2004 of 7 January, as amended. Notwithstanding, digital platforms relating to gambling and crowdfunding are regulated by the legislation applicable to the activities provided through these platforms.

Digital platforms used for transportation activities are regulated by Law No. 45/2018 of 10 August.

**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 by Decree-Law No. 258/2009 of 25 September, Law No. 47/2013 of 10 July, Law No. 82-B/2014 of 31 December, Decree-Law No. 92/2017 of 31 July and Decree-Law No. 95/2019 of 18 July.

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 the 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 transposed into the Portuguese legislation through Law No. 58/2019 of 8 August.

**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 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,



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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.

In the context of the current emergency responses pursuant to the pandemic covid-19, the Portuguese government approved a specific diploma (Decree-Law No. 10-D/2020 of 9 April) that allows electronic communications operators to adopt exceptional traffic management measures to prevent or mitigate congestion in their networks, and imposes some obligations related to the provision of basic services and to critical clients (Health System, Security Forces, etc). Meanwhile, the Body of European Regulators for Electronic Communications (BEREC) approved the 'Joint Statement from the Commission and the Body of European Regulators for Electronic Communications (BEREC) on coping with the increased demand for network connectivity due to the Covid-19 pandemic', which discussed the imminent need to adopt exceptional traffic management measures in the light of the rules on Open Internet Access.

Procedures applicable to award the spectrum for the deployment of 5G are already being carried out by the government and ANACOM (public consultation on the rules of the auction), and are expected to be completed within 2020.

More recently, in April 2020, within the scope of new a digital legislative package, the government is working with operators and regulators to create a social tariff for internet services. The objective is to create a social tariff for access to broadband internet services that allows its most widespread use, to promote inclusion and digital literacy in the most disadvantaged sections of the population, according to the resolution of the Council of Ministers 30/2020, which approved the Digital Transition Action Plan.

The government and ANACOM are preparing the draft of a new electronic communications law, in order to transpose into national legislation Directive (EU) 2018/1972, of the European Parliament and of the Council of 11 December 2018, establishing the European Electronic Communications Code. In accordance with the Directive the new law shall be in force by 21 December 2020.

## 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:
- 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;
- Radio Law No. 54/2010 of 24 December, as amended by Law No. 38/2014 of 9 July; and
- Press Law No. 2/99 of 13 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 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?

Regarding 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 is subject to a prior opinion of the ERC, which shall be mandatory if the ERC considers that the concentration harms media plurality.



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**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 National Frequency Allocation Board.

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, rectified by the Statement of Rectification No. 36/2009 of 28 May and amended by Decree-Law No. 33/2018 of 15 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, regarding 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 7am and 11pm shall not exceed 20 per cent. Advertising is also prohibited for foodstuffs and drinks with a high energy value, salt content, sugar, saturated fatty acids and processed fatty acids in television programme services and audiovisual communication services on request and on the radio in the 30 minutes before and after children's programmes, and television programmes that have a minimum of 25 per cent audience below 16 years old, as well as the insertion of advertising in the respective interruptions.

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.


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### 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 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, on 27 June 2018 ANACOM approved the 'National roadmap for the 700 MHz band', containing 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 audio-visual distribution pursuant to the development of the fifth mobile generation. The roadmap was approved by the government, through an order issued by the Secretary of State for Infrastructure and should be implemented soon.

On 17 April 2020, ERC submitted to public consultation the draft of an amendment to the Regulation on the transparency of the financial resources of media operators.

## 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 Regulatory Authority for Media (ERC). The antitrust regulator is a different body, the Portuguese Competition Authority (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.



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### Appeal procedure

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

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.**

The past few years have witnessed some interesting merger and antitrust decisions in the communications and media sectors in Portugal.

In 2019, the Portuguese Competition Authority 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.

M/L MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

**Nuno Peres Alves**
npalves@mlgts.pt

**Mara Rupia Lopes**
mrlopes@mlgts.pt

Rua Castilho 165
1070-050 Lisbon
Portugal
Tel: +351 213 817 400
Fax: +351 213 817 499
www.mlgts.pt



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# Russia

**Anastasia Dergacheva, Anastasia Kiseleva, Ksenia Andreeva and Vasilisa Strizh**

Morgan Lewis

## 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 governmentand 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 (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.

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



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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 three 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.

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**

The Radio Frequencies Commission allocates radio frequencies (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 Governmentfrom 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 the allocation of RFs for terrestrial and satellite broadcasting.

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 has been launched. RF bands in the range 3,400–3,800MHz have been selected for the testing. In 2019, it was decided that these RF bands could not be allocated for 5G networks as they are already used by important state agencies and corporations, among which was the Roscosmos State Space Corporation and the Federal Security Service. In light of this, Minkomsvyaz recommended to consider RF bands in the range 4,400–4,990MHz for 5G network developments.

In March 2020, the Radio Frequencies Commission has not granted the right to use 2G, 3G and 4G RF bands for 5G developments; the process of obtaining such approval is still pending.

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 of identification 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 the 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



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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 a 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 the provision of communications services adopted by the government. The governmentadopted rules of the 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, namely, 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



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introduce criteria for determination of digital platforms owners as dominant players.

**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.

**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).

Federal Law No. 90-FZ of 1 May 2019, which introduced a set of amendments to the Federal Law on Communications and the Information Law, came into force on 1 November 2019, and the provisions regarding the national domain name system and national cryptosecurity standards come into force in January 2021.

The main purpose of the law is to ensure autonomous operation of the Russian segment of the internet in case of an emergency situation, which will be declared by Roskomnadzor. Roskomnadzor, via a specially created Centre for Monitoring and Control of Public Communication Networks, will take control over the internet if an emergency situation occurs. The Centre for Monitoring and Control of Public Communication Networks has the authority to collect information about network infrastructure and IP addresses; maintain the register of traffic exchange points; and, in case of emergency, order to reroute the traffic.

The law also introduced 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.

**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. There are several legislative initiatives in the big data area.

In September 2019, Minkomsvyaz published draft amendments to the Personal Law that purports to introduce three categories of data: personal data, anonymised personal data and anonymised data. The draft amendments suggest that anonymised data can be freely used for business purposes without an individual's consent.

In February 2020, Minkomsvyaz published a separate set of amendments to the Information Law. Under these amendments, 'big data' is defined as the set of depersonalised data classified by group principles. The draft law proposes to introduce a 'register of big data operators', and provides that the principles, rights and obligations of big data operators, procedures and means of big data processing will be established by the government.

**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.

In December 2019, the liability for non-compliance with the personal data localisation requirements was increased. The law introduced severe penalties such as fines for legal entities of up to approximately US$95,000 for a first-time offence, and up to approximately US$284,000 for the second-time offence for noncompliance with the localisation requirement. On 13 February 2020, the Russian


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court has for the first time imposed liability in accordance with the adopted law.

The Communications Law requires that communication operators 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 has 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. The Radio Frequencies Commission intends to permit operators to use already allocated RFs used for 2G, 3G and 4G networks for testing and development of 5G.

In December 2018, the State Duma introduced landmark changes to the Communications Law. Starting 1 June 2019, telecommunication operators are no longer allowed to charge increased fees for calls between Russian regions ('national roaming') or charge users for domestic incoming calls.

Russia also considers imposing an obligation on telecom operators to grant free access to socially important websites. Reportedly, Minkomsvyaz is working on the draft law, which is expected to be adopted and come into force in December 2020.

## 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 Law of the Russian Federation No. 2124-1 On Mass Media of 27December 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);
- Federal Law on Information, Information Technologies, and Information Protection, No. 149 dated 27 July 2006 (the Information 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, foreign ownership restrictions have been introduced to the Mass Media Law, 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.



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Separate foreign ownership restrictions have recently been adopted for certain specific media services – for example, for an audiovisual service owner.

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 restrictiveregulation on the 'foreign agents' that were initially designed to apply to nonprofits 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 the 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.

### 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. 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 20 per cent of the overall air time per hour and 15 per cent of the overall air time per day;
- 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 the advertising of certain other goods. For instance, advertising of medicines and medical services, including methods of treatment, should contain warnings regarding contraindications, 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.

There are also special restriction of the advertising of certain types of goods in children's programming, such as advertising of alcoholic products, medicines and medical services, including methods of treatment, military products and weapons, risk-based games, bets, and others.

### 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:



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- 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;
- municipal must-carry channels; and
- TV channels that have obtained the right to carry out terrestrial broadcasting using positions in multiplexes.Currently, there are 10 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 the 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. The switchover of 20 federal must-carry channels to digital broadcasting was completed in October 2019. The switchover of regional channels is pending.

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 the 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, Federal Law No. 90-FZ of 1 May 2019 introduced a set of amendments to the Information Law, which are colloquially referred to as the 'sovereign runet law' or the 'law on the secured internet'. These amendments allow the government to restrict access to the internet and to control internet traffic in emergency situations. Starting 1 January 2018, messenger operators must run mandatory identification of users that could be done using subscribers' phone numbers.

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


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infrastructure, transport or public services, banks, communication lines and facilities, power and industrial facilities. Owing to the covid-19 situation, Federal Law No. 99 of 1 April 2020 introduced separate liability for the distribution of 'fake news' related to the:
- circumstances threatening life and safety of citizens;
- measures that are taken to ensure the public safety; and
- methods of counteracting these threatening circumstances.

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 noncompliant 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. 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 nonprofitorganisations). 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.

### 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.**

From 1 January 2021, the manufacturers of certain consumer electronic devices offered for sale in Russia will be required to preinstall Russian software. In February 2020, the Russian Federal Antimonopoly Service (FAS) has developed draft guidelines to determine the types of electronic devices that will be subject to the new regulations, as well as the deadlines and procedures for the preinstallation of domestic software.

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. The draft law is yet not introduced to the State Duma.

Morgan Lewis

**Anastasia Dergacheva**
anastasia.dergacheva@morganlewis.com

**Ksenia Andreeva**
ksenia.andreeva@morganlewis.com

**Anastasia Kiseleva**
anastasia.kiseleva@morganlewis.com

**Vasilisa Strizh**
vasilisa.strizh@morganlewis.com

Legend Business Centre
Tsvetnoy Bulvar, 2
Moscow 127051
Russia
Tel: +7 495 212 2500
Fax: +7 495 212 2400
www.morganlewis.com



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# Serbia

Bogdan Ivaniševic, Pablo Pérez Laya and Zorana Brujić

BDK Advokati

## 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 a functionally and financially independent organisation, 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) 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 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.



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Licences for the use of radio frequencies are issued for 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. The fees for the use of numbering and radio-frequency spectrum are regulated by the Fees for Use of Public Goods Act (Official Gazette of the Republic of Serbia Nos. 95/2018, 49/2019 and 86/2019).

**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 have been 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;



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- 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

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



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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 no legislation or regulation specifically governing digital platforms in Serbia.

However, the Trade Act (Official Gazette of the Republic of Serbia No. 52/2019) expressly refers to and includes e-commerce within its scope of application and, as such, is a piece of legislation that has some impact on the digital platforms that carry out this kind of trade.

**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. However, in 2018, the government adopted the Strategy for the Development of Next Generation Networks by 2023, defining measures to provide infrastructure for the development of the Digital Single Market in Serbia, in line with the EU strategic framework in this area.

The strategy contains an analysis of the area of information and communication technologies, on the basis of which it is recognised that investing in broadband directly affects the increase of the number of jobs, development of small and medium-sized enterprises, competitiveness of all sectors of the economy and improvement of the quality of life of citizens.

The strategy promotes the use of cloud computing and the internet of things, as well as the development of 5G.

**Data protection**

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

The Serbian Data Protection Act (Official Gazette of the Republic of Serbia No. 87/2018) 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.



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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 made without prior authorisation both to countries that are parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (eg, EU countries) and to countries that are granted adequacy status by the EU.

Additionally, prior authorisation is not required if the data controller or data processor has provided appropriate safeguards and if the data subjects are provided with enforceable rights and effective legal remedies. In contrast to the EU General Data Protection Regulation, the Serbian Data Protection Act (2018) does not allow for the use of controller-to-controller standard contractual clauses as an appropriate safeguard, because the law does not authorise the supervisory authority to adopt such clauses.

### 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 (Official Gazette of the Republic of Serbia No. 87/2018) became applicable on 21 August 2019. This new piece of legislation 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 Audiovisual 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.

### Licensing requirements

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

The Regulatory Agency for Electronic Communications and Postal Services (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



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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 Electronic Communications Act (2010, as amended), 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.

In September 2017, the RATEL proposed 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.



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### 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.

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 strategy on the development of the public information system until 2023 was adopted by the government on 31 January 2020.

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.

## 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 Regulatory Agency for Electronic Communications and Postal Services (RATEL), for electronic communications;
- the Regulatory Authority for Electronic Media (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 Electronic Communications Act (2010, as amended) 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.


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### 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, most of which the Commission approved in the summary proceedings. Most of the decisions are related to Telekom Srbija, majority state-owned market leader in the telecommunications industry, 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 and Telemark, a local internet provider, distributor of audio-visual content and provider of public voice services in Central Serbia. The concentration was cleared unconditionally following the investigation phase on 14 June 2019.

**Bogdan Ivanišević**
bogdan.ivanisevic@bdkadvokati.com

**Pablo Pérez Laya**
pablo.laya@bdkadvokati.com

**Zorana Brujić**
zorana.brujic@bdkadvokati.com

Bulevar kralja Aleksandra 28
11000 Belgrade
Serbia
Tel: +381 11 3284 212
Fax: +381 11 3284 213
www.bdkadvokati.com

The Commission has rarely exempted individual agreements in the telecom sector. The latest individual agreement was exempted in October 2018, when 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 27 March 2018 opened an investigation into SBB for the abuse of the dominant position. Despite certain information in the media that the Commission has terminated the proceedings without finding any abuse, the Commission still has not published any official information or a decision in this regard.

The Commission had already established that SBB was abusing its dominant position on two occasions, in 2008 and 2010.



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# Singapore

Lim Chong Kin

Drew & Napier LLC

## 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 (Cap. 323) (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, although the IMDA is currently reviewing and developing a converged competition code to govern competition and market-related matters in both the telecoms and media markets, 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



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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 ISDN services;
- leased circuit services;
- public radio communication services;
- public cellular mobile telephone services;
- public trunked radio services;
- public mobile data 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.<br>Annual fee:<br>• first S$50 million annual gross turnover (AGTO): S$80,000;<br>• next S$50 million–S$100 million in AGTO: 0.8 per cent of incremental AGTO;<br>• 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.<br>Annual fee:<br>• first S$50 million AGTO: S$200,000;<br>• next S$50 million–S$100 million in AGTO: 0.8 per cent of incremental AGTO;<br>• above S$100 million in AGTO: 1 per cent of incremental AGTO . |
| Public mobile data services<br>Public trunked radio services | Licence duration: 10 years, renewable for a further period as the IMDA thinks fit.<br>Annual fee:<br>• first S$50 million AGTO: S$80,000;<br>• next S$50 million–S$100 million in AGTO: 0.8 per cent of incremental AGTO;<br>• above S$100 million in AGTO: 1 per cent of incremental AGTO. |
| Terrestrial telecoms network for broadcasting purposes only<br>Satellite uplink/downlink for broadcasting purposes | Licence duration: 10 years, renewable every 5 years.<br>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 local leased fixed-line connectivity services;
- public internet access services;
- internet exchange services;
- virtual private network services;
- managed data network services;
- mobile virtual network operation;
- live audio-text 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:

- 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;
- 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.

| SBO (individual) licence | |
|---|---|
| SBO (individual) | Annual fee:<br>• first S$50 million AGTO: S$4,000;<br>• next S$50 million to S$100 million in AGTO: 0.5 per cent of incremental AGTO;<br>• 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) |



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### 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. 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.



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**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).

**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.

**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



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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, user-centric data only (UCDO) 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, user-centric data only (UCDO) 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 and UCDO 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.

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



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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;
- 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 (the Cybersecurity Act);
- 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);
- to the extent that digital platforms are regarded as internet intermediaries (for example, social networks, search engines, content aggregators, internet-based messaging services and video-sharing services), they may be subject to directions and obligations under the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA); and
- competition issues involving a digital platform may be governed by the general competition law as established under the Competition Act that 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.

In respect of enforcement activity, on 17 February 2020, the Minister directed the POFMA Office to order Facebook to disable access for Singapore users to the *States Times Review* (*STR*) Facebook page, under section 34 of POFMA. This Disabling Order was issued to Facebook as the *STR* Facebook page had repeatedly conveyed online falsehoods and did not comply with any of the POFMA Directions that it had been served with.

**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



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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.

On a more general level, the PDPA established a baseline standard of data protection for all private sector organisations in Singapore. The PDPA also established a 'Do Not Call' registry that allows individuals to register their Singapore telephone numbers to opt out of receiving telemarketing calls and messages. The PDPA imposes data protection obligations on organisations that collect, use or disclose personal data 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.

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 between the provisions of the PDPA and the provisions of other written laws, the latter 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.

**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.

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 infocommunications 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 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 Data Protection by Design for ICT Systems;
  - 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.



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### 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.

### 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 does not require personal data to be stored locally in Singapore. Nonetheless, 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.

#### Call for Proposal for 5G networks

On 17 October 2019, the IMDA launched a Call for Proposal (CFP) to invite proposals for the award of 5G spectrum lots from the four existing mobile network operators (Singtel, StarHub, M1 and TPG) to facilitate the rollout of 5G mobile networks by 2020. The CFP closed on 17 February 2020 with three submissions received by the IMDA. Singtel and TPG each submitted an individual proposal, while StarHub and M1 submitted a joint proposal. The IMDA is expected to award the spectrum lots by mid-2020.

#### Proposed model artificial intelligence governance framework

On 21 January 2020, the PDPC announced the release of the second edition of the model framework for Artificial Intelligence governance (AI Model Framework). The first edition of the AI Model Framework was released in January 2019 to serve as a general, ready-to-use tool to promote responsible practices for private-sector organisations that are deploying AI solutions at scale. The second edition includes additional considerations (such as robustness and reproducibility) and refines the original AI Model Framework for greater relevance and usability.

## 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


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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 currently, the Media Market Conduct Code (MMCC). However, the IMDA is currently reviewing and developing a converged competition code to govern competition and market-related matters in both the telecoms and media markets, 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 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 internet service providers (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);



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- 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.

**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.

### 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.


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### 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.

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 TV service 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 Ministry of Communications and Information, 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.



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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.

**Introduction of POFMA**

With effect from 2 October 2019, the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA) entered into force. The POFMA was enacted to prevent the electronic communication of false statements of fact, in other words, online falsehoods (also colloquially known as 'fake news'), to suppress support for and enable measures to be taken to counteract the effects of such communication; and to prevent the misuse of online accounts and bots (ie, computer programmes that run automated tasks).

A POFMA Office has been specially set up within the IMDA, with the following functions:

- to issue Directions/Notices upon the instruction of Ministers of the Singapore Government;
- to administer the Codes of Practice issued to prescribed internet intermediaries and digital advertising intermediaries under the POFMA; and
- to monitor and enforce compliance with the Directions, Notices and Codes of Practices that have been issued under the POFMA.

Since its inception, the POFMA Office has issued three Codes of Practices to ensure that prescribed internet intermediaries and digital advertising intermediaries have adequate systems and processes in place to prevent and counter the misuse of online accounts by malicious actors, enhance the transparency of political advertising, and de-prioritise online falsehoods. These Codes of Practices are:

- the Code of Practice for Giving Prominence to Credible Online Sources of Information;
- the Code of Practice for Transparency of Online Political Advertisements; and
- the Code of Practice for Preventing and Countering Abuse of Online Accounts.

**Goods and Services Tax on imported digital services**

With effect from 1 January 2020, Goods and Services Tax (GST) has been imposed on certain businesses that provide imported digital services to consumers in Singapore, such as movie and music streaming services and mobile apps. Under the previous GST rules, services supplied by a supplier who belongs outside Singapore were not subject to GST. The new regime levels the GST treatment for services consumed in Singapore, in particular, for 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.

## 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.

The Competition Act, which establishes the general competition law and is administered by the Competition and Consumer Commission of Singapore (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 Telecom Competition Code 2012 (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 Media Market Conduct Code (MMCC), which provides for market conduct and competition rules applicable to the media industry only.

The IMDA 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, 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


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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. 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.

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 ran from 20 February 2019 to 15 May 2019, was 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 currently pending, will seek comments on the actual drafting of the proposed converged competition code.

**Lim Chong Kin**
chongkin.lim@drewnapier.com

10 Collyer Quay
10th Floor, Ocean Financial Centre
Singapore 049315
Tel: +65 6531 4110
Fax: +65 6535 4864
www.drewnapier.com



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# South Korea

**Ji Yeon Park, Juho Yoon and Kwang Hyun Ryoo**
Bae, Kim & Lee LLC

## 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 basic regulatory framework is set out in the Telecommunications Business Act (TBA) and the Radio Waves Act (RWA). The Ministry of Science and ICT (MSIT) and the Korea Communications Commission (KCC) are the main regulatory bodies that are responsible for the administration of these regulations. Data protection aspects, along with user-facing disclosures and related issues are governed mainly by the Act on the Promotion of Information and Communications Network Utilisation and Information Protection, and will, from August 2020, also be regulated by the Personal Information Protection Act.

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 also comply with the requirements set out in the RWA.

Traditionally, under the TBA, there were three types of telecommunications businesses, namely providers of core telecommunications services (CTS); special category telecommunications services (SCTS); and value-added telecommunications services (VATS). However, the amendments to the TBA, which came into effect as of 25 June 2019, restructured telecommunications services into two main types, CTS and VATS, absorbing SCTS into the broadened class of CTS:

- CTS refers to services relating to the transmission of sound, images or other data in an unmodified manner either by using the service provider's own network or by leasing a third party's network. This includes internet connectivity, as well as mobile and landline phones and voice over internet protocols (VoIP); and
- VATS are online services using the CTS network, including internet-based services, such as cloud computing services, email, e-commerce platforms and internet search engines.

Foreign ownership restrictions under the TBA apply only to CTS providers in possession of their own networks. Generally, only up to 49 per cent of foreign ownership is permitted in such CTS providers, but such restrictions may be alleviated where the foreign investor is from a certain foreign country that has entered into a free trade agreement with Korea.

In the mergers and acquisitions context, under the amended TBA, CTS providers, including enterprises that were formerly SCTS providers, may, depending on their annual revenue for the previous year, have to obtain prior approval from the MSIT, or at least file a report to the MSIT, if they are the subject of a merger or an acquisition.

### Authorisation/licensing regime

**2 Describe the authorisation or licensing regime.**

The relevant authorisation and licensing regimes are set out in the TBA.

Under the amended TBA, all CTS providers must register with the MSIT. These requirements for registration are the same as those that applied to CTS providers and SCTS providers under the previous provisions of the TBA.

In contrast to CTS providers, VATS providers are only required to submit a report to the MSIT. The reporting process usually takes a few days and is generally considered as a mere formality. An exception to this exists, however, in relation to peer-to-peer service providers and text messenger service providers that use a CTS network. These businesses must register with the MSIT, even though they are, strictly speaking, VATS providers. Additionally, VATS providers with less than 100 million won in capital are exempt even from the reporting requirement.

Businesses that are not mainly engaged in telecommunications services, but engage in sales (in their own name) of goods or services that incorporate telecommunications-enabled components, such as vehicles with certain built-in telecommunications services, are not required to obtain any licences or registrations, but are required to file a report to the MSIT.

Furthermore, there is no distinction, in the applicability of authorisation or licensing requirements under the amended TBA, between the different means of communication (fixed, mobile or satellite) or the particular technology applied (for example, 2G, 3G or 4G in the mobile communication context). However, any telecommunication business using radio waves (for example, in relation to mobile or satellite services) must also comply with additional requirements under the RWA in order to be assigned particular radio frequencies.

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 regulated by the MSIT, and the relevant MSIT licence would generally specify the permitted use.

A spectrum licence may be transferred or sub-licensed from three years after the original date of issuance. The transferee or sub-licensee must satisfy all the requirements applicable to the original licence holder and obtain prior approval from the MSIT.


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**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 unjustified discrimination. In this respect, telecommunications service providers are required to file a report to the MSIT with regards to their business status, facilities, users, etc., adding to the transparency of their businesses.

For CTS providers of a certain revenue, there is increased regulatory oversight. They are required to produce separate accounts in relation to their telecommunications business and non-telecommunications business, as well as, in relation to CTS and VATS, to distinctly set out the assets, expenses and profits pertaining to each category.

Furthermore, CTS providers of a certain size of revenue must file a report to the MSIT in respect of their customer terms and conditions, while CTS providers surpassing certain thresholds in terms of subscriber numbers and market share must receive prior approval from the MSIT with respect to their customer terms and conditions. As part of the approval process, the MSIT can require adjustment of the tariffs proposed by the CTS provider, if it deems the tariffs to be excessive, considering the cost of supply, revenue, classification of costs and revenue by service, and impact on the fair competition in the telecommunications 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?

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 providers (except for small-sized operators) are divided into two categories. Either they provide universal services or they provide compensation for expenses arising from the provision of universal services by other service providers.

Those service providers that provide universal services must submit a report to the MSIT regarding 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 provide compensation for other service providers' provision of universal services.

Universal services include, among other things: the provision of wire telephone services; the provision of internet services; the provision of telephone services for emergency calls; and the reduction or exemption of service charges to disabled and low-income persons for toll call services, mobile telephone services and LTE 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 some CTS provider must be reported to the MSIT, and CTS providers surpassing certain thresholds in terms of subscriber numbers and market share must receive prior approval from the MSIT with respect to their customer terms and conditions. This approval is subject to fulfilling certain criteria, such as reasonable consideration of costs and profit and refraining from unfair discrimination against specific users.

Further, the Act on the Regulation of Terms and Conditions, which prescribes general rules regarding customer terms and conditions in order to prevent unfair practices, also applies to customer terms and conditions specific to the communications sector.

**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 the KCC promulgates an enforcement decree to give it effect, but the KCC is 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 providers under the TBA. Data protection aspects, together with requirements pertaining to user-facing disclosing and other terms of use, are also regulated by the Act on the Promotion of Information and Communications Network Utilisation and Information Protection (the IT Network Act), and from August 2020 onwards will also be regulated by the Personal Information Protection Act (PIPA).

Under the TBA, VATS providers must file a report with the MSIT, and this report must include a schematic diagram of the telecoms


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network to be used, a detailed description of user protection measures and details of technical measures in place to prevent online copyright infringement. VATS providers with less than 100 million won in capital, however, are exempt from this reporting obligation. Upon filing of the report, a VATS provider must commence business within one year from the filing date, also implementing technical measures to protect minors as well as measures against viruses and malicious codes. In relation to this, the TBA authorises the MSIT to survey VATS providers and requires 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 regulation, as explained above, is not yet enforceable as the KCC has not promulgated an enforcement decree.

The IT Network 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. However, owing to recent restructuring of data privacy laws, from August 2020, data protection of digital platforms will be governed by PIPA.

**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 it must refer 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?

Although data protection in Korea is generally regulated under the PIPA, the IT Network Act sets out the data protection regime specifically applicable to the communications sector. In the case of any conflict, the communications-specific data protection regulations set out in the IT Network Act prevail. However, owing to amendments being made to the IT Network Act along with the PIPA, which are coming into effect on 5 August 2020, provisions relating to data privacy will be, essentially, taken and deleted from the IT Network Act and transplanted into the PIPA. Thus, the IT Network Act regulations will continue in effect, albeit pursuant to the PIPA.

Currently, regulatory oversight of data protection is divided between the Ministry of Interior & Safety and the KCC. This includes such functions as monitoring and policing compliance, and promulgating recommended practices and privacy policy terms. Under the amended PIPA, these functions will all be the responsibility of the Personal Information Protection Commission (PIPC), a central agency under the Prime Minister's office (already in existence but until now handling only part of the functions at issue). The nine commissioners of the PIPC will comprise government officials and various law and policy experts.

**Cybersecurity**

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

The IT Network 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.

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 programmes, such as antivirus software;
- store personal data in a safe area; and
- minimise the number of personnel processing users' personal information to the extent possible.

Pursuant to the amendments to the IT Network Act and the PIPA, these regulations will continue under the PIPA from 5 August 2020. However, provisions relating to cybersecurity will remain in the IT Network Act, in spite of the amendments to the PIPA and the IT Network Act.

**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?

Under the amended PIPA, Korea has adopted major amendments to its data regulatory framework that will, to a large extent, free up the use of pseudonymised data and ease the way for expansion of Big Data-driven services. (Allied with these changes pursuant to the main data privacy statute, amendments to the Credit Information Protection Act introduce similar types of latitude for use, including aggregation, of pseudonymised data in the financial sector in particular.)

Under the current PIPA, personal information, defined as 'information regarding an individual', can include information that identifies or enables identification of an individual (thus, identifiable information) but also information that, while not by itself identifiable, enables identification when combined with other information. The amended PIPA takes this further, lending clarity to the concept of information being identifiable when combined with other information, and further defining the separate case of 'pseudonymised information'.

Pseudonymised information means information that is unidentifiable without using (or combining it with) additional information, so as to restore it to its original state. The amended PIPA allows pseudonymised information to be used – without need of the individuals' consent – in order to generate statistical information, or for scientific research or public recordkeeping. The statute will also allow compilation of pseudonymised information (sourced from different data controllers) by specialised institutions, designated for such purposes by PIPC and other central government agencies. This will thereby allow pseudonymised information to be used, even in the absence of consent, to analyse big data for the purposes of generating statistical information, scientific research or public record-keeping.

On the other hand, the amended PIPA has not defined separately 'anonymised information'; that is, information from which an individual cannot be identified, 'taking into reasonable consideration the time, expense and technology' involved. While the definition of anonymised information does not seem to present a clear boundary from pseudonymised information, for the time being, it appears that information that is classified as anonymised information could be used in big data analysis without being subject to restrictions under the amended PIPA.



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**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 the usage of cloud services, but the new framework is confined to cloud storage and services located in Korea.

**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; (iii) increased consideration of big data usage by regulating pseudonymised information under the amended data privacy laws; (iv) increased receptiveness to new technologies, as seen in the recent expansion of a 'regulatory sandbox'; and (v) revision of the Passenger Transport Service Act (PTSA) to regulate the operation of app-based taxi hailing businesses. Further details on the developments described in (i), (iv) and (v) are summarised below.

**Designation of local agent**

As of March 2019, the IT Network Act requires offshore businesses that offer IT services in Korea, meeting certain thresholds in terms of global revenue, local revenue or number of users, to designate a local agent for regulatory compliance purposes (this requirement will also continue under the PIPA from 5 August 2020). Modelled on a similar system instituted in the EU's GDPR, designated local agents are responsible for personal data protection measures, and for notifying the relevant authorities, and making document submissions, in the 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 a KCC investigation arising from a (suspected) data incident. As a result, in recent times, the KCC has been proactive in its enforcement efforts, including in relation to requesting that offshore businesses appoint local agents.

**Designation of a chief information security officer**

Since 13 June 2019, all IT service providers, save for small businesses, have been required to designate a suitably qualified chief information security officer (CISO) and report such designations to the MSIT. Relevantly, the MSIT allowed a grace period for the CISO requirement to be met by the end of 2019. The CISO is responsible for taking preventative measures against data security breaches, including adopting internal security policies, and for responding to any incidents as they occur. The IT Network Act requires the CISO of an IT service provider that meets any of the several threshold requirements (eg, in terms of assets or user numbers) to not serve in any other role but that of the CISO.

**Maintaining insurance or reserves for data breach**

Furthermore, pursuant to amendments to the IT Network Act that took effect on 13 June 2019, any IT service provider that maintains personal information with respect to 1,000 or more users is required to maintain a level of insurance or reserve for potential liability in the case of violations of data protection laws. This requirement will also continue under the PIPA from 5 August 2020.

**Consolidation of regulatory authority**

As mentioned above, under the amended PIPA, regulatory functions will be centralised in the PIPC, a central agency under the Prime Minister's office, indicating that a single authority will be able to have complete and comprehensive regulatory oversight, and concentrated powers of enforcement.

**Strengthening investigation and liability**

In two separate court judgments in early 2020 relating to data breach incidents, a data privacy officer in one case, and a company officer in the other, were held criminally liable for negligent management of personal information, and were charged with significant fines, highlighting the potential liability exposure of those in charge of data protection within a corporate organisation. While the results in these cases are pursuant to long-existing provisions of the relevant laws, the imposition of criminal fines, and especially at these levels, are seldom seen, and so are sanctions upon liable company officers. The results would seem to reflect a heightened wariness and concern, on the part of regulators along with the general public in Korea, with regard to safeguarding of data against frequent hacking and invasion attempts.

In addition, throughout 2019, the KCC continued to investigate prominent offshore businesses for violating personal information regulations. Although the results of such investigations have not yet been released, it is believed that even when KCC's investigation powers are transferred to the PIPC under the amendments to the PIPA, the PIPC will continue to investigate offshore businesses for suspected data breaches.

**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.

**Regulation of app-based taxi hailing businesses**

In February 2020, the Seoul Central District Court found that TaDa, a popular van-hailing app, had not breached the PTSA, the main statute that restricts vehicle transport services for pay. However, shortly after, a bill to close the existing loophole allowing Tada to operate was passed, so that businesses with TaDa's business model cannot legally operate. The amendments to the PTSA erect a framework to allow for app-based taxi hailing or 'platform taxi' businesses (however, TaDa's business type is not permitted). The changes to the PTSA will enable several basic operating models, subject to various kinds of government control and oversight: a new formation of a taxi-like enterprise (which will be the most regulated model); platforms based on tie-ups with existing taxi enterprises; or taxi-rider matching ('intermediary') platform businesses. At the same time, a 'Tada banning' part of the legislation will impose further restrictions on short-term rental services that come with a designated driver. The amended PTSA will be effective from a year after the date the government makes the relevant announcement. There are many details delegated to executive decrees, so it will be necessary to pay attention to how executive decrees prescribe the details as they are released (drafts of the main executive decrees may be issued within four or five months).



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## 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 (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). Online media services are generally subject also to the IT Network Act.

The regulatory bodies that administer the media sector are the Korea Communications Commission (KCC) and the Ministry of Science and ICT (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 programmes.

### 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:

- 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);
- ownership between broadcasting business operators;
- ownership by a conglomerate (including its affiliates), or an entity operating daily newspaper or news communications business; and
- 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 programmes for news reports<br>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 programmes<br>10% for those operating specialised programmes for news reports<br>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 that they will move to liberalise the maximum thresholds for foreign ownership.

### 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 programming must obtain prior approval from the KCC. IPTV content providers focused on presenting and selling goods must obtain prior approval from the MSIT. However, value-added telecommunications services (VATS) providers, TBOs, SOs, SBOs and PPs are exempt from the above requirements. Although, the exemption applies to SOs and SBOs only when they provide contents via channels directly operated by them.

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 MSIT 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, as IPTV operators are prohibited from operating broadcast channels directly, 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.



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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: programme commercials arranged directly before and after a particular programme; commercial breaks arranged in the middle of a particular programme; and 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 broadcasts placed before and after any programme mainly viewed by children under the age of 13 years, so that children may distinguish programmes from commercials. Pursuant to the Enforcement Decree of the Broadcast Act as amended in December 2019, the obligations regarding public campaign advertisements have been moderated.

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, and the Act on Fair Labelling and Advertising. Online advertising is regulated differently to broadcast media advertising, as it is governed by the IT Network 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?

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 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, but approximately 95 per cent has been completed.

**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.

**Regulatory institutions' change in stance towards media M&A**

A notable event in the media market was the approval of two M&As between major telecom and IPTV service providers and SOs. Compared to the disapproval shown for a previous M&A (which was also between a major telecom and IPTV service provider and a SO) four years ago, these M&As were recognised as the result of efforts by the regulatory authorities (the Korea Fair Trade Commission and the MSIT) to adapt to



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recent changes in the media market, such as global mega-size media M&As and the rapid advancement in OTT services. Given that regulatory institutions approved the above two M&A deals in a row, sale of SOs that had been lagging behind the growth of IPTV in the media market is likely to gain traction and the reorganisation of the market led by major IPTV providers is also expected to speed up.

**Impending new service 'stability' requirements, and required designation of local agent, for major online content providers**

Pursuant to amendments to the TBA passed on 20 May 2020 and set to take effect on 10 December 2020, some scope of service quality maintenance requirements will be imposed on value-added telecommunications services (VATS) providers (a category that generally includes online content providers) that meet certain thresholds of scale. The specific thresholds, in terms of user numbers, traffic volumes, etc, remain to be defined in ensuing regulations, which will be issued before December 2020. The required 'measures necessary for providing convenient and stable service' likewise await further definition in the regulations. Also, VATS providers that meet the thresholds but are offshore will be obliged to appoint a local agent, as contact point for users and regulators. The legislation was impelled largely by controversies involving major foreign-based online services, and a local perception that such content providers were not bearing connectivity costs in fair proportion to bandwidth.

**Aiming for effective regulatory means to cope with new media services**

According to the mid- or long-term media regulation improvements suggested by KCC, regulators plan to:

- adopt a horizontally integrated regulatory framework to relax unnecessary regulations interfering with market forces;
- create a new concept of 'media' to adapt to the combined media-communication-internet environment, so as to embrace merged media services such as OTT and video on demand (VOD) services;
- prepare adequate level of regulatory means against global OTT service providers to better protect domestic media market and users; and
- promote media or communication-related services utilising AI, big data, 5G network, etc, by relaxing unnecessary regulations.

## 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 Ministry of Science and ICT (MSIT) and the Korea Communications Commission (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 (the Telecommunications Business Act (TBA), the IT Network Act 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 Network Act, and location information under the Act on the Protection, Use, Etc of Location Information.

On a separate note, with regard to the authority to regulating personal data under the IT Network Act, the KCC is currently in charge of overseeing and enforcing these regulations. However, starting from 5 August 2020, the KCC's authority over personal data will be transferred to the Personal Information Protection Commission.

**Broadcasting sector**

- KCC: regulatory agency supervising the broadcasting industry; and
- MSIT: agency with licensing authority over satellite broadcasting operators, system operators (SOs), relay broadcasting operators, programme providers (PPs) (excluding PPs engaging in general programming or specialised programming of news reports), electric signboard broadcasting operators, CATV music broadcasting operators and signal transmission network business operators (NOs) under the Broadcasting Act; and Internet Protocol Television (IPTV) operators and IPTV content providers (excluding IPTV content providers focused on news reporting or general programming) under the IPTV Act.

The main antitrust regulator is the Korea Fair Trade Commission (KFTC), having authority to enforce the Monopoly Regulation and Fair Trade Act (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: 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 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 core telecommunications services (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 would substantially restrict competition in certain transactions. The KFTC's rationale was that such a merger, based on the pay-TV market demarcated



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for each region, would result in an excessively high concentration in each regional pay-tv market. In January 2019, however, the chairperson of the KFTC said in a media interview that the KFTC will take a forward-looking approach with regard to corporate consolidation with the above-mentioned SO. In March 2019, another CTS provider took advantage of such lenient attitude taken by the KFTC and attempted to acquire the same SO, and finally passed through regulatory hurdles in mid-December 2019. Separately, the IPTV operator that had previously failed to merge with the abovementioned SO in 2016, tried to merge with another SO and, in mid-December 2019, was also able to obtain approval from the regulatory authorities.

Relevant regulatory bodies, including the KFTC's change in stance between 2016 and 2019, seem to partially arise from the consideration of rapidly changing media markets or of the possibility that there may be severe competition in domestic media markets with the influx of major foreign OTT service providers, such as Netflix and Disney.

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 M&A in innovation-based sectors, such as semiconductor and IT, may restrict dynamic competition. 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.

The KFTC has also been closely monitoring business practices in the IT sector. More specifically, the KFTC has launched a special task force to help police unfair business practices in the IT sector, particularly with respect to digital platforms and mobile apps, along with holders of communications-related standard essential patents (SEPs). The Information and Communication Technology (or ICT) Sector Investigative Task Force devoted its first meeting, on 15 November 2019, mainly to questions surrounding the use of room rate parity (or most favoured nation) clauses in online travel agency contracts for accommodation listings. The task force, comprising KFTC officials from various departments, is to convene regularly to monitor and coordinate investigations. The KFTC says its task force will focus for now, on unfair practices (eg, exclusionary tactics and tying) in the context of digital platforms expanding dominance in one market into an adjacent one; mobile app service providers impeding market entry by competitors; and SEP holders seeking to impair competition or impose higher royalties.

**bkl** BAE, KIM & LEE

**Kwang Hyun Ryoo**
kh.ryoo@bkl.co.kr

**Ji Yeon Park**
jiyeon.park@bkl.co.kr

**Juho Yoon**
juho.yoon@bkl.co.kr

Centropolis Tower B
26 Ujeongguk-ro, Jongno-gu
Seoul 03161
Korea
Tel: +82 2 3404 0000
Fax: +82 2 3404 0001
www.bkl.co.kr



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# Switzerland

Mario Strebel and Fabian Koch
CORE Attorneys Ltd

## 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 sector in Switzerland is regulated at federal level, the main sources of law being:

- the Federal Act on Telecommunications (TCA) of 30 April 1997, with a first partial revision introduced in 2007, as last amended on 1 March 2018; and
- the Federal Ordinance on Telecommunications Services (OTS) of 9 March 2007, as last amended on 1 January 2020.

The TCA regulates the transmission of information by means of telecommunications techniques, including the transmission of radio and television programme services. Its main purpose is to ensure that a range of cost-effective, high-quality telecommunications services are available in Switzerland, which are competitive both on a national and international level. The OTS contains detailed rules that implement the provisions of the TCA.

Within this regulatory framework, the Federal Communications Commission (ComCom) acts as the independent licensing and market regulatory authority for the communications sector. Its main activities and competences 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.

Certain foreign ownership restrictions may apply. In the absence of any international commitments to the contrary, ComCom may prohibit undertakings incorporated under foreign law from providing telecommunications services in Switzerland unless reciprocal rights are granted. Under the same conditions, they 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.

In principle, licences for telecommunications services have been abolished. Under the currently applicable regulatory framework, a telecommunications service provider is only obliged to notify OFCOM, which in turn registers the provider upon such notice. There is no licence required for public Wi-Fi services as long as these services remain within the authorised frequencies and fulfil the technical requirements. Importantly, in the new Federal Act on Telecommunications (nTCA) that is expected to come into force in the foreseeable future, among other things, the telecommunications service providers' obligation to register shall be eliminated. Only providers that use specific public resources shall have such an obligation. With regard to the latter, a paradigm shift in the regulation will take place: while the licensing obligation for the use of mobile radio frequencies is the rule today, the frequency spectrum shall, apart from certain exceptions that still require a licence, be free to use under the nTCA within the limits of specific statutory regulations. Furthermore, the nTCA includes, for the first time, a regime for frequency sharing and trading, making such practices legal under certain conditions.

Under the currently applicable regulatory framework, licences are mandatory for the use of mobile radio frequencies and the provision of universal services. Accordingly, the use of frequency spectrum for the provision of telecommunications services today requires a licence. Frequency licences are issued either by criteria competition or, more commonly, by frequency auction. Importantly, the principles defined by the Federal Council governing the granting of mobile radio frequency licences lack detail. Therefore, the authorities have considerable discretion in setting the allocation or auction rules respectively. However, the authorities have to exercise their discretion in a dutiful manner – that is, in line with the constitutional principles and the legal purpose of the TCA. Licences are granted only if, having regard to the national frequency allocation plan, enough frequencies are available.

Special rules apply if the broadcaster of a radio programme service is granted a licence under the Federal Act on Radio and Television (RTVA) of 24 March 2006, as last amended on 1 January 2017.

With the exception of the armed forces and civil defence within the scope of their duties, any person wishing to use frequency spectrum must obtain a licence. Such a licence can be acquired only by a person that has the necessary technical capacities and undertakes to comply with the applicable legislation, in particular the TCA, the RTVA, their implementing provisions and the licence conditions. Depending on the kind of licence required, eligibility, documentary and procedural requirements vary. Certain foreign ownership restrictions may apply.

Notifications can be submitted online via OFCOM's website.

According to the TCA, licences for radio communication and universal services are of limited duration. In 2012, licences for frequency spectrum were allocated in a public tender procedure. In early 2019, additional frequencies, particularly for the introduction of the next-generation network 5G, were auctioned. All licences are issued in a technology-neutral manner. The licences allocated in 2012 will expire at the end of 2028 and the licences allocated in 2019 will expire at the end of 2028 or 2033, respectively. The universal service licence for Swisscom was renewed for 2018–2022 (ie, five years).

With regard to fees, the licensing authority charges administration and licence fees for radio communication licences. No licence fee is charged on radio licences for the distribution of licenced radio and television programmes under the RTVA. Additionally, the Federal Council may exempt certain governmental and non-governmental organisations


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from paying the licence fee provided they do not perform telecommunications services and make rational use of the frequency spectrum.

The Federal Ordinance on Telecommunications Fees lays down the radio licence and administrative charges in the field of telecommunications law. The charged rates for administrative fees are set out by the Federal Department of the Environment, Transport, Energy and Communications (DETEC) in its Ordinance on Administrative Charges in the Telecommunications Sector.

The time frames for obtaining a licence or authorisation depend on the telecommunications services to be provided. If a mere notification procedure applies without the granting of a licence, such notification can be effected via the internet within a very short period of time (ie, within hours). In this case, a telecommunications service provider can conduct its business as soon as the notification is filed. With regard to the universal licence or where frequency spectrum is to be used, a frequency licence must be obtained either by criteria competition or, more commonly, by frequency auction – that is, in a process that overall can last several weeks or even months.

**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 communication 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 be transferred, in whole or in part, only with the consent of the licensing authority. This also applies to the economic transfer of a licence, which occurs in the case of 'acquisition of control', as defined in the Federal Cartel Act. In the nTCA that is expected to come into force in the foreseeable future, frequency sharing and trading shall become legal subject to specific requirements.

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?

In principle, the telecommunications regulation in Switzerland is based on ex-post regulation.

**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 legal basis for a structural separation between an operator's network and service activities exists, and the introduction of such a legal basis is currently not 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 licence to telecommunications service providers wishing to provide a universal service for the whole population in all parts of Switzerland. In principle, there is no obligation to provide a universal service. However, if no provider applies for a universal service licence, ComCom may appoint one or more provider as universal service provider.

Universal service licences are put out to tender and awarded on the basis of a criteria competition. Any person wishing to obtain a universal service licence must:

- have the necessary technical capacities;
- furnish convincing proof that the universal service can be offered, particularly with regard to finance and the operation of the service for the entire duration of the licence;
- state what financial compensation will be required for doing so;
- undertake to comply with the applicable legislation, in particular the TCA and its implementing provisions and the licence conditions; and
- undertake to comply with the applicable labour laws and to guarantee customary working conditions.

For universal service licences, the Federal Council decides on quality criteria, periodically reviews the universal service catalogue, and fixes upper limits for the prices of the services of the universal service that apply uniformly for the entire licence area. The universal service criteria are determined based on market developments – that is, on new needs and technological progress.

As of 1 January 2020, universal service includes public telephone services; access to the internet with a minimum data transmission rate of 10/1Mbps; 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.

On 19 May 2017, ComCom decided that the universal service in relation to telecommunications will continue to be provided by Swisscom, and awarded the licence to Swisscom for the period 2018–2022 (ie, five years).

If it is shown before the licence is granted that it will not be possible to cover the costs of the provision of the universal service in a given area even with efficient management, the licensee is entitled to financial compensation. The compensation would be financed by levying a fee on all telecommunications service providers. 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, which is to be approved by ComCom, 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 telecommunications service providers offering the same category of telecommunications services. Within such categories, telecommunications service providers shall ensure number portability. The relevant categories are:

- geographic numbers such as landline numbers;
- mobile telephony numbers;
- service identification numbers such as value-added services; and
- linked numbers (voicemail).

Telecommunications service providers that are required to ensure number portability must bear their own costs. However, a telecommunications service provider that passes a number to another can demand that the latter contributes to the administrative costs. The costs of transmitting a passed-on number to its destination are to be



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defined in interconnection agreements between the telecommunications service providers. If there is no agreement, the procedural rules of interconnection apply by analogy. The new telecommunications service providers can pass part of the costs of number portability to the subscriber. In order to grant fast number portability, donor service providers are required to confirm number porting applications to the recipient service providers within one working day.

**Customer terms and conditions**

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

The market for end-customer prices is, in general, not subject to ex ante price regulation. As an exemption, the OTS contains ceiling prices for certain services forming part of the universal service and for value-added services.

Hence, agreements with end users are not subject to specific telecommunications regulation. However, agreements and the conclusion of such agreements must adhere to mandatory Swiss law. The starting point for any query with regard to the conclusion and dissolution of a contract, as well as faults of performances, is the Swiss Code of Obligations (CO). Particularly relevant in a consumer protection context are also:

- article 8 of the Federal Law Against Unfair Competition (UCA) of 19 December 1986, as last amended on 1 July 2016, which prohibits the use of abusive general terms and conditions; and
- articles 40a and following of the CO and the Federal Consumer Credit Act, which govern the consumer's right to withdraw from a contract within 14 days under certain conditions.

Also, the manner in which prices for telecommunications services and, in particular, value-added services are announced in writing and in advertising for such services are set out in the Ordinance on the Disclosure of Prices and specific provisions with regard to customer data retention and security apply.

**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, no specific regulations exist on net neutrality in Switzerland.

In November 2014, the largest Swiss information and communications technology companies agreed on a code of conduct (CoC) on net neutrality and published related explanatory notes in order to ensure open internet access in Switzerland. Under the CoC, the telecommunications service 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. The CoC, however, allows for specific prioritisation of certain content, among other things for the purpose of network management and to improve the network's quality. It is explicitly stated that zero rating is permitted. As part of traffic management measures, bandwidth throttling may be applied under the CoC. The users may call upon a conciliation body in the event of a provider's alleged breach of its CoC obligations. Such conciliation body will also constantly evaluate the CoC and its impact on the openness of the internet, and report on this subject matter annually.

In the nTCA that is expected to come into force in the foreseeable future, network neutrality is regulated by law, with some exceptions.

**Platform regulation**

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

No specific legislation or regulation exists. Even though the Federal Council has, in principle, identified the need for clarification with regard to platform regulation, this issue is not specifically addressed in the nTCA that is expected to come into force in the foreseeable future.

**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?

Swiss legislation on telecommunications is, as a rule, technology-neutral and does not contain any specific definitions referring to next-generation access networks. Hence, these are, in principle, subject to the provisions of the TCA.

There is no federal scheme to promote broadband penetration. However, aside from Swiss telecommunications providers, there are some local authorities that actively support 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 and the responsible department in the canton of Grisons wants to advance the development of ultra-high broadband in its area.

Furthermore, the holder of the universal services licence, currently the incumbent operator Swisscom, is, inter alia, obliged to provide a broadband internet connection with at least a 10/1Mbps transmission speed to all households in Switzerland, in addition to the telephone connections.

**Data protection**

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

According to article 43 of the TCA, telecommunications service providers are subject to a general confidentiality obligation. Thus, they are not allowed to disclose to a third party any information relating to a subscriber's communications or provide anyone else the opportunity to do so. However, the Federal Act on the Surveillance of Post and Telecommunications and its related ordinance set out the rules and procedure with regard to the interception of communications and access to consumer communications data by the competent authorities.

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 payments are 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, telecommunications service providers 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) of 19 June 1992, as last amended 1 March 2019, applies. The FADP aims to protect the privacy and the fundamental rights of (natural and legal) 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 contradiction to 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.



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The principles of the FADP are, among others, 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 is currently being revised.

**Cybersecurity**

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

No specific law on cybersecurity exists. However, 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 (IntelSA), allowing the Federal Police to monitor the internet proactively.

In 2018, the Federal Council adopted the new national strategy for the protection of Switzerland against cyber-risks (second NCS) for the period 2018 to 2022, containing a total of 28 measures regarding cyber-risks. In order to support the general public and businesses against cyber-risks and improve the security of its own systems, on 30 January 2019, the Federal Council decided to set up a competence centre for cybersecurity, the National Cyber Security Centre. The core of the centre is made up of the Reporting and Analysis Centre for Information Assurance (MELANI) and is being designed to take on the following tasks:

- provision of a national contact point for questions on cyber-risks and reporting cyber-incidents;
- operation of the national Computer Emergency Response Team (GovCERT) as a technical expertise hub;
- operational incident management in the event of serious cyber-incidents;
- office of the Federal Cyber Security Delegate;
- federal ICT security unit;
- operation of a pool of experts to support the specialist offices in developing and implementing cybersecurity standards;
- cooperation with scientific and research bodies; and
- international specialist cooperation.

In December 2019, the Federal Council approved the report 'Options for critical infrastructure reporting duties in the case of serious security incidents', which describes the core issues with regard to the introduction of reporting duties and describes possible models for their implementation. Based on these results, the Federal Council intends to make fundamental decisions on the introduction of reporting duties by the end of 2020.

In the nTCA that is expected to come into force in the foreseeable future, telecommunications providers are required to combat cyberattacks, defined exclusively as manipulations through telecommunications transmissions, such as the distribution of malicious software or the impairment of web services (DDoS attacks). Physical access and backdoors in hardware and software are not covered. If precautions taken by the telecommunications service providers defeat their purpose, the Federal Council may issue more detailed provisions in this regard.

**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. The respective provisions, in principle, also apply to big data. However, because of the fact that most databases contain 'anonymised' and, therefore, theoretically not personally identifiable information as regulated in the FADP and the TCA, addressing legal issues with big data remains a legal area with many uncertainties.

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 Parliament plans the final adoption for summer 2020.

**Data localisation**

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

The FADP aims to protect the private sphere of (natural and legal) persons regarding data processing carried out in Switzerland. With regard to the transfer of data abroad, strict obligations apply. Certain data transmissions abroad must be announced to the Federal Data Protection and Information Commissioner. Furthermore, sector-specific regulation 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 spread of the internet has profoundly transformed the telecommunications landscape, including in Switzerland. It has undergone extremely rapid developments in recent years. Against this background, the Federal Council has recognised the need for a revision of the TCA and issued a dispatch in that regard on 6 September 2017. After several deliberations, the Parliament approved the nTCA. The referendum period expired unused on 11 July 2019. The Federal Council, however, will still have to issue the necessary implementing provisions. The concrete date of entry into force will be announced subsequently.

The nTCA shall in particular ensure and foster competition in the provision of telecommunications services, and better protect users from abuse. Among other things, the telecommunications service providers' obligation to register shall be eliminated. Only providers that use specific public resources shall have such an obligation. Further, the nTCA provides that each telecommunications service provider has the right to access the building entry point and to share the building's internal facilities. Importantly, there is a paradigm shift in the regulation of the use of mobile radio frequencies. While the licensing obligation is the rule today, the frequency spectrum shall, in principle, be free to use in the future within the limits of specific statutory regulations. Frequency sharing and trading shall, subject to certain conditions, be legal. The nTCA stipulates that telecommunications service providers are generally obliged to ensure net neutrality. This means that they must transmit information without making any technical or economic distinction between transmitters, receivers, content, services, classes of service, protocols, applications, programs or terminal equipment. However, the different transmission of information is permitted by way of exception, namely, if it is necessary to comply with the law or a court order, to guarantee the integrity and security of the network or the terminal equipment connected thereto, to comply with an express request from customers or to combat network congestion. Regarding international roaming, the nTCA provides for different measures of the Federal Council to invoke against disproportionately high retail roaming tariffs. The nTCA also provides for new rules regarding the administration of internet domains, measures against unwanted telemarketing and child protection. In that regard, selective adjustments to the UCA should also be emphasised. In addition to tightening the regulations for telephone marketing, the possibility for the public prosecutor's office and courts to revoke or block domains and telephone numbers that have been used in violation of the UCA or the Federal Ordinance on the Disclosure of Prices


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are introduced. With regard to the fixed-line infrastructure, the Parliament did not want to introduce a technology-neutral access regime. Hence, the nTCA will still limit regulated fixed-line access to copper cables.

Besides the revision of the TCA, major trends in the rather concentrated Swiss telecommunications market are mainly driven by technology and include, among other things, the growing convergence of technologies and, as a result, the battle for content. However, in comparison to other European markets, Switzerland has no special features in this respect.

An important turning point in Switzerland's mobile telecommunications market was the allocation by tender of new mobile radio frequencies for 700MHz, 1400MHz, 2600MHz and 3.6-gigahertz bands in early 2019, particularly introducing the next-generation network 5G. Another milestone was the new awarding of the universal service licence in 2017 to Swisscom for five years starting from 2018.

## MEDIA

### Regulatory and institutional structure

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

In Switzerland, apart from the communications sector, regulation of the media sector is also dealt with at a federal level, the main sources of law being:

- the Federal Act on Radio and Television (RTVA) of 24 March 2006, as last amended on 1 January 2017; and
- the Federal Ordinance on Radio and Television (RTVO) of 9 March 2007, as last amended on 1 October 2018, and related decrees.

The RTVA regulates the broadcasting, processing, transmission and reception of radio and television programme services.

The broadcasting sector has three main authorities responsible for the granting of licences. The Federal Council is the licensing authority for the Swiss Broadcasting Company (SBC). With respect to other licences, the licensing competence has been delegated to the Federal Department of the Environment, Transport, Energy and Communications (DETEC). The Federal Office of Communications (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 advises the Federal Council and the Federal Administration in relation to media issues. It is operational since August 2013 and consists of 13 representatives from various areas of the Swiss media sector.

The RTVA provides for an Independent Complaints Authority for Radio and Television. This authority deals with complaints that relate to the editorial programme and rules on disputes on denied access to a programme.

### 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?

Certain foreign ownership restrictions may apply. In the absence of any international commitments to the contrary, licences for broadcasting may be refused to foreign natural persons with their domicile in Switzerland, to companies with foreign control or to Swiss companies with foreign participation unless reciprocal rights to Swiss citizens or Swiss companies are granted.

In addition, the licence granted to broadcasters of radio and television programme services may only be transferred with prior approval of the licensing authority. The latter examines whether the licence requirements are also met after the transfer. The economic transfer of the licence (ie, the transfer of more than 20 per cent of the share capital the voting rights or, where applicable, the participating capital of the licensee) is also deemed to constitute such a transfer.

With regard to cross-ownership, the RTVA provides that – except for the Swiss Broadcasting Company (SBC) – a media corporation may not receive more than two radio and two television licences. In addition, the participation of the SBC in other companies that are broadcasting radio or television programmes requires the approval of DETEC.

### 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 upon a mere 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, hence, need neither a licence nor a registration.

The Federal Council is the licensing authority for the SBC that is subject to a special licence with an extensive mandate.

With respect to the other licences, the licensing competence has been delegated to DETEC. A broadcaster of a radio programme service that has obtained a licence under the RTVA is not required to apply separately for a licence under the Federal Act on Telecommunications (TCA) for use of the frequency spectrum. Such licence is deemed to be granted at the same time in parallel. 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 way of public tender. In order 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 applicable labour laws and customary working conditions, 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.

Except for the SBC, the number of licences a broadcaster and its group companies may acquire is limited to a maximum of two television and two radio licences. In case of several applicants for one licence, the one that is best able to fulfil the performance mandate shall be preferred. In the case of equivalent candidates, the one that best promotes diversity of opinion and offerings shall be preferred. In practice, DETEC often deems independent applicants that do not belong to a media group that already possesses other broadcasting licences to be better able to fulfil this criterion.

The annual fee 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


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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 communication 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 consider 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. Therefore, the respective licences 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) of 19 December 1986, as last amended on 1 July 2016, contains several general provisions on advertising. It provides in particular that any advertisement that is deceptive or in any other way infringes the principle of good faith and 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. Such 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 the form of advertising, it must be clearly separated from the editorial programmes and clearly identifiable as such. Both the beginning and the end of an advertising slot must therefore be indicated by a clear visual or acoustic 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.

The broadcasters' regular editorial employees are prohibited from appearing in advertising programmes. Local and regional broadcasters with limited financial resources are exempt from this restriction.

Furthermore, 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. Stricter restrictions apply to the SBC. As regards transmission time, advertising may not account for more than 15 per cent of the daily airtime and 20 per cent (ie, 12 minutes) within any one hour.

The RTVO contains provisions on the use of new forms of advertising such as split screen, interactive and virtual advertising (ie, the insertion of advertisements into an existing image by means of post-production).

In terms of 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 beliefs, is misleading or unfair, or encourages behaviour that is detrimental to health, environment or personal safety. Less restrictive rules apply to private broadcasters, in particular with regard to commercial breaks and product placement.

There is no specific regulation for online advertising, as traditional online content is usually not covered by the RTVA. Therefore, subject to certain exceptions, 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?

With regard to must-carry obligations, the RTVA distinguishes between broadcasting distribution networks that transmit content via wireless terrestrial broadcasting and via wire.

In the 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 a cost-based compensation for the broadcasting.

In the case of transmission by wire, in addition to the above-mentioned programme services, the Federal Council has defined the programme services of foreign broadcasters that are to be transmitted by wire because of their special contribution to education, cultural development or free formation of opinion. In addition, OFCOM may, at the request of a broadcaster and under certain conditions, require a telecommunications service provider to require that a programme service be broadcast by wire within a specific area for a certain period. The RTVO provides for a maximum number of programme services to be broadcast free of charge by wire.

**Regulation of new media content**

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

There exist no specific rules or regulations concerning the provision of traditional online content (websites, newsgroups, blogs, etc). However, general laws such as the UCA, the Federal Criminal Code, the laws that protect intellectual property rights, etc, 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) is, in principle, covered by the RTVA, apart from offerings of minor editorial importance (ie, programme services that can only be received simultaneously by fewer than 1,000 devices) and on-demand content that is also excluded from the RTVA. As a consequence, most of today's online content is not regulated. Broadcasts that are subject to the RTVA, however, have to abide by the same rules (eg, regarding advertisement) as broadcasts via traditional media. Although no licence is required, the broadcasters must inform OFCOM about their programme service.



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**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 were finally abolished and switched from analogue to digital TV broadcasting. No specific timing is required by law for the switchover from analogue to digital broadcasting with regard to the broadcasting of radio programme services. However, in spring 2013, the radio industry, together with OFCOM, set up the Digital Migration Working Group, which is made up of representatives of the industry and public authorities. Accordingly, it planned to gradually replace analogue FM reception by digital radio from 2020 onwards with completion by 2024 at the latest. Today, the SBC and most private radio stations broadcast their programme services via DAB+ in parallel with FM; some even broadcast exclusively in digital. In order to establish new broadcasting technologies and, in particular, to alleviate a possible financial burden from such parallel setup, OFCOM may provide financial help to licensed broadcasters in case of insufficient resources in the relevant area. The necessary funds are generated by licensing and consumer fees.

**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 of Swiss law. Digital formats that meet 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) are, in principle, covered by the RTVA.

**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?

Except for the SBC, the number of licences a broadcaster and its group companies may acquire is limited to a maximum of two television and two radio licences.

In addition, there are measures against media concentration once a licence has been granted. However, these measures are only applicable if an undertaking abuses its dominant position. In such cases, DETEC consults the Swiss Competition Commission (COMCO). If the report of COMCO ascertains that a dominant undertaking jeopardises diversity of opinion and offerings as a result of an abuse of its dominant position, DETEC may demand that the undertaking concerned:

- 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 these measures prove to be clearly inadequate,
- adapts its business and organisational structure.

**Key trends and expected changes**

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

For some time now, Swiss media companies have faced a challenging time with declining revenues. Among others, this development has mainly been driven by online media or the digitalisation, respectively. The consequences are job cuts, the merging of editorial offices and a decline in media diversity, which is particularly evident on a regional level. The covid-19 pandemic is expected to significantly aggravate this development. Recent concentrations in the media sector in Switzerland confirm a clear trend towards consolidation in this sector.

Against this background, the Federal Council has adopted a dispatch to the Parliament for consultation at the end of April 2020. Therein, it suggests supporting the media with a package of specific measures that aim to improve the framework conditions for the media and promote a diverse range of offerings in the regions. First, in order to maintain press diversity, indirect press promotion shall be extended to all subscribed daily and weekly newspapers. At the same time, other current restrictions shall be lifted. By substantially increasing the federal contribution, all titles supported should benefit from a higher delivery discount per copy. This measure shall be implemented by amending the Federal Postal Act and the Federal Postal Ordinance. Second, the Federal Council intends to support the media industry in its digital transformation by promoting online media. To this end, 30 million Swiss francs of federal money shall be spent each year in conjunction with an incentive for publishers to develop digital offerings. The support shall be based on audience turnover and be degressive, leading to greater support for media offerings with a regional focus. Thereby, the market size of the language regions shall also be considered. This measure shall be implemented by a new law whose application shall be limited to 10 years. Third, the Federal Council intends to improve the framework conditions for the electronic media with various other measures, including support for training and further education institutions, national news agencies or self-regulation organisations, as well as IT projects, from which the entire industry shall benefit wherever possible. The RTVA is to be amended for these measures. According to the Federal Council, all measures shall guarantee the independence of the media.

In order to mitigate the negative effects of the covid-19 pandemic on Swiss media companies until the above-mentioned support measures enter into force, the Parliament has decided on various crisis aid measures in the beginning of May 2020. Accordingly, the national news agency Keystone-SDA will be financially supported to enable it to offer its basic text service to subscribers free of charge. In addition, newspapers will be delivered by the Swiss Post for free or at reduced costs. Finally, financial emergency payments will support regional radio and TV stations.

## 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 authorities regulating the telecommunications sector are the Federal Communications Commission (ComCom) and the Federal Office of Communications (OFCOM). ComCom is the independent licensing and market regulatory authority for the communications sector. Its main activities and competences 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 OFCOM with respect to the preparation of its business and the implementation of its decisions. OFCOM itself is part of the Federal Department of the Environment,


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Transport, Energy and Communications (DETEC) and acts as the supervisory authority in the communications sector. There is no strict line to draw between the competences of OFCOM and ComCom as the latter has delegated some of its competences to OFCOM.

The authorities regulating the media sectors are the Federal Council, DETEC and OFCOM. Further, there are the Federal Media Commission with advisory tasks and the Independent Complaints Authority for Radio and Television.

In addition, anticompetitive practices and mergers in the telecommunications and media sector are subject to general competition laws enforced by COMCO. The cases are prepared and processed by COMCO's Secretariat. In merger notification scenarios, provided that the notification thresholds of the Federal Cartel Act are met, the notifying parties require both clearance from COMCO and an approval of the transfer of mobile radio frequency licences by the licensing authority, either ComCom or OFCOM. Moreover, with regard to specific questions related to the conditions of competition or the market position respectively, the telecommunications regulators are required to consult with COMCO. 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 the Swiss Competition Commission (COMCO) as well as, to a limited extent, its interim procedural decisions, can be appealed to the Federal Administrative Tribunal. The scope of judicial reviews is extensive. An appeal can be lodged on the following grounds: wrongful application of the law; the facts established by the authorities were incomplete or wrong; or the decision was unreasonable (a claim that is, however, rarely invoked in practice). Hence, the appeal before the Federal Administrative Tribunal is a 'full merits' appeal on both the findings of facts and law. However, in practice the Federal Administrative Tribunal grants the previous instances a significant margin of technical discretion.

Decisions of the Independent Complaints Authority for Radio and Television can be appealed directly to the Federal Supreme Court.

The judgments of the Federal Administrative Tribunal and, to a limited extent, interim procedural decisions may be challenged before the Federal Supreme Court on the basis of law and procedure within 30 days of the notification of the decision. 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 binding and cannot be appealed to the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims (ie, the flawed application of the law or a violation of fundamental rights set forth in the Swiss Federal Constitution, in the European Convention on Human Rights or other international treaties). The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

In addition to the possibility of a request for reconsideration from the deciding authority (no actual appeal), as regards to decisions by COMCO, the parties involved may at any time during and after appeal procedures request the Federal Council to exceptionally authorise specific behaviour or to clear a blocked merger for compelling public interest reasons. To date, such authorisation has never been granted.

**CORE Attorneys**

**Mario Strebel**
mario.strebel@core-attorneys.com

**Fabian Koch**
fabian.koch@core-attorneys.com

Talacker 41
8001 Zurich
Switzerland
Tel + 41 43 555 70 00
www.core-attorneys.com

**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 again, a series of concentrations in the telecommunications and media sector have been reviewed by COMCO, most of them in Phase I. In September 2019, COMCO granted unconditional clearance to the then contemplated acquisition of certain Liberty Global assets including UPC Switzerland LLC by Sunrise Communications Group Ltd. The clearance decision followed an in-depth examination of the contemplated acquisition in which COMCO in particular assessed and eventually excluded a collective dominant position of Sunrise and Swisscom. With regard to behavioural cases, on 9 December 2019, the Federal Supreme Court issued a leading case with regard to price-squeezing concerning the Swiss telecommunications market. In this decision, the Federal Supreme Court upheld the decision the Federal Administrative Tribunal with a fine of about 186 million Swiss francs on Swisscom, the incumbent Swiss telecommunications operator, for a price squeeze in the ADSL market.

Regarding legislative changes, the Swiss government is currently analysing whether Switzerland should modernise its merger control regime and switch from the currently applied creation or strengthening of dominant position test to the significant impediment of effective competition test as applied, inter alia, in the European Union. The Federal Council therefore instructed the Federal Department of Economics, Education and Research in February 2020 to prepare a consultation draft. The government believes that this change of test for merger proceedings would have both a medium- and long-term positive effect on competition in Switzerland.

On 14 January 2020, COMCO opened an investigation, accompanied by dawn raids, into possible submission agreements in the field of optical networks, in other words, possibly inadmissible agreements that relate to hardware and software products in the field of optical networks used for data transmission via optical fibre by major customers.



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# Taiwan

**Robert C Lee, Ming Teng and Jane Wu**

Yangming Partners

## 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 currently 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.

The Telecommunications Act classifies telecommunication services into facility-based or Type I telecommunication services and non-facility-based or Type II telecommunication services, the engaging in the former of which is subject to a franchise requirement, while the engaging in the latter is subject to a licence requirement. 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 Type II telecommunication service 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.

Taiwan's Legislation Yuan (Congress) passed a new piece of legislation, entitled the Telecommunication Administration Act ('New Legislation') in mid-2019, which will replace the Telecommunications Act as the main telecommunication legislation in Taiwan once it becomes effective. The New Legislation is tentatively scheduled to become effective in July of 2020. The New Legislation separates telecommunication services from telecommunication networks. Under the New Legislation, engaging in telecommunication services will only be subject to registration, which will be mandatory only for engaging in telecommunication services using public telecommunication resources or that have interconnections with other service providers, and which is optional for engaging in all other types of telecommunication services. The building up and operation of a public telecommunication network (meaning a network for the provision of the services to customers instead of for the use of the network owners), on the other hand, will be subject to the NCC's prior approval. Local entity requirement as well as foreign investment cap, with the level the same as those currently stipulated by the Telecommunications Act, will be applicable to the public telecommunication network owners whose networks use public telecommunication resources, including frequencies and telecommunication numbers. A public telecommunication network owner could build up said network entirely on its own or in combination with components from others.

### 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 and 5G 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 application review process should be completed from 21 working days to 180 working days, depending on the type of service. 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



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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 and 5G 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 and 5G 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. 5G franchises issued in 2019 are valid until 31 December 2030 (for franchises operating in the frequency of 1800 MHZ) or 31 December 2040 (for franchises operating in the frequencies of 3500 MHZ and 28000 MHZ) respectively. The NCC is authorised by law to determine whether those franchises should be renewable then. 4G and 5G 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 4G and 5G 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.

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 access points (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 APs and provide free service to the public, which, again, is not subject to any NCC licence, authorisation or fee obligations.

The New Legislation replaces those franchise and licence requirements for all telecommunication service operators, with a registration scheme for the entities proposing to provide telecommunication services and an approval requirement for the building up and operation of public telecommunication networks. The registration is optional, provided that service providers that intend to interconnect with other providers and apply for frequencies or telecommunication numbers are required to register with the NCC. Only registered telecommunication service providers are subject to the various obligations and compliance requirements set forth by the New Legislation. A telecommunication service provider can choose to build up its own telecommunication network or lease or otherwise acquire the rights of usage to the networks built up by others in their entirety.

**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 or 5G operator could, upon the approval of the NCC, transfer its spectrum to another 4G or 5G operator.

The New Legislation allows an entity with a frequency allocated by the NCC to transfer the said frequency to others or share the use of such frequency with others, all of which are subject to the NCC's prior approval.

**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.

The New Legislation sets forth similar provisions for telecommunication service providers, subject to its mandatory registration requirements.

**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.



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The New Legislation 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.

**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 2018, universal service providers have already achieved a 100 per cent broadband coverage rate for the universal services that they provide.

The New Legislation authorises the NCC to determine the universal services to be provided and which providers shall provide such services, with the obligation to finance the universal services to be shared by all registered telecommunication service providers.

**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 certain 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. The New Legislation replaces the NCC's governance over the customer service terms of the telecommunication service providers by requiring only the registered telecommunication service providers specified by the NCC to set forth their standard service terms and secure the NCC's prior approvals of such service terms.

**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 tax incentives for the development of 5G mobile communication-related businesses, as well as 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 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.



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### 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 Legislative Yuan of Taiwan (Congress) passed the New Legislation (the Telecommunication Administrative Act) in mid-2019 to replace the currently effective Telecommunications Act. The New Legislation has not become effective yet, but is tentatively scheduled to become effective in July of 2020. The New Legislation significantly changes the legal framework in Taiwan's telecommunication sector by separating the function or service operation and network, and by replacing the existing franchise and licence requirements for telecommunication service providers with a registration scheme. The registration is mandatory for service providers who do the following (and optional for telecommunication service providers who do not):

- proceed with negotiation of interconnection with other service providers, or ask for arbitration from the NCC for the said interconnection negotiation;
- apply to the NCC for frequency allocation; or
- apply to the NCC for public telecom network identification numbers or subscriber numbers.

Only telecommunication service providers that have registered with the NCC are subject to the obligations (such as the provision of universal services and contributions to the universal services fund, interconnection, emergency calls, number portability, equal access and lawful interception) and compliance requirements (such as the rights and interests of subscribers, data protection and non-discrimination in terms of the offering of services) set forth by the New Legislation.

A registered telecommunication service provider can provide its services via a public telecommunication network that it builds up by itself, leases or otherwise acquires the usage rights to from other service providers. A public telecommunication network refers to a network for the provision of services to customers instead of for use by the entity building up such network itself.

On the other hand, the building up and operation of a public telecommunication network, either by a registered telecom service provider or any other person, is subject to the prior approval of the NCC, wherein the 'build-up' means an entity has built its own public telecommunication network in whole, or has created a public telecom network by combining its own network or components with those of others. Public telecom networks are further divided by the New Legislation into those using telecommunication resources (meaning frequencies and telecom numbers) and those not using telecom resources. An applicant who applies for prior approval from the NCC for the building up of a public telecom network using telecom resources is subject to certain qualifications and a foreign investment cap, and the application is subject to significant documentation and information requirements (as compared to an application to set up a public telecom network without using telecom resources).

## MEDIA

### Regulatory and institutional structure

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

The National Communication Commission (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.

### 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


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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 or internet programme services and 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 2019, digital penetration had reached 99.99 per cent in Taiwan, with approximately 4.97 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?

New media antimonopoly and divestiture legislation has been proposed by the NCC and is currently being reviewed by the Executive Yuan, and aims to regulate mergers or other forms of consolidation among various broadcasters and other media such as newspapers so to prevent overconcentration within the media landscape. 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 viewer ratings for the merged or consolidated broadcaster and media enterprise would meet certain thresholds and such approval would not be granted if the post-merger or post-consolidation viewer ratings would exceed still higher stipulated thresholds.



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### Key trends and expected changes

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

The NCC is currently proposing to regulate offshore and domestic internet programming service (or OTT services) providers and is scheduled to release a draft of the legislation for comments from the public in July of 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?

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. The New Legislation subjects any merger or cross-investment between or among registered telecommunication service providers with any party that would have been allocated frequencies by the NCC; or would have one quarter or more of the shares of any specific telecommunication market to the NCC's prior approval.

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.

陽明國際律師事務所
YANGMING PARTNERS

**Robert C Lee**
rclee@yangminglaw.com

**Ming Teng**
mteng@yangminglaw.com

**Jane Wu**
janew@yangminglaw.com

10F., No.89, Song Ren Rd.
Xinyi Dist.
Taipei City 110
Taiwan
Tel: +886 2 8725 6677
Fax: +886 2 2729 5577
www.yangminglaw.com

### 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.

There were no merger and antitrust decisions in the communications and media sectors in Taiwan in the past year.



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# Thailand

**John P Formichella, Naytiwut Jamallsawat and Artima Brikshasri**

Blumenthal Richter & Sumet Ltd

## 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:

- Type 1 licence, for telecommunications business operators who provide telecommunications services without operating a telecommunications network;
- Type 2 licence, for operators who provide services to a specific group of customers with or without operating a telecommunications network; and
- 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.

However, the NBTC is now stricter and it takes more time to apply for telecommunications licences (ie, Type 1, Type 2 and Type 3 licences). This is due to a change of internal policy at the NBTC regarding such applications.

**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**

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.



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**Internet service providers**

Internet service provider (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;
- 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;
- disclose or report information;
- change cost-calculation formulas;
- set prices or fees for certain services;



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- 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) (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.



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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?

The Personal Data Protection Act BE 2562 (2019) (PDPA) was published in the *Government Gazette* on 27 May 2019. The PDPA would, therefore, become effective on 27 May 2020, except for the provisions on the collection, use and disclosure of personal data that will be executed one year after publication. On 21 May 2020, however, the Thai government announced that the enforcement of the PDPA would be partially postponed by one more year to 1 June 2021, as compliance with PDPA law is complex and, therefore, costly and requires advanced training. Preparations still need to be made now for compliance with the PDPA, however, as business owners (as data controllers) need to have in place security safeguards for personal data as required by the Ministry of Digital Economy and Society. The PDPA regulates data controllers and protects the personal information of data subjects. Therefore, all data controllers who collect or process the personal information of data subjects in Thailand will be required to fully comply with the PDPA by 1 June 2021.

Once in full effect, the PDPA would limit what companies (under the role of data controller) may do with people's personal data to the extent that they must inform the data subject 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 subject 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 subject is prohibited unless permitted by law, or the personal data controller informs the data subject of the new purpose and obtains their amended consent. A data subject may withdraw their consent at any time unless restricted by law or any agreement that is beneficial to the data subject. If a personal data controller fails to comply with the provisions of the PDPA, then the data subject 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 Cybersecurity Bill BE 2562 (2019) (the Cyber Act) was published on 27 May 2019 in order to enforce legal safeguards to ensure national security in cyberspace, including a cybersecurity risk assessment plan to prevent and mitigate cybersecurity threats that may affect the stability of national security and the public interest (eg, economy, healthcare, international relations, government functions).

The Cyber Act is intended to protect Thailand's national security systems from cyber-related threats and crime. The Cyber Act 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 Cyber Act. A National Cyber Security Committee created under this Cyber Act will be responsible for all national security matters in connection with the government's data and computers.

Cyber threats are categorised into three levels under the Cyber Act 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 the case of a non-critical level event. The responsible authority, which is established under the Cyber Act, is the National Cyber Security Committee.

Under the Cyber Act, 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 Act, 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.



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**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 National Broadcasting & Tele-communications Commission (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.



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### 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.

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. A licence to operate public services (where the main objective is to provide public services) 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) is only available to government entities and certain associations, charities, foundations and educational institutions, and not to private sector operators.

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. In addition to those ownership restrictions, 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 8am and 6pm. 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


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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?

Licensed broadcasters have an obligation to follow the requirements set out by the NBTC regulations, including requirements relating to show ratio, show categorisation, time allocation of the TV show to be broadcast and the management of advertisements. Broadcasters are categorised into two main types:

- broadcasters that use TV broadcast frequencies; and
- broadcasters that do not use TV broadcast frequencies.

### Broadcasters' requirements

Licensed broadcasters are further categorised into types according to the main purpose of their broadcasting. Each type of broadcasting must include at least the following show ratios:

- public service broadcaster –70 per cent of the shows must be for the benefit of the public, such as news reports, knowledge-related shows or documentaries;
- local service broadcaster – 70 per cent of the shows must be for the benefit of a specific local jurisdiction, such as within one district or province, and must have at least 50 per cent of the shows produced by the producers from such local jurisdiction; and
- business-oriented broadcaster – 25 per cent of the shows must be for the benefit of the public, such as news reports, knowledge-related shows or documentaries. A business-oriented broadcaster at the provincial level must have self-produced shows account for at least 50 per cent of the total shows.

Types of TV shows can be divided into six categories, and licensed broadcasters must self-rate shows and allocate shows to the proper time slot as set out by the NBTC regulations, as follows:

- Category Por is for children, produced for an audience age of between three and five years old;
- Category Dor is for children, produced for an audience age of between six and 12 years old;
- Category Tor is a general TV show, for audiences of all ages;
- Category Nor 13 is suitable for an audience whose age is more than 13 years old, and must be broadcast between 20.30 and 05.00 only;
- Category Nor 18 is suitable for an audience whose age is more than 18 years old, and must be broadcast between 22.00 and 05.00 only; and
- Category Chor is suitable for adults only, and must be broadcast between 24.00 (midnight) and 05.00 only.

In addition, broadcasters that use TV broadcast frequencies must allocate at least 60 minutes between 16.00 and 18.00 on Monday to Friday and 07.00 and 09.00 during the weekends for shows with the purposes of developing and benefiting children. In addition, licensed broadcasters must broadcast the Thai national anthem two times per day, at 08.00 and 18.00, and they must broadcast the Royal Family's news every day from 19.00 to 20.30.

Licensed broadcasters must submit to the NBTC overall broadcast schedules, show ratio and plans of the TV shows, including the categorisation and time allocation of the show using the application form provided by the NBTC at least 15 days prior to the initial operation. After the first year, licensed broadcasters must submit their planned broadcast schedule with the aforementioned information at least once a year to the NBTC for its approval at least 15 days prior to the broadcasting. If the NBTC finds that the broadcaster is not following the regulations with regard to its categorisation and time allocation, then the NBTC shall issue a warning letter asking the broadcaster to revise the schedules and plans of its TV shows prior to broadcasting. Any change to the approved schedules and plans must be submitted to the NBTC at least seven days prior to broadcasting. There is no mechanism for financing the costs of the abovementioned obligations.

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.



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### 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 National Broadcasting & Tele-communications Commission (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.

**John P. Formichella**
john@brslawyers.com

**Naytiwut Jamallsawat**

**Artima Brikshasri**

Abdulrahim Place, 31st Floor
990 Rama 4 Road
Bangkok 10500
Thailand
Tel: +662 022 1000
Fax: +662 636 3377
www.brslawyers.com



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# Turkey

**Cigdem Ayozger Ongun, Begum Erturk and Deniz Erkan**

SRP Legal

## 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 main piece of legislation regulating the communications sector in Turkey is Law No. 5809 on Electronic Communications (Law No. 5809). The scope of Law No. 5809 is:

- the provision of electronic communications services and the construction and operation of the infrastructure and the associated network systems thereof;
- the manufacture, import, sale, construction and operation of all kinds of electronic communications equipment and systems;
- the planning and assignment of scarce resources including frequency and the regulation; and
- authorisation, supervision and reconciliation activities relating to said issues.

In addition, the communications sector in Turkey, is particularly governed by:

- Law No. 5651 on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting;
- Law No. 5070 on Electronic Signature;
- Law No. 6563 on the Regulation of E-Commerce;
- the Regulation on the Network and Information Security in the Electronic Communications Sector;
- the Regulation on Processing and Protection of Personal Data in the Electronic Communications Sector;
- the Regulation on Consumer Rights for Electronic Communications Sector;
- the Regulation on Authorization in Electronic Communications Sector;
- the Regulation on Spectrum Management; and
- the Regulation on Access and Interconnection.

The communiques prepared and decisions rendered and enforced by the Information and Communication Technologies Authority (ICTA), and the general laws such as Capitals Markets Law No. 6362, Turkish Commercial Code No. 6102 and Criminal Procedural Law No. 5271 also govern the communications sector in Turkey.

The Ministry of Transport and Infrastructure (the Ministry) and the ICTA are both vested with certain powers and duties under Law No. 5809. The ICTA mainly has regulatory and executive powers, whereas the Ministry mainly has policymaking powers.

As per article 5 of Law No.5809, the Ministry is vested with the following powers and duties:

- setting strategies and policies regarding electronic communications services that are based on scarce resources;
- determining objectives, principles and policies towards the aim of encouraging the development of theelectronic communications sector and supporting the transformation into an information society;
- determining policies towards construction and development of electronic communications infrastructure, network and services;
- contributing to the creation of policies;
- representing the state in the international associations and organisations;
- conducting necessary research;
- taking necessary measures and performing coordination to ensure the continuity of electronic communications in the case of natural disasters and extraordinary situations;
- planning electronic communications services in the case of extraordinary situations and at war and performing necessary actions;
- encouraging domestic design and production of electronic communications systems, promoting research, development and training activities relating to the sectors; and
- determination of the amount of the source to be allocated by the ICTA, which shall not exceed 20 per cent of the ICTA's income and allowing this source to be used by making necessary arrangements.

As per article 6 of Law No. 5809, the ICTA is mainly vested with the following powers and duties:

- making regulations to create and protect competition and eliminating the practices that are obstructive, disruptive or limitative for competition;
- imposing obligations on operators with significant market power in the relevant markets and on other operators when required, taking the necessary measures;
- inspecting breaches of competition and imposing sanctions;
- making necessary arrangements and supervisions pertaining to the rights of subscribers, users, consumers and end users as well as processing of personal data and protection of privacy, rendering decisions;
- conducting the dispute resolution procedure between the operators when necessary and taking the necessary measures;
- following developments in the electronic communications sector;
- planning and allocating the frequencies, satellite position and numbering necessary for the provision of electronic communications services and installation and operation of electronic communications network and infrastructures;
- performing necessary regulations and inspections;
- supervising radio systems and determining the scope of commercial secrets;
- obtaining information and documentation that are deemed necessary;
- transferring sources that shall not exceed 20 per cent of the income, determining general criteria and implementation procedures and principles regarding tariffs to be imposed;



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- approving reference access offers;
- determining provisions and conditions for authorisations and supervising their implementation and conformity;
- conducting frequency planning, assignment and registration procedures;
- ensuring the publication and implementation of the harmonised national standards for all kinds of systems and equipment, and creating technical regulations;
- coordinating the authorisation of institutions that will perform installation, measurement, maintenance and repair activities;
- conducting market analyses to determine the relevant market and operators that have significant market power in the relevant market;
- determining all kinds of procedures and principles regarding fees;
- inspecting operators;
- taking necessary measures;
- making regulations prescribed by the legislation;
- inspecting the quality and standards of service for all kinds of electronic communications; and
- enacting by-laws, communiques and other secondary regulations pertaining to the authorisations granted by Law No. 5809.

Although there is no restriction regarding foreign ownership under the communications law, pursuant to the Regulation on Authorisation for Electronic Communications Sector, in order for a company to be granted an authorisation by the ICTA in the communications sector, the company has to be duly established as a limited liability or joint-stock company in accordance with Turkish Commercial Law No. 6102. In addition, a foreign entity or individual can be the sole shareholder of such an authorised company.

**Authorisation/licensing regime**

2 | Describe the authorisation or licensing regime.

Pursuant to Law No. 5809 on Electronic Communications (Law No. 5809), authorisation is issued by the ICTA based on either notification or right of use.

Companies who are willing to provide electronic communications services or to construct and operate electronic communications networks or infrastructures should notify the ICTA of their intention before commencing their activities. If the companies who have notified the ICTA do not need the assignment of scarce resources such as number or frequency for electronic communications services or electronic communications network or infrastructure that they plan to provide or to operate, they shall be authorised pursuant to the notification to the ICTA.

If the company requires assignment of scarce resources, it shall be authorised upon receiving the right of use from the ICTA. The ICTA is entitled to decide whether it is necessary to grant right of use to electronic communications services. The ICTA issues right of use within 30 days upon due application for electronic communications services, for which the number of rights of use does not need to be limited.

The authorisation fees are stipulated under the Regulation on Authorisation for Electronic Communications Sector. As per the Regulation, for the notification process an administrative fee of 0.35 per cent of the yearly net sales must be paid to the ICTA; for the right of use process, the specific fee for the relevant resource to be used in the operation must be paid, in addition to the administrative fee. The minimum fees for right of use are determined by the Board of Ministers upon the proposal of the ICTA and the resolution of the Ministry.

There is currently no distinct regulation regarding 4G, 4.5G and 5G mobile services. To be able to be granted a spectrum for 5G mobile services, companies have to participate in right of use tenders. The tenders regarding 4G and 4.5G have already been realised and finalised, whereas the right of use tender regarding 5G mobile services has yet to be realised.

**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 main piece of legislation regarding spectrum management is the Spectrum Management Regulation (the Regulation) published in Official Gazette No. 27276, dated 2 July 2009. The Regulation determines the procedures and principles of management, allocation, assignment, national and international coordination and registration of radio frequencies assigned, as well as the withdrawal and reassignment of assigned frequencies if necessary, for the efficient and effective use of radio frequencies. The licences generally specify the permitted use of the licensed spectrum in accordance with the Regulation. The scope of permitted use is generally determined within the spectrum licences.

As per the Regulation, while managing spectrum allocation, the ICTA shall pay attention to providing effective competition, ensuring transparency and avoiding discrimination. The planning is made pursuant to the decisions of organisations such as the International Telecommunication Union, the International Maritime Organisation, the International Civil Aviation Organisation, the EU and the European Conference of Postal and Telecommunications Administrations, and frequencies are assigned to operators that are subject to authorisation for the duration stated in the certificate of authorisation granted for right of use.

The trade of licensed radio frequency spectrum is not prohibited under Turkish legislation. The trading of spectrum licences is not prohibited; however, in order to transfer spectrum frequency, operators must apply to the ICTA for approval. The ICTA shall decide for approval upon evaluation of the application by taking into consideration of the market and competition conditions of the transferee operator and other related issues. Upon the ICTA's approval, a right of use shall be granted to the transferee operator within one month of the date on which the approval is granted.

**Ex-ante regulatory obligations**

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

Communications markets that are subject to ex-ante regulation are:

- the call transfers on fixed network market;
- the call origination on fixed network market;
- the call termination on fixed network market;
- the fixed line network access market;
- the fixed voice telephony services market;
- the wholesale and retail leased lines market;
- the access and call origination on mobile network market;
- the call termination on mobile network market; and
- the wholesale local access and central access market.

The ICTA has the power to make both ex-ante regulations and ex-post regulations. As per article 6 of Law No. 5809 on Electronic Communications (Law No.5809) the ICTA is vested with the duty of conducting market analyses to determine the relevant market and the operators that have significant market power in this relevant market and to inspect the breaches of competition in the electronic communications sector and impose sanctions if necessary.

Sanctions imposed on each of the markets are as follows:

- call transfers on fixed network market: there are no sanctions imposed;



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- call origination on fixed network market: sanctions imposed on operators having SMP are access and interconnection, transparency, publication of reference offer, non-discrimination, tariff control, accounting separation and cost accounting, co-location and infrastructure sharing;
- call termination on fixed network market: sanctions imposed on operators having SMP are access and interconnection, transparency, non-discrimination, QoS, tariff control, accounting separation and cost accounting, co-location and infrastructure sharing. Sanctions imposed on operators that do not have SMP are interconnection, non-discrimination and transparency;
- fixed line network access market: sanctions imposed on operators having SMP are access, wholesale of leased lines, carrier selection and pre-selection, non-discrimination, transparency, publication of reference offer and tariff control;
- fixed voice telephony services market: there are no sanctions imposed;
- wholesale and retail leased lines market: sanctions imposed on wholesale leased lines are access, non-discrimination, transparency, publication of reference offer, tariff control, accounting separation and cost accounting and co-location and infrastructure sharing. Sanctions imposed on retail leased lines are tariff control and accounting separation and cost accounting;
- access and call origination on mobile network market: there are no sanctions imposed;
- call termination on mobile network market: sanctions imposed on mobile network operators are interconnection, non-discrimination, QoS, transparency, publication of reference offer, tariff control, accounting separation and cost accounting and co-location. Sanctions imposed on other mobile operators are; interconnection, non-discrimination and transparency; and
- wholesale local access and central access market: sanctions imposed are access, co-location and infrastructure sharing, tariff control, publication of reference offer, non-discrimination, transparency and accounting separation 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?

Pursuant to article 6 of Law No. 5809 on Electronic Communications (Law No. 5809), the ICTA is vested with inspecting breaches of competition in the electronic communications sector, imposing sanctions and taking the opinion of Competition Authority on issues regarding breach of competition.

Additionally as per article 7 of Law No. 5809, the Competition Board, while performing examinations and supervisions and while making any decisions on the electronic communications sector, including decisions about mergers and takeovers, takes into consideration primarily the ICTA's view and the regulatory procedures of the ICTA.

The Competition Board is also authorised to decide on a structural or functional separation between an operator's network and service activities, taking the ICTA's view on the matter into consideration. That was the case during the privatisation of the incumbent operator: Turk Telekomunikasyon AS. In accordance with Decision No. 05-48/681-175 of 21 July 2005 of the Competition Authority, rendered upon taking the view of the ICTA (which was referred to as the Telecommunication Authority at the time of the decision), TTNET AS was structurally separated from Turk Telekomunikasyon AS and, as of 28 April 2006, TTNET AS was established as a separate legal entity. However as of 27 January 2016, Turk Telekomunikasyon AS and TTNET AS have once again merged.

**Universal service obligations and financing**

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

Law No. 5369 on Universal Services (Law No. 5369) stipulates the rules to promote access to telecom services in rural or under-served areas. Accordingly, operators that have a general authorisation, concession and authorisation agreement or a licence in the telecommunications sector are incumbent universal service providers.

Pursuant to Law No. 5369, universal services include fixed telephone services, public payphone services, telephone directory services (printed or directories on electronic media), emergency call services, internet services, passenger transportation services for settlements to which maritime lines is the single option of access and communications services regarding distress and safety at sea.

For the financing of universal services provided, Turk Telekomunikasyon AS and operators other than mobileoperators are obliged to declare to the Ministry of Transport and Infrastructure (the Mi nistry) 1 per cent of their annual net sales proceeds by the end of April of the following year. Mobile operators are obliged to declare to the Ministry 10 per cent of the share they are to pay the Treasury within the month of payment. The ICTA is obliged to declare to the Ministry 20 per cent of the administrative penalties it has applied under the relevant laws by the end of the month following the month of collection, and is obliged to declare to the Ministry 20 per cent of the amount remaining after all expenditure is met at the end of the fiscal year by the end of January every year.

Following the collection of the above-mentioned amounts, the net cost incurred owing to the operator's obligations to provide universal services and other expenses incurred within the scope of Law No. 5369 shall be financed by the Ministry.

**Number allocation and portability**

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

Pursuant to Law No. 5809 on Electronic Communications (Law No. 5809), the ICTA is authorised to allocate numbers and to prepare the National Numbering Plan and the National Frequency Plan under the policies of the Ministry of Transport and Infrastructure. Number allocation and usage principles are specifically regulated under the Numbering Regulation. The purpose of that regulation is to ensure that the numbers used in the electronic communication networks are planned in a national context and are used effectively and efficiently in accordance with the stipulated plan.

Number portability is mainly regulated under the Regulation on Number Portability, which was amended pursuant to the Regulation on the Amendment of the Regulation on Number Portability published in the Official Gazette dated 28November 2015 (No. 29546). As per the Regulation on Number Portability, subscribers may change their operator, geographical position and service type without having to change their subscriber number. Operators are under the obligation to provide number portability.

**Customer terms and conditions**

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

The customer terms and conditions between subscribers and operators are subject to the Regulation on Customer Rights in Electronic Communications Sector.

The Regulation on Customer Rights in Electronic Communications Sector requires operators to be fully transparent and lays the burden of proof on the operator with respect to subscriber requests and approvals.



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Pursuant to the Regulation on Customer Rights in Electronic Communications Sector, the customers have the following rights:

- access to services under the same terms with similar customers and benefiting from the services with fair prices without any discrimination;
- entering into agreements with the authorised operators, requesting that their personal data be or not be included in publicly available directories;
- benefiting from directory services being free of charge or for a price and being able to register with the directories without any discrimination;
- being informed of the emergency call services and accessing those services free of charge;
- requesting itemised invoices;
- requesting information about the scope of the services to be provided by the operators;
- access to clear, detailed and current information on the tariffs to be applied to the customers and being informed of any change to those tariffs before such change is applied;
- opting out in a simple way or by an original way of application to the service, from all the services under the campaigns or tariffs including value added services that they opted in through SMS, call centre or internet;
- requesting equal treatment without any discrimination in relation to resolving the malfunction problems; and
- receiving services in the standards determined by the ICTA or by international institutions.

Finally, the agreement between the customer and the operator must be made in writing in accordance with the Regulation on Customer Rights in Electronic Communications Sector.

**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 regarding net neutrality under Turkish legislation. However, in 2012, to restore net neutrality, the ICTA imposed an administrative fine against an internet service provider owing to the internet service provider blocking some websites on its network without any court or competent authority's decision.

**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 regulation that covers digital platforms. However, there are general and specific laws and regulations that are applicable to digital platform providers. For instance, Law No. 5809 on Electronic Communications includes provisions regarding digital platforms providing services by satellite broadcasting. In addition, Law No. 6563 on Regulation of Electronic Commerce (Law No. 6563) regulates the rules and procedures for electronic commerce platforms and digital marketing. Furthermore, Law No. 4054 on the Protection of Competition in Turkey is applicable to the digital platform markets in Turkey. Moreover, all content published on the internet is subject to Law No. 5651 on Regulating Broadcasting in the Internet and Fighting against Crimes Committed through Internet Broadcasting (Law No. 5651). Law No.5651 restricts the publication of content constituting certain types of crime and content violating the rights of third parties. Finally, digital platforms are also subject to the laws and regulations on data protection and privacy.

**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 Turkey, there is no specific regulation in force for NGA networks. However, there are several board decisions of the ICTA regulating the NGA networks. In the ICTA's plan pertaining to 2020, it is stipulated that new monitor stations and vehicles, as well as hardware and software, are planned to be supplied for the purpose of adapting to new generation technologies. Besides this, the ICTA has also published several public releases indicating that the NGA penetration should be increased.

**Data protection**

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

Data protection in the electronic communications sector is mainly regulated under Law No. 5809 on Electronic Communications (Law No.5809) and the Regulation on Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (the Regu lation), published in the Official Gazette dated 24 July 2012 (No.28363). P ursuant to these specific laws and regulations, operators are obliged to protect subscribers' information and their privacy. In addition, communication must not be listened to, recorded, stored, intercepted or tracked without the explicit consent of all the relevant parties to the communication, except in cases where the relevant legislation and judicial decisions so require. Moreover, traffic and location data may be transferred abroad only with the explicit consent of the data subjects. Finally, operators are obliged to take necessary technical and administrative measures to ensure the security of the networks and personal data of the subscribers. Besides this, operators are subject to the Law on Personal Data Protection for the general rules, principles and procedures regarding data protection and privacy they process in their data filing system.

**Cybersecurity**

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

The Council of Ministers' Decision on Conducting, Managing and Coordinating National Cybersecurity Activities (the Decision), which entered into force on 20 October 2012 is one of the important legislative developments regarding cybersecurity in Turkey. Also, a Cybersecurity Board has been established pursuant to the Decision, the duties of which include approval of policies, strategies and action plans regarding cybersecurity and rendering of decisions regarding their implementation nationwide in an effective manner, resolving proposals regarding the determination of critical infrastructure and determining the institutions to be wholly or partially exempt from cybersecurity provisions.

On the other hand, electronic communication sector-specific cybersecurity provisions are regulated with the secondary regulation, the Regulation on Network and Information Security in Electronic Communication Sector. This Regulation, which regulates and underlines technical, administrative, organisational and physical measures to be taken by operators, does not apply for personal data processing and protection.

Pursuant to Regulation on Administrative Sanctions No. 28914, issued by the ICTA, any natural or legal entity who fails to comply with the obligations related to network and information security



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and cybersecurity measures to be determined by the ICTA shall be imposed with an administrative fine of 1,000 to 1,000,000 Turkish lira.

**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 regulation regarding big data within the frame of Turkish legislation. However, if big data involves the processing of personal data, personal data-related provisions can be applied for.

If big data does not involve personal data but involves non-personal data (anonymous data, commercial information, trade secrets etc), non-personal data-related provisions can be applicable to those processing activities. For instance, it can be said that the Regulation on Network and Information Security in Electronic Communication Sector excludes personal data processing and protection but can be applicable to big data processing in the electronic communications sector.

**Data localisation**

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

Pursuant to Law No.5809 on Electronic Communications (Law No.5809), data belonging to customers may only be transmitted abroad upon the consent of the customer. The Draft Regulation on Processing of Personal Data and Protection of Privacy in the Electronic Communications Sector (the Draft Regulation), which has been submitted to public opinion, also stipulates that data transfer to third parties located abroad may only be realised upon the consent of the customer. In this scope, the customer has to be informed regarding the country to which the data is transferred, the scope and period the data will be kept and the relevant legislation and practice in the country.

Additionally, operators are also subject to Law No. 6698 on Personal Data Protection (Law No.6698) in terms of the general rules, principles and procedures of personal data processing and protection. Therefore, operators, while transferring personal data, must ensure compliance with and fulfilment of the requirements arising from both regulations.

**Key trends and expected changes**

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

One of the most significant legislative developments is the Draft Regulation on Processing of Personal Data and Protection of Privacy in the Electronic Communications Sector being submitted to public opinion. As per the Draft Regulation, the ICTA is given a more dominant role in the operations and practices of operators in relation to the processing of personal data.

The Competition Board is conducting an investigation against Turkey's largest fixed-line operator, namely Turk Telekomunikasyon AS, on the basis that the operator is abusing its dominant position in the telecommunications sector.

On another note, the Ministry of Transport and Infrastructure has announced that there has been major progress in preparations regarding the 5G mobile service infrastructure, and it is anticipated that the transition to 5G will be realised as of 2020.

Finally, the Ministry of Transport and Infrastructure published the national cybersecurity strategy and action plan for 2020–2023.

## MEDIA

**Regulatory and institutional structure**

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

The key regulations governing the media sector in Turkey constitute: the Constitution of the Republic of Turkey (No.2709); international agreements (the European Convention on Transfrontier Television); sector specific Laws (Press Law No. 5187, Law No. 4982 on the Right to Obtain Information, Radio and Television Law of Turkey No. 2954, Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises, Law No. 3093 on Radio and Television Incomes in Turkey, Law No. 5651 on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting); general laws (Industrial Property Law No. 6769, Turkish Criminal Law No. 5237, Turkish Law No. 6098); regulations (the Advertisement Regulation of Radio and Television Authority of Turkey); directives, communiques, principles and procedures, instructions executing and enforcing and the decisions rendered by the relevant authority.

In 2019, the following developments took place:

- the Regulation on Procedures and Principles regarding the Improvement of Broadcasting Services Access by Hearing and Visually Handicapped, published in the Official Gazette dated 11 October 2019 and numbered and fully entered into force on 11 January 2020; and
- the Regulation on Radio, Television and On-Demand Broadcasts on the Internet (the RTI Regulation)published in the Official Gazette dated 1 August 2019 (No. 30849) and fully entered into force on 1 September 2019. The essential point is that the RTI Regulation is also applicable for content or hosting providers located in a foreign country, and media service providers that perform their business activities under the jurisdiction of the established country. In addition to this, media service providers broadcasting over the internet in Turkish and targeting Turkey, or broadcasting in another language but targeting Turkey and also including commercial broadcasts to Turkey are subject to this RTI Regulation. However, individual communications are excluded from its scope.

The Radio and Television Supreme Council (RTSC), founded in 1994, is the administratively and financially autonomous and impartial public legal authority for the regulation and supervision of radio, television and on demand media services. In the field of audiovisual media services, the main function of the RTSC is taking essential precautions for securing freedom of expression and information, diversity of opinion, media pluralism, competition environment for avoiding media concentration and protecting public interests. On the other hand, the Information Technology and Communication Authority (ICTA) that is the national telecommunications regulatory and inspection authority of Turkey may also be intervened and act in some cases in this sector. For instance, under the RTI Regulation, the ICTA is entitled to impose administrative fines on companies that do not abide by decisions of the Criminal Court.

**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?

Certain restrictions regarding foreign ownership have been stipulated under Law No. 6112 on the Establishment and Broadcasting Services


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of Radio and Television Enterprises (Law No. 6112). For instance, the total direct foreign capital share in a media service provider shall not exceed 50 per cent of the paid-in capital. Furthermore, a foreign real or legal person can directly become a partner of a maximum of two media service providers. Although it is important to point out that if foreign real or legal persons hold shares in companies that are shareholders of media service providers and become indirect partner of the broadcasters, the chair, the deputy chair and the majority of the board of executives and the general director of the broadcasting enterprises must be citizens of the Republic of Turkey, and the majority of the votes in the general assemblies of broadcasting enterprises should belong to the real or legal persons having the Turkish citizenship. Finally, foreign shareholders shall by no means own preference shares, as domestic shareholders do not.

In terms of the cross-ownership of media companies, the same Regulation indicates that a real or legal person can be a partner directly or indirectly of a maximum of four media service providers holding terrestrial broadcasting licences. However, in the case of partnership in more than one media service provider, annual total commercial communication revenue of those media service providers in which a real or legal person has direct or indirect shares shall not exceed 30 per cent of the total commercial communication revenue of the sector. The real or legal persons whose total commercial communication revenue exceeds this rate shall transfer their shares in media service providers so that it will be reduced down to the aforesaid rate within a time limit of 90 days given by the RTSC.

**Licensing requirements**

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

First of all, it is necessary to define 'broadcasting licence' under Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises (Law No. 6112). 'Broadcasting licence' means the certificate of permission issued separately for each broadcasting type, technique and network by the RTSC to media service providers to allow them to broadcast using any kind of technology via cable, satellite, terrestrial and similar networks.

Pursuant to Law No. 6112, a broadcasting licence may only be granted to joint stock companies established pursuant to Turkish Commercial Code No. 6102. The scope of the purpose of the joint stock company has to be exclusively determined, with regard to providing radio, television and on-demand broadcast service.

However, political parties, unions, professional associations, cooperatives, associations, societies, foundations, local administrations and companies established by them or of which they are direct or indirect shareholders, stock broker companies and real or legal persons who are direct or indirect shareholders of these companies are not allowed to apply for a broadcasting licence.

Media service providers shall apply for a separate licence for each broadcasting technique and network to the RTSC in order to be able to broadcast through cable, satellite, terrestrial and similar networks. It should be clearly indicated in the licence document for which broadcasting technique and network the licence is granted. Enterprises requesting to make simultaneous broadcast on different networks by different techniques should apply for separate licences for each broadcasting technique and network, and must provide a simultaneous broadcast.

As per Law Amending Tax Laws, Certain Laws and Certain Decree Laws No. 7103 stipulating amendments to Law No.6122, media service providers and online broadcast platforms that only broadcast content over the internet are also subject to these licensing requirements.

As per online broadcasting, the Regulation on Radio, Television and On-Demand Broadcasts on the Internet (the Regulation) sets forth licensing requirements regarding three types of licences. The first regards radio-based broadcasting online, namely, INTERNET-RD broadcasting licence. The second regards television-based broadcasting online, namely, INTERNET-TV. The third one regards on-demand broadcasting online, namely,INTERNET-IBYH.

As per the Regulation, online broadcasting licences shall only be granted to joint-stock companies established as per Turkish Commercial Law No. 6102, exclusively established for providing radio, television and on-demand broadcasting services.

Pursuant to the Regulation, online platform operators that provide various radio, television and on-demand broadcasts through their URL address or mobile applications must obtain internet broadcast transmission authorisation from the RTSC.

The term of a broadcasting licence is 10 years, both according to Law No. 6112 and the Regulation, and there are no specific time-scale provisions for obtaining authorisation from the RTSC.

Licence fees are determined each year by the RTSC, and the most recent information on satellite, cable and online broadcasting license fees for radio, television and on demand broadcasting services can be found on the website of the RTSC.

**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?

Law No. 6112 on Establishment and Broadcasting Services of Radio and Television Enterprises (Law No. 6112) does not prohibit broadcasting in foreign languages; however, broadcasts made in foreign languages shall follow the rules of that preselected language and be supervised by the RTSC. On the other hand, the Regulation on the Procedures and Principles of Media Services stipulates that providing broadcasts in languages and dialects other than Turkish by media service providers is subject to permission to be issued by the RTSC. Thus, the RTSC permits broadcasting in a foreign language if it finds the media service provider's application appropriate according to their broadcasting area and technical facilities. However, no permission is required for on-demand media services in languages and dialects other than Turkish.

Pursuant to the same Law, if television enterprises that conduct general and thematic broadcasts include cartoons in the broadcasts for children, at least 20 per cent of the cartoons, and at least 40 per cent of other children's programmes, shall be productions made in the Turkish language and reflecting Turkish culture. There are not any other local content quotas for media service providers.

However, content required to be broadcast for television broadcasters that hold a national terrestrial broadcasting licence is as follows:

- televisionbroadcasters are obliged to allocate at least 50 per cent of their broadcast time to European works, excluding the time allocated to news, sport events, contests, advertisements, tele-shopping and related data broadcasts; and
- they must allocate 10 per cent of their broadcast time or programme budget broadcasts to European works of independent producers, excluding the time allocated to news, sporting events, contests, advertisements, tele-shopping and related data.

Additionally, as per the Regulation on Radio, Television and On-Demand Broadcasts on the Internet, the broadcasting services of foreign media service providers and foreign internet broadcasting platform operators under the jurisdiction of a country other than Turkey may be suspended by the RTSC, if it is decided by the RTSC that the media service providers



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or internet broadcasting platform operators have acted in violation of Law No. 6112 or any international treaties within the scope of the RTSC's authority to which Turkey is a party to.

**Advertising**

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

The main pieces of legislation governing broadcast media advertising are Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises (Law No. 6112) and the Advertisement Regulation of Radio and Television Authority of Turkey.

As per Law No. 6112, advertisements and tele-shopping in television and radio broadcasting services have to be broadcast in a manner that is easily distinguishable from the rest of the elements of the broadcasting programmeservices, by way of the use of audio or visual warnings. Broadcast media advertisements are also within the scope of the Regulation on Commercial Advertisements and Unfair Practic es (the Regulation) published in the Official Gazette dated 10 Januar y 2015 (No. 29232). Thus, advertisements and tele-shopping must be made in compliance with the Regulation.

Online advertising is subject to the Consumer Protection Law and the Commercial Advertisement Regulation, which are the main legislation with respect to advertisement rules. The Advertisement Board regulates the compliance of advertisements in all media, except for specific broadcasting rules that are governed under Law No. 6112. In addition, all online broadcasts in Turkey are subject to Law No. 5651 on Regulating Broadcasting in the Internet and Fighting against Crimes Committed through Internet Broadcasting. If the content of an online broadcast, including online advertising, constitutes specific crimes that are listed in this Law, access to this website could either be banned by the Information Technology and Communication Authority or by the court, depending on the type of case and urgency.

**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 regarding must-carry obligations under Turkish legislation.

**Regulation of new media content**

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

Internet-based on-demand content has been traditionally regulated by Law No. 5651 on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting (Law No 5651). However, with the amendments to Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises (Law No.6112), media service providers that make online broadcasting and platform operators that transmit these broadcasts via the internet are required to obtain a licence from the RTSC and online broadcasting activities are subject to supervising and controlling of the RTSC under the same principles applied to TV and radio broadcasts as per Law No. 6112.

Moreover, unlike traditional broadcast media such as radio and television, new media content is regulated under Law No. 5651. Additionally, advertisements made via new media content are also subject to Law No. 5651.

**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?

Pursuant to Law No. 5651 on Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting, companies that obtained the right to a terrestrial digital multiplex capacity allocation in the ranking tender realised pursuant to the Regulation regarding Procedures and Principles on Terrestrial Broadcast Licences and the Ranking Tender published in the Official Gazette dated 23 December 2018 (No. 30634) may, in line with their ranks and the analogue channel capacity, be granted the right to make analogue broadcasts as well as terrestrial digital broadcasts for a period of maximum of two years. At the end of the two years, analogue broadcasts shall be terminated nationwide.

The transition from analogue broadcasting to digital broadcasting has not yet been completed.

**Digital formats**

25 Does regulation restrict how broadcasters can use their spectrum?

First of all, according to Law No. 5809 on Electronic Communications (Law No. 5809), the ICTA is the competent authority for spectrum management, supervision and inspection in Turkey. However, pursuant to Law No. 5809, the RTSC is the competent authority regarding the regulation of radio frequencies and television channel broadcasts.

The regulation restricts how broadcasters can use their spectrum. So, after obtaining the terrestrial broadcast licence, current transmitting facilities must be removed by the private media service providers or must be transferred to a transmitter procurer and operating company in exchange for a reasonable sum.

Pursuant to Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises, the RTSC shall adopt frequency plans with regard to television channels and radio frequencies, within the framework of the frequency bands for terrestrial radio and television broadcasts allocated pursuant to Law No. 5809. Within the scope of the frequency plans the numbers and types of national, regional and local terrestrial broadcast networks as well as multiplex numbers for digital broadcasts shall be determined.

**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?

Pursuant to Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises, one of the duties of the RTSC is to take essential precautions, in the field of media services, for media pluralism. On the other hand, the maximum number of media service providers in which a real person or a legal entity may directly or indirectly hold shares is four. However, there is no specific regulation with regard to media plurality in Turkey.

**Key trends and expected changes**

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

The most important piece of legislation currently adopted in Turkey is the Regulation on Radio, Television and On-Demand Broadcasts on the


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Internet (the Regulation), which was published in the Official Gazette dated 1 August 2019 (No. 30849). The Regulation has been drafted as a cooperative effort of the ICTA and the RTSC. It is understood that the two authorities are carrying out their activities in cooperation.

As per the recently enacted Regulation, online broadcasting of radio, television and on demand broadcasts shall fall under the authority and supervision of the RTSC, and online broadcast platforms that only broadcast content over the internet shall also be obliged to obtain licences from the RTSC. As per the Regulation, the RTSC is now also vested with the power to suspend online broadcasts that are in violation of the Regulation and Law No. 6122. Additionally, the broadcasting services of foreign media service providers and foreign internet broadcasting platform operators under the jurisdiction of a country other than Turkey may be suspended by the RTSC, if it is decided by the RTSC that said media service providers or internet broadcasting platform operators have acted in violation of Law No. 6112 or any international treaties within the scope of the RTSC's authority to which Turkey is a party.

In the last quarter of 2019, significant negotiations were initiated in connection with foreign broadcasting platforms, in addition to local broadcasting platforms. As per the announcements published by the RTSC:

- special importance shall be given to artificial intelligence;
- when evaluating broadcasts, matters such as cyber bullying and violence shall be taken into consideration;
- measures shall be taken for content that may adversely affect the psychological and physical development of children; and
- in connection with on-demand broadcasts, special attention shall be given to parental control mechanisms

Some of the relevant expected changes and the steps to be taken accordingly within the media sector are as follows:

- informing the legislative organ about the need for new regulations regarding issues on the establishment of a more effective sanction system and the implementation of joint audit in connection to new technological developments;
- the strengthening of the cooperation among shareholders in the media sector;
- the drafting of more explicit and concrete regulations by the RTSC, an independent and unbiased authority, especially regarding broadcasting principles in areas that are conceived negatively;
- the re-evaluation and revision of the legislative regulations in a manner that enhances the freedom of speech and freedom of information stipulated under the laws; and
- the establishment of a more efficient mechanism to enable the consent analysis of the regulatory needs within the media sector and the overcoming of issues regarding regulatory activities.

## 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 governed by Law No. 5809 on Electronic Communications (Law No. 5809). Whereas the media sector is mainly governed by Law No. 6112 on the Establishment of Radio and Television Providers and Broadcasting Services (Law No.6112), the communications regulator is separate from the broadcasting regulator. The competent authority for the communications sector is the Information Technology and Communication Authority and the Competition Authority (ICTA), whereas the competent authority for the media sector is the Radio and Television Supreme Council (RTSC). However, with regard to online broadcasting both the ICTA and RTSC are vested with certain regulatory powers. Finally, the Competition Authority is the main competition and antitrust monitoring authority,and the primary law applied is Competition Law No. 4054 (Law No. 4054).

Besides this, the Advertisement Board, established under the Turkish Ministry of Commerce, is the main authority that is entitled to monitor and supervise advertisements for all media, including broadcasts in Turkey and to determine the related rules and impose fines in the case of violations.

Pursuant to article 6/1 of Law No. 5809, one of the powers vested in the ICTA is the undertaking of regulations so as to establish and protect competition and to prevent activities that prevent, distort or restrict competition, and to impose remedies on operators with significant market power and on other operators if necessary. However pursuant to paragraph 2 of the same article, it is stipulated that the ICTA, while inspecting competition breaches against the same Law with regard to the electronic communications sector, and imposing sanctions, seeks the opinion of the Competition Authority on issues regarding breaches specified by the legislation. Moreover, under Law No. 5809, the ICTA is authorised to conduct analysis and investigations and impose sanctions regarding anti-competitive activities and practices, on the condition that the opinion of the Competition Authority is also demanded. However, the provisions of Law No.4054 are reserved.

Under Law No. 6112, one of the powers vested in the RTSC is to take the required precautions in the field of broadcast services in order to guarantee freedom of expression and information, diversity of opinions, competition environment reserving the duties and powers of the Competition Authority and pluralism, and prevent concentration and protect the public interest.

Finally, both the RTSC and the ICTA must cooperate with the Competition Authority regarding matters relating to competition and anti-competitive practices. There have been cases where cooperation between the ICTA and the Competition Authority has been low, and there have been some disputes regarding the respective scopes of the two authorities. The ICTA and the Competition Authority signed a cooperation protocol in 2011 and the scope of this protocol was expanded on 22 January 2015. This protocol aims to ensure the cooperation of the two regulatory bodies and avoid conflicts of jurisdiction. However, within the scope of article 7 of the protocol, article 6/2 of Law No. 5809 regarding seeking the opinion of the Competition Authority has been emphasised.

### Appeal procedure

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

The Radio and Television Supreme Council, the Information Technology and Communication Authority and the Competition Authority are all independent and impartial administrative authorities and render administrative decisions related to the media sector in Turkey. The decisions are rendered under the above-mentioned laws and regulations,and also the administrative laws and regulations, mainly Law No. 2577 on Administrative Procedures. Criminal courts of peace, administrative courts and the Council of State are competent for legal actions to be taken against these administrative decisions.

Decisions rendered by the Board of Advertisement, established under the Ministry of Trade, can also be brought to administrative courts.

In principle, the time period to bring an action for nullity is 60 days from the notification of the decision. Under Law No. 2577, an action for



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nullity against administrative decisions and actions can be brought forward under the following circumstances:

- if the administrative decision is not made by the competent governmental body; or
- if the form, rationale, subject or the objective of the administrative decision is against the law.

Administrative court decisions can be appealed before the regional administrative courts within 30 days, starting with notification of the court's 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.

One of the most important decisions rendered by the Competition Authority is the decision regarding Google LLC, Google International LLC and Google Reklamcilik ve Pazarlama Ltd Sti (Google). In the decision, dated 19 September 2018, the Competition Authority imposed an administrative fine in the amount of 98,354,027.39 Turkish lira on Google,and the decision was finalised as of 13 February 2020. The decision of the Competition Board was based on article 6 of Law No. 4054 on the Protection of Competition, stating that Google has abused its dominant position in the mobile operating systems sector. Additionally, the Competition Board granted Google three months to comply with certain obligations determined in its decision; however, Google has not complied with said obligations.

Another important decision regards Huawei Telekomunikasyon Diş Ticaret Ltd Sti (Huawei), dated 30 May 2019. The Competition Board, upon its investigations in relation to the base station hardware and software market and the base station antenna market, decided that Huawei did not abuse its dominant position in the mobile network sector by way of predatory pricing.

**SRP Legal**

**Cigdem Ayozger Ongun**
cigdem@srp-legal.com

**Begum Erturk**
begum.erturk@srp-legal.com

**Deniz Erkan**
deniz.erkan@srp-legal.com

Maslak, Ahi Evran Cad. 42 Maslak No: A 27/8
34398 Sariyer
Istanbul
Turkey
Tel + 90 212 401 44 01
www.srp-legal.com



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# United Arab Emirates

**Raza Rizvi**

Simmons & Simmons LLP

## 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) https://www.tra.gov.ae/en/about-tra/legal-references/law.aspx.

The Telecoms Law establishes the Telecoms Regulatory Authority (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 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. Beyond the provision of public telecommunications services in the UAE, there is a vast array of businesses offering products and services as part of the wider communications eco-system, and many of these are not subject to foreign ownership restrictions.

### 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.



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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. 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 a short regulatory policy on ex-ante competition safeguards, which details the various factors it may take into account in assessing competition and dominance in the UAE. The policy provides a wide discretion to the TRA on the factors to be considered and 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, have significant government ownership interest 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, 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 encompasses issuing rules or regulations relating to the terms of supply to the customer, and includes Consumer Protection Regulations, such as key terms that must be included in contracts with customers (eg, restrictions on usage and rights to terminate) and detailed information that must be provided to the customer prior to the purchase of a service.



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**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.

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 although this is felt to be on the horizon (with the TRA playing a role in the development of the law), 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). There are also pockets of data regulation seen in certain specific verticals, for example in the healthcare and consumer payments verticals.

**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 hard primary legislation. 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. One of the latest laws that creates data domiciliation requirements in a specific vertical is UAE Federal Law No. 2 of 2019 concerning the use of Information and Communication Technology in Healthcare.



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### 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, 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 emerging technology 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.

The TRA has been active in terms of regulatory and policy output covering a range of communications areas including Earth Station Regulations, Space Service Regulations and a new Information Assurance Regulation. One of the most significant developments in light of the various Smart City ambitions in the UAE is the IoT Regulatory Policy, which remains largely untested and has a seemingly broad ambit covering IoT services.

## 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 (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.


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**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 Telecoms Regulatory Authority (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, 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


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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 National Electronic Security Authority.

## 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 Telecoms Regulatory Authority (TRA) and the National Media Council (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.

simmons + simmons

**Raza Rizvi**
raza.rizvi@simmons-simmons.com

Level 7, The Gate Village, Building 10
Dubai International Financial Centre
PO Box 506688
Dubai
United Arab Emirates
Tel: +971 4 709 6600
Fax: +971 4 709 6601
www.simmons-simmons.com

### 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.

### 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 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.



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# United Kingdom

**Alexander Brown and Peter Broadhurst**
Simmons & Simmons LLP

## 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), 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 (DCMS) 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 2020/2021 Plan of Work focuses on ongoing investment in faster broadband and better mobile coverage across the country, ensuring customers are treated fairly by their providers, supporting UK broadcasting, ensuring that online communications work for customers, working with the government on emerging policies protecting people from harmful content online and enabling strong and secure networks.

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.

As a consequence of Brexit, certain parts of the UK electronic communications regulatory framework have required amendment. For example, the requirement to notify matters to the European Commission ceases to be applicable when the UK ceases to be a member of the EU. The Electronic Communications and Wireless Telegraphy (Amendment etc) (EU Exit) Regulations 2019 and the Broadcasting (Amendment) (EU Exit) Regulations 2019 were made on 12 February 2019 and came into force on exit day (31 January 2020 at 11pm). Both of these statutory instruments 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 1 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 (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


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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 1 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.

**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.

**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 0.0959 per cent of relevant turnover for the year ending 31 December 2017. 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 2018/2019/2020 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


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on an updated 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. 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 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 published on 28 October 2019 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 28 June 2019, Ofcom published the final statement and concluded that it will continue to regulate what Openreach can charge providers to use their leased-line networks and imposed requirements on Openreach for repairs and installations. Openreach will also be required to give competitors in certain areas physical access to its fibre-optic cables;
- 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 – on 28 June 2019, Ofcom made a decision on regulation that will allow all telecoms providers 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. Ofcom continues to monitor Openreach's strategic independence to ensure that the separation is operating in practice. In the event that Ofcom is not satisfied that it does, a further option would be a 'structural separation' that would see Openreach being completely separated from the BT Group.

**Universal service obligations and financing**

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

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


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household and business a new legal right to demand an affordable broadband connection up to a reasonable cost threshold.

With the Broadband Delivery UK programme 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. On the basis of the Electronic Communications (Universal Service) (Broadband) Regulations 2018, which came into force on 4 December 2018, Ofcom designated BT and KCOM (in Hull) as the universal service providers to whom broadband conditions are to be applicable.

From 20 March 2020, customers have the right to request an affordable broadband connection from BT or KCOM. The relevant provider will have 30 days from the request to confirm whether the customer is eligible. The customers will be eligible if their property does not already have access to affordable broadband and is not due to be connected by a publicly funded scheme within 12 months. The costs of providing connection will be paid for up to £3,400. If the required work costs more, the customers will have an option to either pay the additional costs or seek an alternative solution outside the universal service.

### 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. In July 2019, Ofcom introduced new rules under which mobile customers can leave their network by sending a short, free text message without the need to call their existing provider. Ofcom has also banned mobile providers from charging for a notice period that runs after the switch date. In addition, if a customer's request to port their number is being frustrated, the old provider will be put on notice and will have up to five days to resolve any issues. If it fails to do so, the customer now has the right to trigger the process that will enable their new provider to override this obstacle. The customer will need to submit a complaint on Ofcom's website, which will be assessed by an independent industry panel. 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.

In 2019, Ofcom introduced a series of new rules with a view to increasing fairness for customers. The new protections require providers to:

- provide clear and honest information to prospective broadband customers in relation to a minimum guaranteed speed before they commit to a contract;
- compensate broadband and landline customers when they experience difficulties and delays in receiving the service;
- inform customers before their contract comes to end and explain their best available deal (including those available to new customers); and
- allow mobile phone customers to switch provider with a text message.

As part of the Fairness Framework, Ofcom has also launched a review to ensure clearer, fairer deals for customers with bundled mobile airtime and handset contracts and started reviewing broadband pricing practices, examining why some customers pay more than others.

In January 2020, Ofcom published a framework outlining how it will determine whether customers are treated fairly by telecom and pay-TV companies. Ofcom will consider the following aspects: how providers treat their customers throughout the customer journey, who is being harmed, the extent of the harm, importance of the service and whether the service depends on risky new investment.

### 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.



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The Regulation on Open Internet Access will become retained EU law. The UK government has made the Open Internet Access (Amendment etc) (EU Exit) Regulations 2018 to address issues arising from the UK exiting the EU. The Regulations will come into force at the end of the transition period and 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, 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. The EU Regulation on fairness and transparency in online platform trading entered into force in July 2019, and the platforms will need to comply with its provisions by 12 July 2020. 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.

In July 2019, the CMA launched its market study to investigate concerns surrounding the power of online platforms. In its interim report published in December 2019, the CMA proposed a number of interventions, such as an enforceable code of conduct regulating behavioural infringements and introducing a duty of fairness for platforms to ensure consumer-friendly default data settings.

**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 28 June 2019, Ofcom made a decision to open 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 Building Digital UK, 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 (LFFN) challenge fund. In August 2018, the third allocation of funding, worth £95 million, was opened up to bidding. The UK government had confirmed nine winning bidders who cumulatively had secured £53 million of the total available. The LFFN programme is set to run until 2021 and comprises £287 million of investment.

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.

In January 2020, Ofcom published a four-point plan to support investment in fibre networks, which includes:

- setting Openreach's wholesale prices in a manner that encourages competition from new networks and investment by Openreach;
- ensuring that customers can access affordable broadband and preventing Openreach from restraining competition;
- supporting Openreach's investment in rural areas; and
- closing the copper network in order to cut Openreach's costs of running two parallel networks.

BEREC released a final report, dated 13 June 2019, 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.



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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. The E-Privacy Directive is still being revised and a new draft was published in February 2020. If the E-Privacy Regulation has not come into effect prior to end of the UK's transition period, 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. Alternatively, the government would need to introduce equivalent provisions in domestic law in order for the UK to stay fully in line with the EU laws on e-privacy. It is very likely that the UK companies will be caught by the extended territorial scope of the EU regime.

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. The government had until 1 November 2018 to amend the legislation. The Data Retention and Acquisition Regulations 2018, which came into force on 31 October 2018, increased the threshold for accessing communications data to serious crime only and imposed a requirement on authorities to consult with an independent Investigatory Powers Commissioner before requesting data. However, in July 2019, the High Court dismissed a human rights group's latest challenge against surveillance laws and holds that the IPA includes several safeguards against the possible abuse of power and is therefore not in breach of the Human Rights Act 1998.

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, Privacy and Electronic Communications Regulations, GDPR and also the Network and Information Systems Regulations 2018 (the 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, 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.

The new European Electronic Communications Code introduces certain changes that aim to strengthen the current network security provisions. The government decided it was not appropriate to consult on the implementation of these provision due to the then-ongoing Telecom Supply Chain Review, which included a review of the legislative framework for the security and resilience of telecoms network and services. As a result of the Review, the government made a decision to develop a new security framework for telecoms.

### 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. In 2019, the Information Commissioner's Office appointed a new role of data ethics adviser whose key task will be to contribute to ongoing data ethics discussions.

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.



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**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**

The Act, and much of the regulation surrounding the telecoms market, has its foundations in EU law. Following the UK's departure from the EU, 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.

However, it is unlikely that after the transition period UK telecoms law will differ significantly from the current regime. This is due to the fact that UK adheres to the World Trade Organization's Basic Agreement and more particularly its Reference Paper, which has been described as EU law 'writ large'. This means that if the UK falls out of line with the EU regulatory framework, it will also not be in line with the regulatory frameworks of the countries that adhere to the Basic Agreement.

In a no-deal scenario, the UK telecom operators will continue to be able to provide cross-border telecoms services and operate within the EU, under the WTO's General Agreement on Trade in Services (GATS). GATS provides for a number of basic regulatory provisions such as major suppliers' obligation to interconnect, transparent authorisation regime, independent regulation and procedural rules for allocation of scarce resources.

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 the EU member states would be able to impose additional authorisation requirements on providers established in the UK; 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.

In addition, the UK providers will cease to benefit from the right to request providers authorised in the remaining 27 EU member states that are not 'major suppliers', to negotiate access and interconnection and the right to request or be subject to the dispute resolution procedure within the EU, for disputes within a member state and in relation to cross-border access.

If no deal on roaming is agreed between the UK and EU before the end of transition period, EU mobile operators will no longer be limited in what they can charge UK operators for providing roaming services. This will mean that surcharge-free roaming may no longer be a standard. In its no-deal Brexit technical notice on mobile roaming, the government said that charges for roaming will become a commercial matter, which suggests that it does not intend to legislate to require mobile companies to offer surcharge-free roaming. The Mobile Roaming (EU Exit) Regulations 2019, made on 14 March 2019, removed the requirement on UK mobile operators to guarantee surcharge-free roaming for customers in the EU. It also implemented an obligation on operators to notify customers travelling abroad when they use 80 per cent and 100 per cent of their data allowance and to advise customers on how to avoid inadvertent roaming in border regions.

Brexit could also have an impact on development programmes for 5G, the internet of things and the deployment of broadband networks that benefit from EU funding. It is likely that the UK will need to enter into a mutual recognition agreement with the EU to enable the accreditation process for electronic products in order to remove restrictions for market entry of telecoms equipment. The UK would also need to become a stand-alone member of the WTO Information Technology Agreement to be able to benefit from zero tariffs on many IT goods.

However, the UK may benefit from a shortened approval process of state aid initiatives as a result of the European Commission no longer having to assess the compliance of public funding with competition rules.

In light of the EC losing its oversight of Ofcom, Broadband Stakeholder Group has called for the third party's supervision to ensure appropriate scrutiny of Ofcom's decisions and its independence from the government.

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 implementation period falls within the proposed transition period in the UK. 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. Consequently, on 16 July 2019, the Department for Digital, Culture, Media and Sport has published a consultation on its proposed implementation of the EECC. DCMS intends to focus on the most significant changes introduced by the EECC, such as investment in very high-capacity broadband networks, effective consumer protection and engagement, ensuring efficient spectrum management to support 5G service rollout and expanding the definition of 'electronic communications service' to include interpersonal communications services (such as internet phone and messaging services), which will bring these types of services within the scope of regulation.

**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. In December 2018, Ofcom proposed to include coverage obligations in their auction rules for the release of 700MHz and 3.6–3.8 GHz spectrum bands. In March 2020, the government announced that it reached agreement with four mobile network operators on their commitment to the Shared Rural Network plan, which aims to deliver good quality 4G coverage to at least 90 per cent of the UK over six years. The plan will be supported by government funding of £500 million. In light of these commitments, Ofcom decided to no longer include coverage obligations in their



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upcoming auction in spring 2020. It still, however, proposes to place a 37 per cent cap on the overall spectrum that any one mobile company can hold following the auction.

In January 2020, Ofcom proposed to make additional spectrum available for Wi-Fi in the 6GHz frequency band without the need for a licence, and to open extremely high frequency spectrum, which is vital for developing innovative future services. The consultation was open until 20 March 2020.

**Statement of Strategic Priorities**

The Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services was designated on 29 October 2019. It sets out the government's strategic priorities in a number of areas such as gigabit-capable broadband deployment, 5G, spectrum management, security and resilience of telecoms infrastructure and furthering telecoms consumers' interests.

**Ofcom Proposed Annual Plan 2020/21**

The Ofcom Proposed Annual Plan for 2020/21 focuses on:

- ongoing investment in faster broadband and better mobile coverage across the country;
- ensuring customers are treated fairly;
- supporting UK broadcasting;
- ensuring online communications work for customers;
- working with the government on emerging policies that are meant to protect people from harmful content online; and
- ensuring that the UK's networks are secure, resilient and protected against cyber-attacks and outages.

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.

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.

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.

EU Directives that have been transposed into UK law in advance of the end of the Brexit transition period (ie, 31 December 2020) will be effective as UK law. However, there may be some differences in the licencing required for broadcasters as a result of Brexit.

**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 (note that 700MHz DTT Clearance Programme has been postponed due to covid-19).

**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 (note that 700MHz DTT Clearance Programme has been postponed due to covid-19).

**Digital television programme services**

Other than those provided by Channel 3, 4 or 5, digital television programme services (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**

Digital television additional services 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.


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**Television licensable content services**

A television licensable content services (TLCS) licence covers services broadcast from a satellite, distributed using an electronic communications network (ECN) or electronic communication service 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 (referred to as European Works) 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 Works content quota for on-demand services, raised from 20 per cent to 30 per cent. The UK will be required to fully implement the amending Audiovisual Media Services Directive despite its exit from the European Union, as the date for implementation (19 September 2020) falls before the end of the Brexit transition period and will therefore be subject to these quotas. Despite the UK's exit from the EU, works 'produced' in the UK will still be considered to fulfil the definition of European Works, as European Works are defined by reference to production by ECTT countries, rather than EU member states. As a result, there may not be a significant downturn in demand for UK-produced works, as they will continue to help fulfil European Works quotas post-Brexit.

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 6.00am and 6.00pm, 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 6.00pm 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



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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.

In June 2019, a new rule was added to the CAP code banning advertisements that contain gender stereotypes in both broadcast and non-broadcast media (including online and social media). Several adverts have since been banned following introduction of the new rules owing to their containing harmful gender stereotypes, including advertisements for household name brands, such as Mondelez and Volkswagen.

**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 February 2020, Ofcom published 'Small Screen: Big Debate' a review of PSB covering 2014 to 2018. It noted that live broadcast viewing has declined over the period due to the increased use of online and on-demand services. In response, the report noted that PSB broadcasters are increasing their online and on-demand services to try and meet the expectations of their audience, but that, despite these efforts, they have not been able to fully recover from the loss of live broadcast viewers, especially among younger generations. Revenue to PSB channels, both in terms of advertising and the BBC licence fee, have fallen by 3.8 per cent and 4 per cent per year, respectively, over the 2014–2018 period.

Alongside this decline in viewership of PSB channels, debate in relation to the TV licence fee has increased. Although the existence of the BBC licence fee is guaranteed until 2027 due to the BBC's Royal Charter, the BBC and the government are soon expected to commence negotiations to set the level of licence fee for 2022–2027. These negotiations will follow the outcome of a government consultation launched in February 2020 on the decriminalisation of TV licence evasion, instead proposing the introduction of an alternative civil enforcement scheme.

Separately, from 1 June 2020, free TV licences will no longer automatically be granted to the over-75s – instead, only those over 75 in receipt of pension credit will be eligible for a free TV licence.

**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 video-on-demand (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. A report by Plum Consulting, commissioned by the Department for Culture, Media and Sport, concluded in February 2020 that there were six video sharing platforms that are, or could potentially be considered to be, under the jurisdiction of Ofcom by virtue of the provisions of the amended Directive.

In February 2020, the Department for Culture, Media and Sport published its updated response to the consultation on the Online Harms White Paper, which covered online safety and regulation of social media. The White Paper proposed a new statutory duty of care to ensure companies take more responsibility for online user safety and tackle harm. It proposed that companies within the scope of the duty would social media platforms, file hosting sites, public discussion forums, messaging services and search engines. Compliance with this duty of care would be overseen by an independent regulator. Following consultation, the government proposed Ofcom take on this oversight role, in addition to its existing remit. In addition, the government is proposing to develop a new online media literacy strategy.

**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 was given the power to nominate the digital switchover for radio broadcasting. The UK government set criteria to be met before the switchover could commence: digital listening must reach 50 per cent of all radio listening (including via television and digital audio broadcasting (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 4 July 2019, indicates that DAB radio listening had reached 56 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


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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.

In an exercise of these powers, in June 2019, the Secretary of State issued a Public Interest Intervention Notice in relation to the acquisition of shares in Lebedev Holdings Ltd (LHL) and International Digital News and Media (IDNM), as a result of which Ofcom were required to investigate the transactions. LHL is the majority shareholder in Evening Standard Limited, which is responsible for the publication of the *Evening Standard* newspaper and related online services, while IDNM is responsible for the running of *The Independent*, the online-only news publisher. The grounds for the issue of this Notice were the need for accurate presentation of news and the need for free expression of opinion. Following its enquiries, Ofcom concluded that a reference to the Competition and Markets Authority (CMA) was not warranted on either ground.

### 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, it is not anticipated that the UK government will bring in any significant divergent measures, the UK's exit from the EU will cause some changes to broadcasting licence requirements for UK and some EU countries. The most imminent change to the licensing requirements relates to the 'country of origin' principle, which underpins European broadcasting regulation. Currently, a broadcaster regulated in one EU member state is not required to apply for an additional licence in order to be able to transmit in another member state – for a UK broadcaster, therefore, an Ofcom licence is sufficient for all member states.

Following the UK's exit from the EU at the end of the transition period, this principle as set out in the Audiovisual Media Services Directive will no longer apply. Despite the Audiovisual Media Services Directive having been transposed into UK law, the 'country of origin' principle would require reciprocity from other EU member states to continue to operate. However, the European Convention on Transfrontier Television (ECTT) will continue to apply. The ECTT has been signed by 20 of the EU member states, as well as the UK, and allows freedom of reception for services among the signatory states. Therefore, UK broadcasters regulated by Ofcom will continue to be allowed to broadcast in ECTT signatory states, as will ECTT-regulated broadcasters in the UK. The additional licensing requirements will therefore apply only in relation to the EU countries who have not signed the ECTT, which includes the Netherlands and Ireland (although there are separate provisions in the Good Friday agreement applicable to certain Irish broadcasters). UK broadcasters will be required to apply for additional licences in order for their service to be made available in these states – the same will apply to any service providers from these states wishing to broadcast in the UK, who will be required to obtain an Ofcom licence.

Although the ECTT may help to mitigate the effect of Brexit on broadcasters to some extent, it cannot be enforced in the same way that the Audiovisial Media Services Directive previously could – while there is a standing committee to address disputes, and provision for arbitration in the convention, these methods have seldom been used.

One further limitation of the ECTT that should also be taken into account is its more limited scope – it does not cover online streaming services, which continue to be regulated under the Audiovisual Media Services Directive in EU member states.

#### Digital Services Tax

The introduction of a Digital Services Tax (DST), effective from 1 April 2020, was announced in the budget held on 11 March 2020. DST will be levied at 2 per cent on the revenues of companies such as search engines, social media services and online marketplaces that derive value from UK users. The introduction of DST was intended to remedy the perceived misalignment between the place where company profits are taxed and the place where value is created. DST is intended to be in place only until an appropriate international solution is in place to better address the issue.

It is anticipated by the UK government that DST will affect primarily large multinational businesses, as DST only applies where a group's worldwide revenue from digital activities exceeds £500 million, of which £25 million must derive from UK users. There is, however, a £25 million allowance, and DST will only be levied on UK generated revenues over £25 million.

The Exchequer has estimated that the measure will raise £70 million in 2019/2020, rising to £515 million in 2024/2025. However, the impact that the introduction of DST could have on the UK–US trade deal to be negotiated in the wake of Brexit remains to be seen.



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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?**

Ofcom and the Competition and Markets Authority (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. 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 'Annual report on concurrency' (most recently published on 15 April 2020), 'the CMA and the regulators have continued to work together' using 'all the competition and regulatory tools available to promote and protect competition in the regulated sectors', despite the fact that there was a fall in cases opened from the previous year. The UK's Department for Business, Energy and Industrial Strategy (BEIS) expressed some concern over the lack of enforcement cases launched and infringement decisions issued by the sector regulations. The CMA responded to this, stating that the proposals suggested by the CMA's Chairman, Lord Tyrie, in February 2019 (outlining a range of proposals for the reform of the UK's competition regime and streamlining of enforcement) would deal with some of the concerns that BEIS had raised.

#### 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 electronic communications networks (ECNs), electronic communication services (ECSs)and associated facilities (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



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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. Under the Digital Economy Act 2017 (Commencement No. 1) Regulations 2017 (SI 2017/675), the new standard of review applies to all new appeals from 31 July 2017.

**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**

Bauer Radio/Celador Entertainment merger inquiry

On 12 March 2020, the CMA published its final report in its Phase II investigation regarding the acquisition of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited and Wireless Group Limited, as well as the entire business of UKRD Group Limited. The CMA concluded that the acquisitions had resulted, or may be expected to result, in a substantial lessening of competition in the market of the supply of representation for national advertising to independent radio stations. The CMA was not satisfied that divestment was feasible as a remedy and therefore decided that a behavioural remedy, requiring Bauer to provide advertising representation to independent radio stations for a 10-year period on the same terms that they were previously receiving, would be more appropriate.

DMG Media Limited/JPIMedia Publications Limited merger inquiry

On 27 March 2020, the CMA announced that it had cleared the completed acquisition of JPI Media Publications Limited (the owner of *The i* newspaper) by Daily Mail and General Trust and would not be referring it for a Phase II investigation. This follows the Secretary of State's decision of 25 March 2020 not to refer the merger on media public interest grounds. The Department for Digital, Culture, Media and Sport had previously issued a public interest intervention notice due to the possible concern of having sufficient plurality of views in newspapers.

PayPal/iZettle

On 12 June 2019, the CMA published its final report on the Phase II investigation into the completed acquisition of iZettle by PayPal, clearing the deal. In 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 (mPOS) 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). However, the CMA cleared this at the Phase II stage, finding that although PayPal and iZettle are two of the largest suppliers of mPOS devices, their customers would be willing to switch to traditional devices, and Worldpay and Barclaycard will be significant competitors for the merged entity.

On 24 September 2019, the CMA imposed a £250,000 penalty on PayPal for breach of an interim enforcement order by contacting UK customers in breach of a derogation.

**Active enforcement by the CMA**

The past year has shone a spotlight on activeness of the CMA, and it has been reported that the CMA is the most actively involved competition enforcer in the world. In 2019, the CMA frustrated eight deals in the UK (three were prohibited and five were abandoned), contrasting only one deal that was frustrated by the CMA in 2018. The CMA has sent a clear message in the past year that businesses can expect harsher and stricter enforcement and has commented that observers will see the CMA 'get tougher on mergers and enforcement', take on 'bigger global cases', and 'engaging more with consumers'.

**Covid-19 and merger control delay**

It is to be reasonably expected that covid-19 will have an impact on mergers across the UK (as well as globally). The CMA asked companies to hold off on filing new notifications that had not been filed by 24 March 2020; and, therefore, it is to be expected that businesses with proposed mergers in the pipeline may elect to delay their plans, or abandon them altogether (noting however, that the UK's merger regime is voluntary, and businesses may opt not to notify the merger in the UK). The CMA is also reallocating resources to deal with the immediate pressures and challenges resulting from the pandemic.

**Antitrust**

Digital markets taskforce

On 11 March 2020, the government announced that it is establishing a digital markets taskforce that will sit within the CMA, as part of the government's measures to 'empower customers and boost competition'. The taskforce will have a remit of providing advice to the government on the implementation of pro-competitive measures for unlocking competition in digital platform markets. The announcement demonstrates the government's intentions to improve the functioning of competition in digital markets and to improve consumers' experience. It also confirms that the government is accepting the recommendations from the Furman Review (the government commission review chaired by US economist Jason Furman), which was published in March 2019.

The Furman Review highlighted several competition issues in digital markets, and specifically recommended setting up a digital markets unit. The taskforce will consider the issues raised in the Furman review, and aims to put forward practical pro-competitive measures to address the issues highlighted and deliver on the government's objectives in a proportionate and efficient way.

The taskforce will focus, among other things, on:

- a methodology to designate digital platforms with 'Strategic Market Status', which will be reserved for only the most powerful companies;



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- a pro-competitive code of conduct for digital platforms with strategic power; and
- securing access to non-personal and anonymised data where data access represents a significant barrier to entry for newer firms, while also protecting privacy and security.

### CMA digital markets strategy

In July 2019, the CMA published its Digital Markets Strategy, also in response to the Furman Review. To attempt to address the key and important competition enforcement issues in the digital economy, the CMA identified several strategic aims and priority focus areas, including conducting market studies on online platforms and digital advertising, and considering potential future remedies in digital markets.

### Royal Mail abuse of dominance

On 10 January 2020, the CAT dismissed the Royal Mail's appeal of Ofcom's decision (of August 2018) to fine Royal Mail £50 million, rejecting Royal Mail's arguments that Ofcom had erred in its assessment of infringement.

Ofcom had fined Royal Mail for abuse of its dominant position, by discriminating against its only major competitor delivering letters who was also one of Royal Mail's wholesale customers; Whistl. At the time, Whistl was competing directly with Royal Mail by delivering 'bulk mail' to addresses in certain parts of the UK. Royal Mail's wholesale price increases meant that any of Royal Mail's wholesale customers seeking to compete with it by delivering letters in some parts of the country, as Whistl was, would have to pay higher prices in the remaining areas – where it used Royal Mail for delivery.

### Royal Mail and The Salesgroup Limited anti-competitive agreement

On 14 November 2019, Ofcom announced a decision against Royal Mail Group Limited and The Salesgroup Limited for breaching the Chapter I prohibition under the CA 1998 and Article 101 of the TFEU by participating in a customer allocation agreement that had the object of preventing, restricting or distorting competition in the market of parcel delivery services. Royal Mail reported in May 2018 that its ParcelForce sector had agreed with The Salesgroup Limited that each company would not offer delivery services to the other's customers. Having concurrent powers, the CMA referred this to Ofcom, who launched an investigation in August 2018.

In its decision, Ofcom fined The Salesgroup Limited £40,000. Royal Mail was granted immunity under the CMA's leniency policy (as Royal Mail reported the agreement, and cooperated during the investigation), and therefore did not receive a fine.

On a related note, on 22 November 2019, Ofcom announced that it has opened an investigation under the CA 1998 into agreements between parcel delivery companies, suspecting there may be anti-competitive agreements in this market, such as establishing minimum prices and imposing online sales restrictions.

### Ofcom review of pricing practices in broadband market

On 25 September 2019, Ofcom published its review of pricing practices in the fixed broadband market. The findings revealed concern over the prices charged to certain categories of broadband consumers and the barriers that exist which prevent individuals from looking elsewhere for products. Ofcom highlighted that new customers tend to get the best deals, whereas out-of-contract customers tend to get the worst deals and pay the most, which may disproportionately affect vulnerable customers who are less likely to 'shop around'.

As a result of the review, many of the UK's biggest broadband providers (BT, Sky, TalkTalk, Virgin Media) agreed to implement a range of measures to better protect customers and ensure value for money, including allowing out-of-contract customers to get the same deals as new customers when they take out a new contract, and carrying out annual price reviews with vulnerable customers.

**Alexander Brown**
alexander.brown@simmons-simmons.com

**Peter Broadhurst**
peter.broadhurst@simmons-simmons.com

CityPoint
One Ropemaker Street
London EC2Y 9SS
United Kingdom
Tel: +44 20 7628 2020
Fax: +44 20 7628 2070
www.simmons-simmons.com

## Consumer protection

### CMA in line for new powers in 2020

The CMA is expected to get governmental approval for direct powers of consumer-law enforcement, which will allow it to address breaches without having to pursue businesses through the courts. The CMA's chairman, Andrea Coscelli, has been highlighting the need for reforms since early 2019, and has suggested the need for fining powers for consumer-law breaches, new interim measures to prevent abuses, reform of the CMA's powers for market investigators, wider powers on remedies, and also the ability for the CMA to seek disqualification of directors in relation to consumer-law breaches (as it can already do so for competition-law breaches).

Having examined the reforms proposed by the CMA, and the findings from the separate Furman Report, BEIS is expected to bring forward a package in 2020 that gives powers to the CMA for more direct enforcement action to protect vulnerable consumers.

### CMA interim report in online platforms and digital advertising

On 18 December 2019, the CMA published an interim report on its market study into online platforms and digital advertising. The market study aims to inform the debate on the regulation of online platforms, as previous reviews including the Furman Review concluded that new approaches are needed in relation to regulating online platforms, as traditional competition law is not sufficient in this area.

The interim report found that Google and Facebook have market power in their respective markets, that their profitability was above what would be expected in a competitive market, and that they have the ability and incentives to leverage their market power. The CMA sets out its findings on potential concerns, including:

- barriers to entry and expansion in the general search and social media markets;
- a lack of consumers' control over collection of their personal data;
- a lack of transparency; conflicts of interest; and
- market power in the digital advertising markets.

All these findings will strengthen the argument that there is a need for a pro-competitive regulator to regulate the activities of online platforms.



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### Regulatory shift incoming under the draft Digital Services Act

Tech companies could see new regulation across online platforms under proposed EU legislation, the Digital Services Act. The legislation may force big tech companies to remove illegal content such as hate speech or face serious sanctions. Currently, tech companies such as Facebook, Twitter and YouTube take part in voluntary self-regulation of illegal material (with the exception of terrorist content). The Digital Services Act is expected to place more responsibility on internet companies for the content uploaded by users of the platforms.

This appears to be in line with trends on a UK national level. In April 2019, the UK government published the Online Harms White Paper, detailing its plans to have an independent watchdog that will write a 'code of practice' for social networks and internet companies and have enforcement powers including the ability to fine for non-compliance. The Paper covers a range of issues that are already defined in law, including terrorist content, hate crimes and sale of illegal goods. It also covers harmful behaviour that is less clearly defined legally, such as cyber-bullying, trolling, and spreading fake news.

### Covid-19 and consumer protection

There has been a general trend towards consumer protection in the UK and more widely across Europe as a result of the covid-19 pandemic. The CMA has set up a covid-19 taskforce with a specific remit to challenge businesses that exploit the circumstances and take advantage of consumers. The taskforce is particularly concerned with the role of online platforms (such as Amazon and eBay) in preventing unscrupulous traders from using the platform to charge unjustifiably high prices for items in the light of the pandemic.

The covid-19 taskforce also has within its remit the option to advise the government if emergency legislation is required (where existing consumer protection laws are not going far enough), and on 25 March 2020, Prime Minister Boris Johnson suggested that legislative change is possible in this area to adapt to the challenges presented by the pandemic.


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# United States

**Kent D Bressie, Colleen Sechrest, Michael Nilsson and Paul Caritj**
Harris Wiltshire Grannis LLP

## 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 radio frequency 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' (the 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' (the 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' 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 ('autodialler') 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, 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 autodialled 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 'autodialler'. 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


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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 autodiallers, 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 autodialler 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 autodialler, but it has yet to act to clarify the definition. In the reassigned number context, the FCC 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 adopted a safe harbour from TCPA liability for those callers that choose to use the database to learn if a number has been reassigned. In 2019, the FCC adopted rules to implement the RAY BAUM'S Act (the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018) by: 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 expanding the scope of covered communications to include text messages and additional voice services. The FCC also adopted a further notice of proposed rulemaking laying the groundwork to mandate implementation of Signature-based Handling of Asserted Information Using toKENs (SHAKEN) and Secure Telephone Identity revisited (STIR) standards if major voice service providers fail to do so by the end of 2019.

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 internet service providers (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 to 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 Defense, 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 control by foreign persons of existing US businesses engaged in interstate commerce, acquisitions by foreign persons of real estate proximate to sensitive US government facilities, and certain non-controlling investments by foreign persons in US businesses engaged in critical infrastructure, critical technology or collection and storage of sensitive personal information. 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



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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 intrastate 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 Wi-Fi and other unlicensed devices comply with these rules and operate within these designated bands, they do not require a licence to operate. 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:

- 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;
- has proposed to open 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;
- has proposed to open 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; and
- opened the 'white spaces' between television broadcast channels for unlicensed operation, and has proposed new rules that would allow fixed white-space devices to operate at increased power levels and heights as well as a new set of rules to promote the use of white-space devices for precision agriculture and other IoT applications.

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**.** The FCC 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) systems, 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



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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 licence'). 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. These agencies (which also review mergers and acquisitions) 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 generally asks the FCC to defer action on such applications pending sometimes lengthy national security reviews.

**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; 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



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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. 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. 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 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



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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, but 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.

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.

**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



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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 2020 the assessment rate is at 21.2 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 24.4 per cent for the fourth quarter of 2019. 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 programmes.

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 that are 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.



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**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 ISPs will be governed by existing general antitrust and consumer protection law.

In the 2017 Order, the FCC stated that it was pre-empting 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 numerous states 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. Other states adopted legislation to support some form of net neutrality protection for their consumers. Over 20 state attorneys general offices, several online companies and a number of public interest groups challenged the 2017 Order in court. Those lawsuits were consolidated in the US Court of Appeals for the DC Circuit.

On 1 October 2019, the DC Circuit issued its long-awaited decision in *Mozilla v FCC*, largely upholding the FCC's repeal of the 2015 net neutrality rules but striking down the agency's attempt to pre-empt state and local neutrality laws. Among its key decisions, the court upheld as reasonable the FCC's reclassification of broadband as a Title I information service and classification of mobile broadband as a 'private mobile service' exempt from Title II common-carriage regulation. The DC Circuit also upheld the FCC's conclusion that section 706 of the Communications Act is not an independent grant of regulatory authority for issuing net neutrality rules. The DC Circuit remanded questions back to the FCC to address the repeal's effects on public safety, pole attachments, and the FCC's Lifeline programme. The decision leaves the FCC's rules in place while the FCC reconsiders those issues. Finally, the DC Circuit vacated the 2018 Order's pre-emption of 'any state or local requirements that are inconsistent with [its] deregulatory approach' on grounds that the FCC failed to establish legal authority for such pre-emption, stating that the FCC cannot pre-empt where it lacks authority to regulate.

The court's ruling will likely free ISPs from previous restrictions on the blocking, throttling, or paid prioritisation of online content. By striking down the FCC's attempt at wholesale pre-emption, however, the court cleared the way for states to pass and enforce more stringent net neutrality rules, which will likely face state-by-state legal challenges.

**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 a '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. 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.

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.



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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 which 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 current 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


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with key stakeholders to update the Framework. The FCC-convened Communications Security, Reliability, and Interoperability Council 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.

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



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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 this year, 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. In 2018, the Supreme Court heard an argument 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: 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; opening up the 6GHz band (allocated to point-to-point microwave links, fixed satellite system uplinks and mobile services) to unlicensed use; developing GHz bands that currently impose limited educational use requirements and restrict licence uplinks and mobile services) to unlicensed use; and 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 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



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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. 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, 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 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 three 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 established a single, comprehensive database of reassigned number information from each provider that obtains NANP US geographic numbers, including toll free numbers; and 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 SHAKEN and 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 Federal Communications Commission (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' (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;



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- 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 World Trade Organization (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: permit indirect foreign ownership up to 100 per cent upon a public interest finding; permit a previously authorised non-controlling foreign investor to increase its interest to 49.9 per cent without additional approval; and 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 radio frequency licence, subject to consent requirements. 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 Federal Trade Commission (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,



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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, the FCC has adopted rules covering the accessibility of user interfaces for devices used to access video programming. These rules 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.

**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.
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. 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.

**Mergers and acquisitions**

Numerous television broadcast ownership groups have sought permission to combine. We expect many additional such requests in the coming months.


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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?

**General**

The US Department of Justice (DOJ) and the Federal Trade Commission (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 Federal Communications Commission (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. Under the 2020 thresholds, effective 27 February 2020, a transaction must be notified if: the voting securities and assets of the acquired person are valued at more than US$94 million and if one of the parties has sales or assets of at least US$188 million and the other party has sales or assets of at least US$18.8 million; or if the voting securities and assets of the acquired person are valued at more than US$376 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, public utilities commissions 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 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. The FCC is considering reform of Team Telecom reviews.

**CFIUS**

Pursuant to section 721 of the Defence Production Act of 1950, the Committee on Foreign Investment in the United States (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 the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which became law on 13 August 2018. New CFIUS regulations implementing FIRRMA took effect on 13 February 2020. 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



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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 involving non-controlling investments in a US business engaged in critical infrastructure, critical technologies, or collection and storage of sensitive personal information where a foreign government with a 'substantial interest' in the foreign investor (ie, where the foreign government holds a 49 per cent or greater voting interest in the foreign investor, and the foreign investor holds a 25 per cent or greater interest in the US business) 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.

**Kent Bressie**
kbressie@hwglaw.com

**Colleen Sechrest**
csechrest@hwglaw.com

**Michael Nilsson**
mnilsson@hwglaw.com

**Paul Caritj**
pcaritj@hwglaw.com

1919 M Street NW, Suite 800
Washington, DC 20036-3537
United States
Tel +1 202 730 1300
Fax +1 202 730 1301
www.hwglaw.com

**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 takeover 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. This decision may pave the way for more vertical mergers going forward.

In November 2019, the FCC granted consent for the merger of T-Mobile USA and Sprint, the third and fourth largest national wireless carriers in the US, following earlier clearance by the DOJ. The FCC found that the merger would help to close the digital divide and advance



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US 5G leadership and that it would not, as conditioned, harm competition. To obtain FCC consent, T- Mobile and Sprint committed within three years to deploy 5G service to cover 97 per cent of the US population, and within six years to reach 99 per cent of the US population. This commitment includes deploying 5G service to cover 85 per cent of the US rural population within three years and 90 per cent of the US rural population within six years. T-Mobile and Sprint also committed that, within six years, 90 per cent of the US population would have access to mobile service with speeds of at least 100 Mbps and 99 per cent of the US population would have access to speeds of at least 50 Mbps. This includes two-thirds of the rural US population having access to mobile service with speeds of at least 100 Mbps, and 90 per cent of the rural US population having access to speeds of at least 50 Mbps.


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